



European Securities and
Markets Authority

Response Form to the Consultation Paper

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





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	Association of the Luxembourg Fund Industry (ALFI)
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Luxembourg

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_FRANDT_1>

The **Association of the Luxembourg Fund Industry (ALFI)** represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg-domiciled investment funds, asset management companies and a wide range of businesses that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, law firms, consultants, tax advisory firms, auditors and accountants as well as specialist IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg-domiciled investment funds are distributed in more than 70 countries around the world.

ALFI has been very much implied in the application of the mandatory clearing obligation of EMIR, and is happy to provide views on the article 4(3a) of EMIR Refit regarding the conditions under which commercial terms of clearing services are to be considered to be fair, reasonable, non-discriminatory and transparent (Frandt).

We thank the ESMA for the opportunity to participate in this consultation.

<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>

We generally agree with the approach on transparency and how to publicly disclose fees and commercial terms as well as other conditions of clearing services.

Transparency and fairness requirements can only facilitate the application of the mandatory clearing obligation.

We agree on the segmented approach to consider different criteria such as, the scope of services, the general contractual terms, fees disclosure, on-boarding fees, fixed fees, fee per transaction. Possible capital charges to the indirect clients depending on their risk profile is also a criteria to take into account. For proper comparability purposes, we would welcome that the aforementioned criteria would be each distinguished by setting out uniform sub-criteria in a sufficiently detailed manner.

Regarding the compression services proposed in addition to the clearing, we observe that very few funds have more than 500 transactions, so this criteria is not a major point.

<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>

We generally agree with the elements to be taken into consideration in the commercial terms for the provision of clearing services, in particular the provisions in §65 and §71 regarding respectively the standardisation and changes of commercial terms.

We would welcome a market standard document reflecting the standardisation of the commercial terms. This would facilitate the claim of the counterparties rights. We would also welcome guidance on how a counterparty should proceed where doubt exists on the fulfilment of the Frandt regime by Clearing members.

<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>

We appreciate the suggestions to assist in facilitating access to clearing services, but do not fully agree with the requirements listed to ensure prices are fair, proportionate and non-discriminatory.

Indeed, The provisions of §84-85 on proportionate prices and fees, should protect counterparties from the case where clearing members are using their position to add contractual clauses that go far beyond CCPs requirements and increase transactions costs, Despite their size, even large asset management institution have are still facing less favourable trade contractual conditions compared to previous bilateral contractual framework. We are convinced that smaller institutions have even worst contractual conditions.

Hereafter is a set of limitation that are imposed on funds and asset managers: Ability for the clearing member to cancel unilaterally the trades, Ability to refuse collateral that even the CCP accepts, Ability to unilateral increase fees, Operational burden like intraday posting of margins which investor cannot perform due to daily NAV calculation, Ability to request unilateral margin on top of what the CCP requests.

In our experience the discrimination is also observed via a minimum level of fees to pay by the clearing counterparty whatever the volume of activity is.

The treatment of the non-discriminatory aspect should in particular protect small sized counterparties having less bargaining power.

The clearing is an important piece in the Capital Markets Union (CMU) implementation, which should not lead to a consolidation of the industry, but should leave room to smaller players in light of the barriers reported by the EPTF report¹ and the IOSCO report on central clearing interdependencies².

<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>

We generally agree with the proposed elements regarding the risk control criteria,

Moreover, we would like to share 4 additional proposals.

1. It would be interesting to understand how the risk profiling is done to ensure a clearing member client can have an idea of the detailed implications.
2. The Frandt and credit assessment conditions should offer the possibility to have a large scope of assets eligible for collateral, not restricted to cash.
3. The Frandt and risk assessment conditions should also take into account the regulatory requirements regarding the usage of Initial Margin (IM) models for bilateral margining applicable to OTC derivatives contracts not cleared by a CCP. In line with our letter to ESAs dated 17 May 2019, we would like to reiterate our recommendation to exempt the smaller financial counterparties from
-the initial margin model approval as addressed Article 11 of EMIR,

¹ https://ec.europa.eu/info/sites/info/files/170515-eptf-report_en.pdf

² <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD610.pdf>



-the back-testing and internal governance process requirements for use of globally approved standard IM models.

4. In line with ALFI's general position on collateral management, we invite ESMA to provide flexibility regarding its guidelines 2014/937 (on ETFs and UCITS).

UCITS and ETFs vehicles have to comply with current limitations of the re-use of collateral received, as stated by these guidelines.

-Art. 43 i) non-cash collateral received should not be sold, re-invested or pledged.

-Art. 43 j) cash collateral received should only be placed on deposit; invested in high quality government bonds; used for the purpose of reverse repo transactions; invested in short-term money market funds.

As a consequence, UCITS and ETFs vehicles are still prevented from accessing liquidity via repos (due to the limitations of the § 42 and 43i of the above mentioned guidelines). ESMA is aware of this issue.

ALFI would welcome some clarification on this aspect from ESMA at its earliest convenience, in the event it intends to amend the guidelines. ALFI would also welcome some flexibility on the cash collateral re-use limitations (with regard to the limitations of the § 43j of the above mentioned guidelines). Indeed ETFs and UCITS should be allowed to use cash collateral received to exchange margin (VM in particular).

This amendment would be welcome to also ensure a level playing field with the banking sector which is not constrained by such limitations.

<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>

We advocate for a different approach in order to take into account the time factor.

Indeed, whereas the EMIR clearing obligation timetable is now fully applicable, we have noted from the Refit text that the Article 4(3a) regarding Frandt will be applicable only in 24 months after the Refit initial application date, i.e. from 18 June 2021.

During this period, counterparties will still suffer from the commercial issues presented earlier.

<ESMA_QUESTION_FRANDT_5>