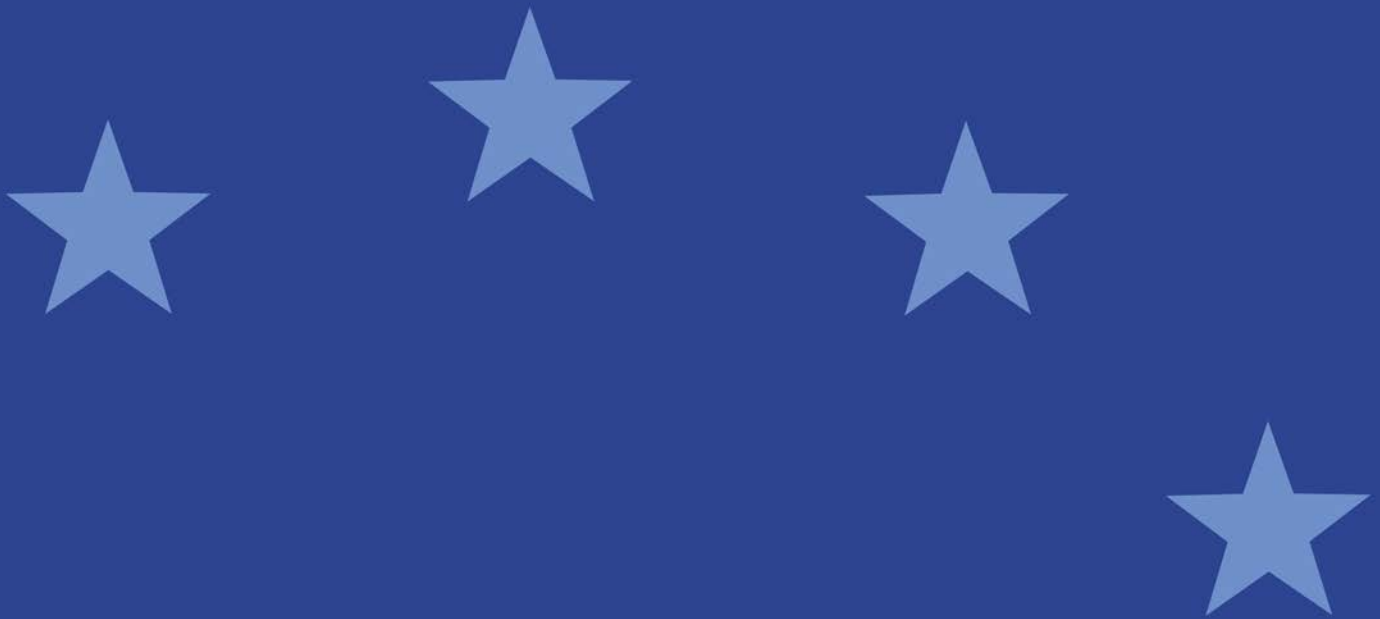


Response Form to the Consultation Paper

**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	AFG
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	France

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_FRANDT_1>

AFG considers that clearing service provider activity should be assimilated as an investment service submit to MiFID 2 (directive 2014/65/EU of 15 May 2014). The investment service considered should be the “*execution of orders on behalf of clients*”. In this case, the clearing service provider should be submit to rules of good conduct, especially the best execution obligation as laid down in MiFID 2.

AFG encourages ESMA to extend FRANDT principles to all services required in EMIR Refit, and not only for centrally cleared transactions.

<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>

The draft technical advice requires that the standard contract under which the clearing service provider offers clearing services shall be publicly disclosed. It shall be made available on a freely accessible (no subscription) website of the clearing service provider. Given that clearing service providers shall define different categories of clearing clients according to their risk profile, categories not defined in the draft technical advice, the multiplicity of different categories could create difficulties in the comparison of contracts.

AFG considers that the basis for determining the offers (notably via the client clearing categorisation) should:

- not be left to the suppliers' discretion, as in that case offers might not be completed, willingly or due to frequently changing operational environment; and
- should be limited to a reasonable number of categories, based on transparent criteria.

