esma European Securities and Markets Authority

Response Form to the Consultation Paper

Draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT)

3 October 2019 ESMA70-151-2758

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **2 December 2019.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.

2. Please do not remove tags of the type <ESMA_QUESTION_FRANDT_1>. Your response to each question has to be framed by the two tags corresponding to the question.

3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.

4. When you have drafted your response, name your response form according to the following convention: ESMA_FRANDT_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_FRANDT_ABCD_RESPONSEFORM.

5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT)").

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Data protection'.

Who should read this paper

All interested stakeholders are invited to respond to this consultation. In particular, responses are sought from counterparties acting (or intending to act) as clearing service providers and counterparties that are current or potential clearing clients.

General information about respondent

Name of the company / organisation	European Federation of Energy Traders (EFET)
Activity	Non-financial counterparty
Are you representing an association?	☒
Country/Region	Europe

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_FRANDT_1>

EFET welcomes the opportunity to respond to the European Securities and Markets Authority's ("ESMA") consultation paper on draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT) and sets out below its comments. We remain available to discuss the response in more details.

I. Executive Summary

EFET endorses ESMA's intention to develop FRANDT principles and EFET members are fully supportive of ESMA's considerations and proposals as these facilitate the access to clearing for commodity firms. In particular, EFET believes that the draft technical advice to specify the FRANDT principles (as set out in the Annex IV) is a proportionate and appropriate starting point. However, we would welcome that ESMA extends the FRANDT principles to cover all derivatives available for clearing at EU CCPs without differentiation on the counterparty status of the clearing client, so that the real economy and in particular commodity firms (most of which are NFC-) can take advantage to those.

II. Further comments

EFET members would like to make the following further comments which are relevant for the clearing of derivatives, but not directly addressed by ESMA's consultation:

1. **Facilitating access to clearing**

As far as energy and commodity derivatives are concerned, we observe that a decreasing number of clearing members are currently offering direct and indirect clearing services and that smaller counterparties with a limited volume of activity in the derivatives markets do not have easily access to clearing services. We therefore believe that more legislative or/and regulatory incentives are necessary to make the provision of clearing services more attractive for clearing service providers and clients. This should however not lead to watering down of the proposed FRANDT requirements as these remain essential to facilitate the access to central clearing for energy and commodity firms.

The suggested facilitation could be achieved through other regulatory avenues. Insofar we appreciate that legislators and regulators have started to address this concern, for instance by clarifying that CCPs should not be prevented from following default management procedures by Member States' insolvency laws or through amendments under CRR in relation to the leverage ratio to cover the exposure of clearing members (see nr. 5 of ESMA's CP). It is important to facilitate the access to clearing by lowering prudential requirements as we also observed that clearing members pass on higher prudential costs to their clients or suspend their clearing services if the client exposure exceed certain limits

A further solution could be to allow non-banks (non-financial firms) to become direct (self) clearing members and reduce the entry barriers for these firms, e.g., by removing the requirement of being a MiFID II licensed entity. However, the consideration of extending accessibility to clearing membership should not impact negatively the level of risk controlling and mitigation of a clearing system based on margin and contribution to the default fund.

A further issue is the prudential treatment of commodity trading firms under the new Investment Firm Regulation (IFR), which are licensed MiFID II investment firms and clients of clearing members: The exposure of these MiFID II investment firms as non-clearing members to their clearing service providers are not excluded from the prudential requirements for concentration risks under the IFR, although their direct exposure towards CCPs would be exempted under IFR if they were direct clearing members. This leads to the result that these licensed commodity firms have to hold substantially higher amounts of capital in their books as non-clearing members. This can disincentivise these licensed commodity trading firms from hedging, respectively, substantially increase the cost of hedging of their commodity price risk.

Therefore, we propose that the exposure of licensed commodity firms towards their clearing service providers are likewise exempted from concentration risks under IFR.

