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COMMERCIAL TERMS FOR PROVIDING CLEARING SERVICES UNDER EMIR (FRANDT)

The Swedish Securities Dealers Association (**SSDA**) welcomes the opportunity to respond to ESMA's consultation on commercial terms for providing clearing services under EMIR (FRANDT)(**Consultation Paper**). Below are some general comments that also apply to some of the questions set out in the Consultation Paper.

General comments: It could be discussed whether it is necessary for the Commission to use its mandate to adopt delegated acts specifying the conditions under which commercial terms are considered to be fair, reasonable, non-discriminatory and transparent (**FRANDT**), as such rules would add very little in substance. We recommend ESMA and the Commission to reconsider whether further rules are needed in addition to the level 1 rules set out under EMIR, which, in our view, are sufficient to address the intended purpose.

In our opinion, the FRANDT-rules and ESMA's proposal infringes on fundamental principles such as free competition and freedom of contract and will, most likely, lead to higher prices and stricter terms and conditions in clearing agreements. It can therefore be questioned whether the proposal will not have the opposite effect of what was intended, i.e. decrease access to clearing.

Should ESMA conclude that additional rules are required, we support the view that the FRANDT-requirements need to be carefully calibrated in order to ensure a meaningful addition to the existing requirements for the provision of clearing services.

Client categorisation: The introduction of prescriptive client classification criteria would severely impact service providers' ability to adapt their risk management policies and could affect their participation in the clearing market. Too proscriptive requirements could also have an impact on clearing firms' ability to carry out their business and could, ultimately, lead to some firms leaving the market. The result would be less competition, higher costs for clearing and a higher concentration of risks amongst the remaining clearing members.

FRANDT-compliance: As set out in ESMA's consultation paper, clearing firms need to show that they are FRANDT-compliant. The ongoing compliance with the FRANDT-requirements in the offering of clearing services is an ongoing obligation and concepts such as reasonableness and fairness changes over time. For clearing firms, this means that they constantly need to monitor and evaluate how they comply with the FRANDT-requirements, which will be very costly and burdensome. We urge ESMA to take the costs of complying with the FRANDT-requirements into account when drafting the rules.

Price regulation/obligation to contract: It is also important that the FRANDT-rules are carefully drafted and do not result in a price regulation or an obligation to contract (cf. Recital 11 of EMIR Refit).

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.

The SSDA does not agree with the approach on transparency and how to publicly disclose fees and commercial terms and other conditions. Although we generally support transparency, we doubt that the publication of fees and commercial terms will increase access to clearing. Generic disclosures without any reference to individual clients are unlikely to provide a useful comparison and may potentially be misleading.

The requirement that each individual financial instrument for which clearing services are offered should be detailed is also very impractical as some CCPs clear thousands of contracts and the list will have to be updated on an ongoing basis. Instead, we suggest that clearing firms are required to disclose the CCPs that they have access to and the categories of products that they clear.

As for the different prices and fees that should be disclosed, it should be noted that clearing firms may have other costs that do not fit into the listed categories of fees, e.g. costs relating to the replenishment of the CCPs' default fund should the CCP enter into recovery or resolution. The clearing firms' risk and the related cost is impossible to estimate and therefore very difficult to include in the list of fees that should be disclosed. We therefore urge ESMA to leave some room for costs that are difficult to price as well as unexpected costs in its proposal.

As for the publication of commercial terms, many clearing firms rely on the standard forms for OTC client clearing that are published by FIA and ISDA which are subject to copyright protection. Even if clearing firms would be able to publish a modified version of these forms, there is a great deal of optionality embedded in them. In addition, most CCPs have their own rulebooks that apply to cleared transactions that are published on each CCP's website. The requirement to publicly disclose general contractual terms will therefore have a limited value for clients who receive the documentation as part of the negotiation process.

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.

No, many of the requirements set out in the Consultation Paper infringes on the basic principle of freedom of contract without adding any protection for clients. The requirement to use a standard set of documents to ensure that the legal review is effective, reasonable and non-discriminatory is based on several assumptions that are not only incorrect but also misleading. Not all clearing agreements are based on standardised terms and even if they are based on standardised terms, this is not a guarantee to ensure that the review process is effective and reasonable.

