

Stockholm, 7 April 2021

SSMA's comments to the European Commission's draft delegated act rspecifying the conditions under which commercial terms for clearing services for OTC-derivatives are to be considered to be to be fair, reasonable, non-discriminatory and transparent

The Swedish Securities Markets Association ("SSMA"), transparency no 7777147632-40, welcomes the opportunity to provide comments to the European Commission's draft delegated act and the draft annex specifying the conditions under which clearing services for OTC-derivatives are considered to be to be fair, reasonable, non-discriminatory, and transparent ("FRANDT").

As a general comment, the SSMA appreciates that the European Commission has made amendments to ESMA's proposals in order to increase the proportionality of the FRANDT-requirements and we fully support that the requirements have been limited to mandatory clearing under article 4 (3a) EMIR. However, as mentioned in our response to ESMA's consultation¹, the SSMA is concerned that the FRANDT-rules infringes on fundamental principles such as free competition and freedom of contract. In our view, some of the proposals will increase the risk of clearing and most likely lead to higher prices and stricter terms and conditions in clearing agreements. Thus, unless carefully calibrated, the effect of the FRANDT-rules could be the opposite of what is intended, i.e. a decrease in access to clearing.

Against this background, the SSMA wants to encourage the European Commission to take a cautious approach in order to avoid any unintended consequences. In particular, we would like to raise the following important issues:

1. Form for the request of proposal

The SSMA considers that the introduction of a binding requirement for clearing services providers ("CSPs") to provide a form for request of proposal is unproportionate. The onboarding process is different for different clients. We believe such forms will be of little practical use and only lead to unnecessary cost and administrative burdens. If kept in the delegated act, the use of a form for request of proposal should be voluntary for both CSPs and clients.

¹ <https://svenskvardepappersmarknad.se/wp-content/uploads/2020/10/SSDA-response-to-ESMA-Consultation-Paper-on-Commercial-Terms-for-Providing-Clearing-Services-under-EMIR---2-Dec-2019.pdf>

2. Fees and pass-on costs

Information on fees and pass-on costs are likely to change over time and the SSMA therefore considers that it would be most impractical to require that the information should be included in the clearing agreement ("the contract"). If kept, we propose that the European Commission clarifies that incorporation by reference can be used.

3. Notice period

A notice period for termination and amendments of contracts is not a matter that in our view is suitable for binding legislation but should, in accordance with the principles of freedom of contract, be freely negotiated between the parties. As mentioned in SSMA's response to ESMA's consultation, we are also worried that this proposal could have unintended consequences since it may restrict the ability of CSPs to terminate a contract when this would in fact be a prudent action from a risk management perspective. In our view, a mandatory 6 month notice period creates unnecessary risks for the clearing system in EU whilst being of limited value to clients. The requirement should therefore be deleted from the delegated act. If the Commission nevertheless decides to keep a legislative minimum notice period, the time should be shortened to 3 months, which is more in line with industry market documentation.

4. Obligation of clearing

The introduction of an obligation to clearing by level 2 legislation will in SSMA's view create new risks to the clearing system in EU, in particular in combination with the above-mentioned notice period for termination and amendments. No obligation of clearing exists under industry market documentation today and the introduction of such obligation is likely to discourage firms from providing clearing services, in particular to smaller clients. This would be counterproductive considering that the general goals of FRANDT is actually to increase access to clearing.

5. Implementation time

The SSMA would like to underline that a sufficiently long implementation period is essential for CSPs to comply with the FRANDT requirements. In order to facilitate an orderly implementation of the delegated act, we therefore propose that the European Commission introduces a implementation period of 6 to 12 months after the delegated act has come into effect.

Please note that an implementation period of 6 to 12 months assumes that the scope of FRANDT is limited to new clients. If also existing clients are to be included, the CSPs will need even more time considering the massive re-papering exercise that would be required. In this connection, it should be recalled that EU firms still suffer from operational challenges due to COVID-19 and that the necessary resources in many cases already are tied up in other large implementation projects such as CSDR review and IBOR reform. The administrative burden that a re-papering exercise for existing clients would imply is therefore not proportional to the potential benefits, in particular since the main policy objective of FRANDT is to facilitate new clients' (i.e. not existing clients) access to clearing services.

For the sake of legal certainty, it should also be confirmed that CSPs do not need to comply with the level 1 requirements in art 4(3a) EMIR until the delegated act becomes applicable, i.e. at a date later than 18 June 2021.