2. Transparent and harmonised default management

We believe that a binding industry standard on default management framework for CCPs would increase transparency for clients and lead to a better understanding which obligations they engage to by accessing to clearing. This should be a clear and transparent methodology that describes the rights and duties of clearing members and clearing clients. Currently, there is a noticeable difference in default management across all main CCPs. In case a major default impacts several CCPs simultaneously, it could lead to notable problems – but also to arbitrage opportunities that could highly disturb relevant markets.

3. Fall-back solutions for clearing services

Although we understand that FRANDT requirements should not result in an obligation to contract for clearing service providers, we would welcome an obligation of clearing service providers or CCPs to offer fall-back clearing solutions. This would improve possibilities for clearing clients to move their positions from one clearing member to another. We acknowledge that it would be fair and reasonable to apply certain conditions to this obligation to ensure that it is operationally and economically feasible for clearing members to perform.

Alternatively, CCPs should be obliged to allow more than one clearing member per clearing client, including for the same product classes. CCPs should establish a simple option to set up several clearing members for one client. This could be done by means of a main and reserve clearing setup or even having several clearing members providing services simultaneously for different product groups (e.g. clearing member A for power products and clearing member B for gas products).

CCPs should be allowed to offer basic ‘clearer of last resort’ solutions. Such clearing service providers would take all interested clients and provide a fall back in case the clearing member is in default or ends its clearing services. We understand that such solutions may be expensive, but it would nonetheless ensure clearing at any time for all kinds of participants.

4. Quality check of CCP of their Clearing Members

In general CCPs should apply stricter quality assurance to their Clearing Members (clearing service providers). Experiences from daily operations show issues with services resulting in significant incorrect margin calls amounts and processing/settlement of trades not following the CCP methodology. This could lead not only to serious mismatches and inconvenience in daily operations but may also conduct to hidden risks for the CCPs which should be mitigated.

CCPs should monitor and review more frequently/intensively and take appropriate actions and allow clients to comment and complain (see amendment in art. 38 of EMIR).

<ESMA_COMMENT_FRANDT_1>

Questions

Q1 : Do you generally agree with the approach on transparency and how to publicly disclose fees and commercial terms and other conditions? Please elaborate and if you disagree with any specific requirement, please suggest alternative ones. You can also suggest additional ones.

<ESMA_QUESTION_FRANDT_1>

Scope of services offered (nr. 41):

We agree with ESMA's statements in nos. 41 and 42, in particular that the scope of clearing services should be clearly specified, detailing the financial instruments for which the clearing service provider is offering clearing services and the extent to which additional services are offered including reporting, collateral management and compression.

Furthermore, we would like to make the following comments on the scope of application of FRANDT:

Product scope

ESMA seems to suggest that FRANDT principles should apply only to commercial terms for the provision of clearing services for over-the-counter derivative contracts pertaining to a class that has been declared subject to the clearing obligation under EMIR (see nr. 12 of ESMA CP). We believe that it would be beneficial to apply a wider understanding of the product scope. While from a regulatory perspective the FRANDT considerations are not expressly limited to OTC derivative contractual arrangements and to counterparties subject to the clearing obligation under EMIR, there is no material justification for keeping ETD derivatives and NFC- clearing arrangement outside of these considerations. A harmonisation of clearing terms (for mandatory or voluntary clearing of OTC and ETD derivatives) will ensure a level playing field between clearing clients and between clearing service providers, further the reduction of systemic risks by removing barriers to OTC derivatives clearing and makes the clearing services and process more efficient for all involved parties by applying the same approach to all derivatives (OTC and Exchange Traded Derivatives ("ETDs")) and all clients. Therefore, we are of the opinion that FRANDT principles should apply to any mandatory or voluntarily cleared derivatives (independently of whether a regulatory framework caters for compulsory clearing) and to clearing relationships of clearing service providers (clearing members) with any counterparty/client (Non-Financial Firms above and below the EMIR clearing threshold (NFCs+/-) and Financial Firms ("FCs and FC-)). Otherwise, the real economy would not benefit from the application of FRANDT principles when they voluntarily clear their OTC derivatives over

CCPs as EU corporates are usually NFCs- and, hence, not clearing obligated counterparties (NFCs+) and trade mostly with derivatives that are not subject to the clearing obligations, such as commodity derivatives. For the reasons above, we believe that ESMA's consideration to limit the scope of FRANDT to OTC derivatives subject to the mandatory clearing obligation is much too narrow (ESMA CP no. 12, p. 7) and will create a significant hurdle for EU corporates who want to opt for voluntarily central clearing of OTC derivatives.