Typically, each clearing firm uses its own template clearing agreement which is subject to bi-lateral negotiation between the parties. Many clients are sophisticated market participants who engage legal experts in the negotiations. Each contract between the clearing firm and the client is individually negotiated and the final agreement is likely to vary considerably from the pre-printed standard form. A range of different factors are considered in the negotiations, including the overall relationship with the client, counterparty risk, etc. Therefore, to require that changes to the commercial terms should be reasonable, justified and applied equally to all counterparties in a non-discriminatory manner does not only violate the foundations of contract law and the parties' right to negotiate the agreement, it is also a very impractical and will most likely lead to a less beneficial outcome for individual clients.

Since the CCPs' rulebook apply as an extra layer of provisions that are binding on clients, the requirement in paragraph 65 of the Consultation Paper – that commercial terms should not include unnecessary duplicative terms and the contract should not include local law requirements only as references to the local law but should replicate its content – is somewhat flawed. It is here important to understand how the different provisions and rules interact and the hierarchy of provisions that apply to clients' clearing agreements. CCPs' update their rulebooks on a unilateral basis which is an additional fact that needs to be taken into account. To prohibit the reference to local law requirements is also contrary to how agreements are drafted and interpreted in many EU jurisdictions and is not helpful for the clients.

Another concern is that the requirement that the notice period upon termination should be at least six months is not aligned with CCPs' termination period and the basic principle that clearing firms acts as riskless principals. This means that clearing firms effectively are acting as agents/intermediaries and do not take any risk in relation to their clients' transactions. It should also be compared with the CCPs' rulebooks which often have a shorter termination period (three months or less). As a minimum, this FRANDT-requirement needs to mirror the CCPs' notice period.

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.

No, in addition to what has been mentioned above, fees that clearing firms charge their customers are not standardised but deviate depending on a range of different factors, including

onboarding requirements and IT-integration. The technical requirements also deviate between different customers. It is therefore very important that the requirements that are imposed do not require that the existing IT-infrastructure have to be rebuilt. It should also be taken into account that the relevant CCP often control the onboarding process and offer different solutions to different customers.

As mentioned, the introduction of prescriptive client classification criteria would severely impact service providers' ability to adapt their risk management policies and could affect their participation in the clearing market. Unfortunately, it is very difficult to price clearing services based on different customer categories. A range of different factors need to be considered, including different risk criteria, volume, type of product, etc.

It should also be noted that clearing services often are an ancillary service to other services provided by the institutions. In many cases, clearing services are provided together with other investment and banking services and the clearing firm is likely to have a wider relationship with the client. The assumption that separate fees are charged for clearing services is therefore often incorrect.

The SSDA also object to the requirement in paragraph 85 that clearing firms should disclose the costs assumed by clearing firms in providing clearing services. This information is commercially sensitive and clearing firms are already subject to the costs and charges rules under MiFID II, which requires firms to disclose costs to clients.

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.

No, the SSDA does not agree with the proposed elements regarding the risk control criteria as there is no need for additional regulation in this area. Clearing firms are already subject to the client risk assessment requirements in RTS 6 of MiFID II.

Clearing firms have their own risk policies and offer different products in different markets; their offerings and risk criteria are therefore not comparable and develop over time based on the laws and regulation that govern the clearing firms' operations. It is very important that clearing firms are able to control the risks related to the clearing services offered, including counterparty risks.

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.

As mentioned above, we genuinely believe that additional rules that specify the conditions under which the commercial terms are considered to meet the FRANDT requirements would add very little in substance and would most likely not lead to an increased access to clearing. Should ESMA not agree with this conclusion, the SSDA supports the proposed approach under option 1, i.e. to establish limited conditions with requirements under which commercial terms are to be considered, merely supplementing the current framework. The motivation would be that FRANDT is already covered by the current regulation which is sufficient to address the intended purpose of the rules.

Considering the changes that have been introduced through EMIR Refit with the introduction of the small financial counterparty (SFC) category and the amendments made with respect to non-financial counterparties (NFC), the SSDA also question whether the initial concern regarding access to clearing services for counterparties with a limited volume of activity in the OTC derivatives market remain. We therefore encourage ESMA to do an inquiry whether the problem still exists and a cost benefit analysis of whether the high costs of implementing the proposed rules are worthwhile.

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Please do not hesitate to contact us if you have any questions or if there is anything that you would like to discuss.

Yours sincerely,

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