ISDA Response to the ESMA Consultation Paper
"Draft RTS on information on clearing fees and associated costs (Article 7c(4) of EMIR)"

Responses to ESMA's questions

Q1: Is there any aspect of the scope of this requirement that ESMA should consider detailing further?

Overarching comment

If the overall purpose of these additional disclosures is to enable end-users of derivatives to benefit from transparency on fees and costs, and facilitate their decision-making, it is not apparent how such transparency is achieved by multiple and partly overlapping disclosure requirements, which result in more complexity rather than clarity. Introducing additional requirements, on top of existing disclosures, will lead to confusion from clients, whilst not improving the decision-making when selecting an appropriate clearing service provider (CSP) for their needs.

While we are aware that this new requirement is driven by the level 1 EMIR 3 regulation, we urge ESMA to streamline these requirements and make them as simple as possible. We suggest that ESMA considers unifying all the disclosure requirements in relation to fees, costs and charges as part of future revisions of these regulations. For the purpose of this consultation, we strongly suggest that ESMA leverages the existing disclosures already required under MiFID costs and charges, Article 4(3a) of EMIR on the conditions under which the commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent (FRANDT), and Article 38 of EMIR. If there are perceived gaps, only then should ESMA consider specific, targeted changes that will introduce meaningful benefits for clients rather than the current broad-brush approach, which we do not believe is proportionate to the goal of the regulations. Ultimately, clients are motivated to choose a clearing firm that offers the best price and service (e.g. in terms of the range of CCPs that the CSP can offer access to). From a cost perspective, clients are not interested in the reasons why a clearing firm is more or less expensive (e.g. the breakdown of their costs) but focus instead on the bottom-line cost.

Implementation period

If, but only if, ESMA follows our proposed adjustments, including by allowing firms to satisfy their obligations under Article 7c of EMIR by pointing to existing disclosures, we consider an implementation period of 3 months appropriate.

In the event that ESMA proceeds without these adjustments, we believe a minimum implementation period of 18 months would be required to allow firms sufficient time to

adapt their systems, processes and disclosures. The time required should not be underestimated: firms must undertake complex validation processes and internal controls before changes can be operationalised.

Scope

ESMA should introduce an article in the draft RTS precisely defining the scope of application of the requirements. The scope should be explicitly limited to clearing services providers (CSPs) providing services in the EU, to EU clients, and only in relation to clearing activity at CCPs authorised in the EU. It should not apply in relation to clearing activity at third-country CCPs recognised in the EU, given that Recital 16 of EMIR 3 sets out that "the information on costs that clearing members and clients that provide clearing services should disclose should be limited to the Union CCPs in relation to which they provide clearing services".

Purpose of the new requirement, in light of existing disclosures

We would welcome further clarity as to the purpose of the requirement, in light of the existing disclosures currently required under Article 38(1) of EMIR. To facilitate compliance with this new requirement, further explanation with regards to this additional disclosure, and the difference in purpose with the EMIR Article 38(1) requirement as well as MiFID II Article 24 disclosures would be helpful. As part of FRANDT disclosures, clients are already informed of the third-party costs and clearing member mark-up for transaction fees. This should already enable clients to compare fees across clearing providers as well as across infrastructures.

To avoid regulatory duplication, we propose that Article 7c(2) should be applied proportionately and only to the extent that its requirements are not already fulfilled through compliance with other provisions, including Article 24 of MiFID II, Article 4(3a) of EMIR and Article 38(1) of EMIR. The objective of transparency would be achieved just as well where firms make use of existing EMIR or MiFID disclosures.

We therefore respectfully request that ESMA clarify, in Article 1, that compliance with Articles 4(3a) of EMIR, 38(1) of EMIR, and Article 24 of MiFID II may be considered as contributing to, or satisfying the requirements, under Article 7c(2), where the disclosures are substantively equivalent.

Such clarification would reduce duplication, thereby supporting the EU's broader agenda in relation to simplification and competitiveness without undermining the need for transparency for clients.

With regards to the purpose of such disclosures, detailed information on clearing member fees should serve the primary purpose of allowing client and potential clients to compare across clearing providers and Union CCPs and select the clearing provider that suits their needs. The reason why the fees are higher or lower is irrelevant for the client, because from a cost-perspective, they are more fundamentally concerned with the overall bottom line cost. The purpose of such transparency requirements should not be to allow for an analysis of the reasons why a clearing member has a cheaper or more expensive fee structure, as

those reasons pertain to the clearing members internal business operations. In light of this, the requirement to provide information broken down as set out under Article 2 and 3, e.g. specifying fees for IT systems, appears superfluous in light of the intended purpose of these disclosures.

We would also note that the provision in Article 1(2) of the draft RTS which states "Clearing service providers shall disclose fees and costs referred to under paragraph 1 to both existing and prospective clients upon request" does not mitigate the impact of the proposals because even if only one client requests this information, CSPs will need to calculate and provide this information.

It should be made clear that if a CSP doesn't charge for a particular service (e.g. onboarding fee) it does not need to disclose that. ESMA indirectly refers to this in paragraph 19 of the consultation paper where ESMA states, "The onboarding fees, **where applicable**, should represent a one-off cost for the client at the beginning of the clearing relationship." However, this is not reflected in Article 9 of the draft RTS which states that "clearing service providers shall disclose, **separately where practicable**, the on-boarding fees….". The reference to "separately where practicable" only refers to the possibility to break down the onboarding fees into components but does not acknowledge the fact that onboarding fees are not always charged by CSPs in the first place. We would suggest amending this to start with "where a CSP charges onboarding fees…".