Furthermore, we understand that it will be difficult for most clearing firms to try to ring-fence the FRANDT rules to only OTC derivatives which are covered by the clearing obligation, as it would be a complex administrative overhead to maintain the transparency framework for only certain clients and for a subset of their products. An additional consideration is the impact and confusion by applying the FRANDT principles only to select products for clients that trade a variety of product types.

Territorial Scope

The text of EMIR does not appear to narrow down the territorial scope as the definitions for each of the CCP, the client and the clearing member (clearing service provider) are silent as to whether these are to be EU or non-EU entities. It is our conclusion that the FRANDT principles are applicable to both EU and non-EU clearing service providers and clients as long as they are using an EU CCP. This means that for instance where a US clearing member (through indirect set-ups where the EU client's clearing service provider being the direct client of the US clearer member) would clear EU clients' portfolios at a EU CCP, he need to provide these services under EMIR standards and protection. We would support this understanding which is important in practice as clearing members often use non-EU affiliates to provide their clearing services. In this context clearing members should be obliged to disclose any such structures and inform client about the related risks. Currently there is a significant uncertainty on how the regulatory framework can ensure customer protection in such cross-border markets .

Publicly disclosing general contractual terms (nr. 43)

We agree with ESMA's statement in nos. 43 and 44 that the standard contract under which the clearing service provider offers clearing services should be publicly disclosed, incl. sections on the scope, definitions, netting, provision of indirect services, information, relationship with indirect clients, indemnity, termination and default provisions. We agree that the standard contract would include a separate schedule or annex for amendments, justifications or elections.

Fee disclosure (nr. 45):

We agree with ESMA's statement in nos. 45 and 46 as well as its draft Article 6 in the Annex. We agree that clearing service providers should publicly disclose the standard prices and fees associated with the services provided, including the prices and fees of each service, as well as discounts and rebates and the conditions to benefit from those reductions. The according standardised price lists should distinguish between on-boarding fees, fixed fees, transaction fees and any other fees related to any additional services offered. We agree that the clearing service provider may apply discounts and rebates.

Furthermore, we would like to make the following detailed comments:

Although we understand the commercial aspects involved in determining the fees related to clearing services as indicated under nos. 27 and nos. 45. we agree with ESMA's statement in nr. 38 that the presentation and comparability of the information is definitely an area of improvement. In general, this should be feasible for clearing service providers as also CCP fees structures are transparent, public and equal for all clients.

We support this approach as fee transparency has undisputed advantages and opportunities and would in particular disincentivise the application of a diverse range of fee schedules across different clearing service providers for exactly the same markets and products that we currently observe. Therefore, a standard (reference) price list – in the form of a table quoting generally applicable fee levels per clearing service for each type of client - should be disclosed for the sake of fairness and transparency.

We agree that the standardised price list should be separated into four groups, i.e., onboarding fees, fixed fees, transactions fees and fees for additional services. As proposed by ESMA this list should also include the possible discounts and rebates and the conditions to benefit from those reductions. With regard to these fee categories we would like to make the following comments:

Transaction fees:

With reference to ESMA's statements in nr. 25, we observe that transaction fees constitute the main category of fees established by clearing service providers.

Transaction fees are typically charged on a x c€/Unit basis e.g. MWh, Barrels, tons. This means that large number of trades with only small volumes could be more expensive than a smaller number of trades with large volumes (e.g. transactions with settlement within a week vs. transactions with settlement along a whole calendar year).

Therefore, the assumption in no. 26 that it is often more expensive to clear a smaller volume of transactions than a higher one is only partially correct. It is also highly dependant on the result of individual negotiations with the clearing service provider, because normally the amount of fees for clearing services exponentially increases with the number of transaction processed (see the example above of a typical fee rate per trade/per volume).