This clarification would help to implement FRANDT principles in a meaningful way that will improve access to clearing and bring concrete benefits to clearing customers.

There is no model contract that has been drafted with the participation of the whole financial sector players concerned. Today, the model contracts used by the participants are those published by ISDA (model contracts drafted by banking sector players) which do not take into account the specificity of the asset management. The model contract shall specify decisions or services provided by the clearing service provider which are free of charge (e.g. end of contract because of the client to respect its own regulation or because of clearing service provider's decision).

<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>

The draft technical advice requires that *"the 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"* (article 4-5).

The ESMA's document shall take into account the regulation applied to the client of the clearing service provider and not only the regulation or rules of the relevant CCP. Indeed, AFG considers that the regulation or rules of the relevant CCP can not

prevail over those applicable to the client of the clearing service provider. In others terms, when the client (e.g. European fund) of the clearing service provider is subject to specific rules, like European regulation (AIFMD, UCITS Directive, ...), that impact the contract terms, these shall respect this regulation. The clearing contract must not prevent a client from complying with its own regulation and it shall be adaptable according to the client's regulation.

By way of example, we can cite Article 50-1, g), (iii) of the UCITS Directive which imposes on UCITS the following obligations: *"the OTC derivatives are subject to reliable and verifiable valuation on a daily basis and can be sold, liquidated or closed by an offsetting transaction at any time at their fair value at the UCITS' initiative"*.

Accordingly, the contract shall permit a UCITS to sell, liquidate or close by an offsetting transaction at any time at their fair value at the UCITS' initiative its position on OTC derivatives. Otherwise, no fee should be levied by the clearing service provider for this operation carried out by the UCITS.

We can also mention the regime of best execution that is applied to French funds that prohibits in particular clearing service provider to reserve the right to consent, or not, to clear transactions. If this possibility for the clearing service provider should remain, a process should be put in place to ensure the client to find at once another clearing service provider without transfer fees.

All modification of contractual terms, including fees, shall be subject to a notice period of at least 6 months.

<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>

Given that clearing service providers shall define different categories of clearing clients according to their risk profile, categories not defined in the draft technical advice, the multiplicity of different categories could create difficulties in the comparison of the onboarding processes. The model contract shall specify decisions or services provided by the clearing service provider which are free of charge (e.g. end of contract because of the client to respect its own regulation or because of clearing service provider's decision).

AFG wants to insist also on the notion of proportionality in prices and fees as highlighted in paragraph 84.

We consider that small financial counterparties (SFCs) should not be listed in less favourable categories because:

- SFCs are recognised as bearing lower risks to market; and
- SFCs require less full-time equivalent to serve them due to their directional activities and their limited compression rate.

<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>

Each clearing service provider shall publicly disclose its exhaustive list of aspects in relation to identifying its risk control criteria.

Regarding the calculation of risk measures as described in paragraph 91, we consider that clearing service providers are defining their fees based on the risk taken and should not be allowed to restrict the type of collateral eligible or impose haircut. They should therefore be forced to allow all assets that are eligible at CCP level as eligible collateral. Acting differently is detrimental to clearing and increasing the risks supported by SFCs.

Given that clearing service providers shall define different categories of clearing clients according to their risk profile, categories not defined in the draft technical advice, the multiplicity of different categories could create difficulties in the comparison of the onboarding processes.

In the consultation paper, ESMA precises that *“FRANDT requirement stipulates that the clearing service providers may consider risks, hence clearing service providers may refuse to provide clearing services on grounds of risk including not limited to counterparty risk”* (paragraph 88). The ESMA’s consultation does not provide an alternative for an entity subject to EMIR in the event of a refusal by a clearing service provider. AFG considers that EMIR regulation should put in place a process to permit client to find an another clearing service provider, without fees in case of transfer.

<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>

AFG agrees with the proposed option 2

<ESMA_QUESTION_FRANDT_5>