Fixed fees:

Fixed fees are typically observed in the form of either (i) a minimum fee in the case of low volume of transactions processed or (ii) regular fees paid via the clearing member (clearing service provider) to Exchanges and/or CCP level to pay for example annual membership or system connectivity fees.

Fees for additional services:

EMIR requires a clearing member to publicly disclose the levels of protection and the costs associated with the different levels of segregation, and the clearing member has to offer those services on reasonable commercial terms. With reference to nos. 23 and 37, we believe therefore that clearing services providers should offer Individual Segregation on more reasonable priced terms. Currently it is generally much too expensive for clients to opt for individual segregation which provides increased customer protection in a clearing member (clearing service provider) default scenario. Although we appreciate that ISA (Individually Segregated Account) offering require more technical efforts on the clearing member than OSA (Omnibus Client Segregation) this does not justify the much higher fees. Clearing members do not take more risk when carrying an ISA account. The high prices for ISA could be perceived as an intentional barrier to the further introduction of ISA.

Also, we believe clearing members (clearing service providers) should be transparent about profits they make from clients using non-segregated accounts as opposed to segregated accounts, as the netting effect is an additional profit for the bank.

Discounts and rebates:

We agree with the ESMA statements in nr. 46 and 51, in particular that the clearing service provider may apply discounts and rebates and that these should be made public, incl. the conditions to benefit from those reductions. We believe that these fees should certainly remain open for negotiation as long as they are compliant with the FRANDT principles, in particular clearing members should have the commercial freedom to offer better conditions to certain clients that for example would balance their whole portfolio.

Additional note about costs of funding margin calls:

The CCP pay interests to the clearing members calculated on the amount cash collateral deposited (prorata temporis). We believe that it is up to the clearing member and the client to negotiate bilaterally the interest rate to be passed through to the client. Our experience shows that clearing members are keen on passing on costs, but they do not, per default pass on the interest income. When interest rates are negative, they make sure to pass on all costs, and when they are positive, they try to keep it or only pass on part of the charging spreads. In this matter, we would also welcome higher transparency on interest rates applied, especially a basic term that the clearing member passes on these interests to the client to a reasonable extent.

<ESMA_QUESTION_FRANDT_1>

Q2 : Do you generally agree with the elements to be taken into consideration in the commercial terms for the provision of clearing services? Please elaborate and if you disagree with any specific element, please suggest alternative ones. You can also suggest additional ones.

<ESMA_QUESTION_FRANDT_2>

Transparency of technology requirements (nr. 61)

We agree with ESMA's statements in nos. 61 to 64 that clearing service providers shall disclose the technical requirements needed to onboard clearing clients and for the provision of clearing services. This will help clients to compare more easily the offers of the different clearing service providers and help clients to check their capabilities for meeting those requirements.

In this context we would like to highlight that the non-harmonisation and low quality of used technology and data format cause recurring problems and high costs for clients to collect, reconcile and maintain data. We believe that the technology must be substantially improved and we would welcome an improvement and harmonisation of the technology solutions used and the data format. This is currently not provided neither by CCPs nor by clearing service providers even for similar products on similar clearing platforms across Europe. The individual technology solutions used by clearing service providers (and CCPs) often forces clients to implement burdensome and costly manual processing or self-developed IT-solutions in order to cope with the reconciliation of data, with the different data formats provided by clearing service providers (and CCPs) and regulatory obligations like EMIR reporting. For example, EFET members often experience delays in identifying incorrect position limits, incorrect contract sizes, deal duplications, erroneous deal bookings with the clearing member leading to incorrect variation margin requirements,

regulatory reporting or position limits. Also, clearing members offer individual technology for reconciliation which are based on their own systems and therefore do not allow an efficient and independent reconciliation process on the client side. Overall, more harmonised and standardised technologies and data formats would allow clients a smoother and automated operation and by this way reduce operational risks considerably.

Standardized commercial terms (nr. 65), changes to commercial terms (nr. 71) and termination/replacement (nr. 74)

We fully agree with ESMA's statements in nos. 65 to 70, in particular that clearing service providers shall publicly disclose the general standard contract terms under which they provide clearing services. This is necessary and our experience over the last 15 years at least shows very long, bespoke and complex negotiations with clearing service providers (see detailed description further below).

We clearly see significant advantages and positive impacts in a standardisation and harmonisation of clearing service agreements which should remain possible as clearing services at EU CCPs are provided in a generally harmonised regulatory framework. Such a standard set of documents will simplify the legal review process for clearing clients, ensure that similar contractual terms applies to all clients and help clients to compare offers from clearing members much more easily. Furthermore, such an approach would substantially increase the efficiency of the EU clearing system and mitigate clearing members' default risk as it would not only significantly reduce negotiation times but also facilitate the replacement of clearing members or installation of a fall-back clearing service provider (clearing member). Finally, standardised contractual arrangements, which are compliant with FRANDT principles, would help clients of clearing services to request the contractual terms adjusted to their needs instead of being placed in a situation of "take it or leave it" because of the monopolistic situation observed following the decreasing number of clearing service providers over the past few years. For these reasons, we fully support the introduction of FRANDT compliant standardised contractual terms developed by different market associations.. These are in particular (a) various forms of Terms of Business as published by the FIA and as may be supplemented by a Clearing Module as published by the FIA or an ISDA/FIA Client Cleared OTC Derivatives Addendum as published by the International Swaps and Derivatives Association, Inc, ("ISDA") and the FIA and (b) a 1992 or 2002 ISDA Master Agreement as published by ISDA and as may be supplemented by an ISDA/FIA Client Cleared OTC Derivatives Addendum.

We would therefore welcome the proposed contractual structure in the form of a standardised master agreement with standardised appendices and standardised election sheet(s) (which for its part could be customised – see hereunder). The advantage of such a structure is also that it is inspired from the contractual trading framework, with which most market participants are widely familiar. We agree with ESMA (no. 65) that the commercial terms should be clearly drafted, complete and concise and where several documents are part of the provision of the clearing service, a clear structure of the hierarchy of documents should be provided, in particular to avoid any overlapping or contradiction between the different documents.

In this context, we agree with ESMA (see draft Article 4 (3) in the Annex) that the general standard contract terms may be complemented by schedules and annexes to cater for a limited number of amendments, election or additions to the standardised contract terms. In this context we believe that the contractual arrangement should cover in particular the following:

- Standardised General Term of Business (e.g. with reference to FIA Module),
- Standardised appendices to reflect common terms specifications related e.g. to EU or US rules & regulations related to the variety of markets and products covered by the clearing services agreement
- Standardised form of election sheet/schedule for customisation of business terms
- Standardised regulatory reporting agreements
- Standardised set of onboarding documentation (e.g. KYC, Fees schedule),
- In addition, market participants would welcome the publication of a high-level, concise and comprehensive summary of all important contractual elements which would help the client to better understand, review and compare the different clearing service offers of clearing banks.
- Standardised fees schedule i.e., onboarding fees, fixed fees, transactions fees and fees for additional services

We believe in line with ESMA's statements in nos. 58 and 67 that these standardised documents should to be able to be customised and negotiated between the counterparties to a reasonable extent and this in line with the FRANDT principles. This would preserve legitimate interests of the clients and clearing service providers, in particular to adapt commercial offerings to the profiles (including risk profiles) of their individual clearing clients and to maintain the ability of clients to negotiate individual conditions, especially on fees but also on other commercial terms. However, we agree with ESMA (see no. 73) that any changes to the standardised contracts shall be reasonable, fair, rational and applied

equally to all clearing clients. We agree also that parties shall not change the commercial terms unilaterally, except where agreed by the parties or where they derive directly from a change in the applicable regulation or the rules of the relevant CCP (see nr. 73).

Furthermore, we very much agree with the statements in nos. 74-75 stating that the notice period with regards to termination should be at least 6 months unless otherwise agreed. With regards to the limited offer on clearing services which limits considerably a smooth and quick replacement of clearing service provider as well as the timeline needed to negotiate new clearing service agreement as indicate above, a termination period of 6 months sounds reasonable to limit impact not only for the client but also for the stability of the clearing system. This termination period is necessary in particular as the porting of large positions towards a new clearing services provider would have to go via a (technical) close-out process.

We are of the opinion that the above-mentioned FRANDT approach toward standardised contractual arrangement is necessary as the EFET members observe complex and one sided, unbalanced contractual terms for providing clearing services, in particular the following:

- There often exists an unclear agreement structure: clearing service providers use too many layers of documents with overlapping provisions and complex hierarchies and scope which can lead to contradictory terms and confusion.
- General Terms & Conditions: usually the terms and conditions of clearing services agreements greatly differ and are rather designed for investment banking and not designed to cover the specificity of physically settled commodity derivatives.
- More and more clearing service providers use the FIA Clearing Module, but then tend to amend this FIA standard to the detriment of the client. For example: a “default” is often defined exclusively on the client’s side and defined in the interest of the clearing service provider. There is commonly no minimum notice period for non-default termination to allow the clearing client to renegotiate clearing service agreement with another clearing service provider. In general most of clearing service agreements used by the clearing service providers impose one-way liability clauses where the client remain generally liable and the clearing member’s liability is excluded wherever legally admissible.
- When clearing service providers do not use the FIA Clearing module (which contains a clearing members event of default), their own clearing services terms and conditions often do not contain any provisions on clearing member defaults.

- Often clearing service providers impose on their clients unilateral representations or warranties clauses without any reciprocal representations or warranties to be given or made by the clearing service providers (for example, maximum response times on queries or escalation procedures).
- Generally clearing services terms contain the client obligation to indemnify clearing members for losses arising from own clearing member default (often even including gross negligence).
- General clearing service providers retain the right not to accept orders even without providing a reasoning. We consider that clearing service providers should be obliged to accept orders with a limited scope of qualifications and that the contractual options should be restricted for a clearing member not to accept an order, e.g. because of regulatory or exceptional risk management reasons.
- Clearing service providers can usually exercise their unilateral discretion to suspend trading. Also, clearing service providers' rights to liquidate, respectively, close-out clients' positions are in general not limited to default scenarios and, hence, are quite broad. To avoid that a clearing member takes an unfair decision (e.g. if the clearing service provider has a conflict of interest) there should be clear rules and obligations in respect to the suspension of trading and the closing out of clients' positions. This could be achieved, for example through a requirement to seek regulatory approvals for such measures. The porting of position to a clearing service provide acting as a fall-back may results in the necessity of an immediate approval of an increasing exposure for the fall-back clearing member. In order to ensure a smooth transfer of positions and related margin that support the stability of the CCP risk management, a time limit for the credit approval request should be established.

<ESMA_QUESTION_FRANDT_2>

Q3 : Do you generally agree with the suggestions to assist in facilitating access to clearing services? Do you generally agree with the requirements listed to ensure prices are fair, proportionate and non-discriminatory? Please elaborate and if you disagree with any specific element, please suggest alternative ones. You can also suggest additional ones.

<ESMA_QUESTION_FRANDT_3>

Onboarding process (nr. 81)

We fully agree with ESMA's statements with regard to FRANDT requirements for the onboarding process (see nos. 79 – 83 and draft Article 2 in the annex) and this transparency approach toward the onboarding process is necessary as EFET members

observe in many occasions a significant lack of such transparency. In particular we agree that clearing service providers shall publicly disclose and clearly display on their websites all the steps and information in relation to their onboarding process to provide visibility on the onboarding process, with an indication on expected timeline and allow clearing clients to assess the different steps to undertake and the requirements to fulfil in order to become a clearing client. We believe that the information items mentioned in the draft Article 2 (1) of the Annex IV are needed for clients to assess and complete the onboarding process. We agree that the onboarding process shall avoid unjustified and disproportionate on-boarding requirements and a clearing service provider shall carefully design any procedural steps and different deadlines for deliveries to ensure they are not unreasonable or disproportionately costly or cumbersome for the clearing client.

With regard to the proposed transparency on the applicable margin model (see draft Article 2 (1) (f) in Annex IV) we would like to make the following comments.

Under Article 38 (6) of EMIR Refit clearing members are provided by CCPs with a tool enabling the simulation of initial margin. It therefore seems feasible that clearing members should make initial margin calculation transparent and allow their client to run corresponding scenario analyses. Therefore, we propose that the transparency on the applicate margin model should include this calculation tool. Furthermore, we would welcome if CCPs could agree on a common and generic solution towards the calculation of initial margins, which would enhance transparency among the CCPs and their clearing members.

In addition, we would welcome more transparency of the clearing members' assessment of a clients' request for onboarding, in particular with regard to the conditions for onboarding a client (or not) and its assignment to a client category. In this respect the proposed risk control criteria and categorisation of clients as proposed by ESMA are a step in the right direction (see nos. 87 – 95 and draft Article 3 in Annex IV). However, we propose that further criteria should be made transparent to the clients, in particular on further parameters used by clearing service providers to decide on the onboarding of a client. In practice this seems to be a combination of commercial attractivity due to volume expected versus the risk level and related costs for the clearing service provider, but these additional criteria are currently not transparent to the clients.

Furthermore, we would welcome clear rules on the ability of intraday margin calls from clearing members to their clients which may have less capability in meeting this obligation than the clearing member. In such a case clearing clients are contractually obliged to provide e.g. cash liquidity within the same timeline as a bank although they do not have

the practical and operational ability to do it. Proportionate rules as of when the clearing member is allowed to send an intraday-call to their client are required.

Proportionate prices and fees

We agree with ESMA statements with regard to proportionate prices and fees for the provision of clearing services (nos. 84-86), in particular with the requirement that any differences in prices charged are proportionate to costs, risks and benefits for each clearing client category and shall be justified by the clearing service provider. We would like to highlight our concern that clearing service providers should not be allowed to use fees as access barriers for clients. Hence, we agree with ESMA that fees should reflect the true costs of providing clearing services in distinction with other additional costs (see nr. 85).

<ESMA_QUESTION_FRANDT_3>

Q4 : Do you generally agree with the proposed elements regarding the risk control criteria? Please elaborate and if you disagree with any, please suggest alternative or additional ones.

<ESMA_QUESTION_FRANDT_4>

Risk elements (nr. 91) and client clearing categorisation (nr. 93)

We agree with ESMA statements (see nos. 88-95 and draft Article 3 in the Annex IV) with regard to the risk control criteria and categorisation of clients. In particular we agree that clearing service providers shall publicly disclose the risk control criteria used to assess the risk profile of clients and that clearing service providers shall define different categories in which to classify clearing clients according to their risk profile. Therefore, we welcome the proposed listing of the risk control criteria in the draft Article 3 (2) in the Annex IV.

This transparency is necessary as EFET member find it difficult to determine what are the relevant risk criteria towards clients. If the risk criteria were more transparent, then a better understanding of the correlation between the risk classification (client categorisation) and corresponding fees can be achieved. This enables the client to have a better understanding of its relevant risk level and the consequential fee level in comparison to more/less risky client categories.

In this context we would like to highlight that clients should not be forced to take any further credit risk which is not related to their own credit worthiness. For example, a clearing member should not be allowed to require or pass though Default Fund Contribution to its clients. If a clearing member cannot carry risk concentration and capital costs then the

Clearing System and especially the Default Fund functionality needs to be reviewed/re-designed fundamentally, as this undermines the role of the clearing member as the risk carrier. These risks should not be transferred 1:1 to the clearing clients.

<ESMA_QUESTION_FRANDT_4>

Q5 : Do you identify other benefits and costs not mentioned above associated to the proposed approach (option 2)? If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.

<ESMA_QUESTION_FRANDT_5>
TYPE YOUR TEXT HERE
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