Q2: Do you agree with the typology of fees identified by ESMA? If not, what fees would be more suitable?

Existing disclosure requirements

Clearing members are required to disclose information on fees and costs as part of various provisions of EMIR and MiFID II. Further to Commission Delegated Regulation 2021/1456[1] specifying the conditions the commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent, clearing members are already required to provide detailed information on the commercial terms under which it offers clearing services (point 3 of Annex 1) and detailed information on fees and pass-on costs (point 6 of Annex 1). Further to Article 24 of MiFID II and Article 50 of the MiFID II Commission Delegated Regulation 2017/565[2], investment firms are required to provide detailed information to their clients on all costs and associated charges charged for the provision of investment services and/or ancillary services.

Breakdown of costs

The RTS should avoid going into excessive detail. We would urge ESMA to fully apply the principle of proportionality, as enshrined in Article 5 of the Treaty in developing its approach to clearing cost disclosures. The objective of Article 7c(2) of EMIR — to enable clients to compare the conditions under which clearing services are offered — does not require overly

[1] Delegated regulation - 2021/1456 - EN - EUR-Lex
[2] EUR-Lex - 02017R0565-20210822 - EN - EUR-Lex

granular categories. What matters most to clients is the total fee charged by CSPs, not an artificial breakdown of charges into predefined categories that may not reflect the way services are actually priced or structured in practice. Imposing excessive granularity in the disclosure risks creating rigid disclosure frameworks that are burdensome to implement, and ultimately unhelpful to clients. We therefore recommend that ESMA avoid mandatory categories, and instead focus on ensuring that clearing service providers disclose costs in a manner that is clear, comparable, and meaningful, leaving flexibility for firms to adapt disclosures to their business models while meeting the transparency objective.

Furthermore, we note that Article 1 of the draft RTS seems to consider some items subject to disclosure that do not appear to be within the scope of the Level 1 text. Article 7c(2) of EMIR 3 states that the following is to be disclosed: "*the fees to be charged to such clients for the provision of clearing services and any other fees charged including fees charged to clients which pass on costs, and other associated costs related to the provision of clearing services.*" There is no reference to rebates and discounts in the level 1 text, while Article 1(6) of the draft RTS refers to these items as within the scope of the requirements. We also note that such items are already addressed by Article 38 and 4(3a) of EMIR. We therefore consider that Article 1(6) should be removed.

Since some costs are inherently unforeseeable, firms would not be able to disclose them in advance in any meaningful way.

As part of its description of transaction fees, ESMA notes that these should include the booking fee and maintenance fees per transaction volumes. We note that it is not possible to provide maintenance fees per transaction. Maintenance fees are charged on a life to date open position, not at a transaction level (e.g. Total return futures)

As part of the breakdown of fixed fees, ESMA notes that the information should include "a. the recurring minimum fees; b. the recurring fees to cover the IT infrastructure costs; c. the recurring fees for maintaining different types of accounts; and d. the recurring fees for collateral management and transformation, unless these depend on the clearing activity of the client and are treated under Article 4". It would not be possible to perform this disaggregation for minimum fees into a specific amount, and the information of fixed costs at the client level would only remain valid if the client base stayed static. Given clearing businesses are scale businesses, disaggregating fixed fees as contemplated by ESMA does not appear possible.

As an additional point for clarification, we note that EMIR, in the recitals, in Article 7c, and throughout the consultation report, use the terms "fee" and "cost". We would welcome further clarity as to whether the terms are used interchangeably, or whether ESMA is looking to capture different elements under each term.

Q3: Do you agree with ESMA's proposal in relation to pass-on costs?

We do not agree with ESMA's proposal in relation to pass-on costs. The transparency provided under MiFID II Article 24, as further specified under Article 50 of the MiFID II Commission Delegated Regulation 2017/565 already provide the necessary information on costs related to the provision of clearing services.

As part of its description of pass-on costs, ESMA notes that "[t]hese should include the costs borne by the CSP to access the CCP, without which the client could not benefit from the client clearing service, including the clearing fees charged by the CCP and IT system costs. Other pass-on costs borne by the CSP such as the costs of exchanges fees and other costs for the operational infrastructure or the staff needed should also be clearly identified". We note that these are unlikely to be fees which could ever be disaggregated at a client level. They will likely be fixed costs. Therefore, if firms had to disclose a breakdown of pass-on costs per client this would be operationally burdensome as it would need to be updated very frequently as clients participate/do not participate in a given market (i.e. the size of a CSP's client base naturally fluctuate over time). In fact, the practical reality is that CSPs simply cannot update disclosures in real time when a change occurs at CCPs level. The lag is a natural limitation of the process and can run counter to the objective of transparency and comparability for clients. It therefore reinforces the point that the obligation for disclosure must rest with CCPs themselves, who hold the most up-to-date information.

In ISDA's view, CSPs' obligations should be limited to providing a link to the CCPs' public disclosure, as well as a high-level description of the costs passed on. This would give clients access to the most accurate and up-to-date information directly from the source (the CCP). Doing otherwise would result in duplication and would be overly burdensome as CCPs' costs are subject to frequent changes. Additional requirements on CSPs should be limited to what is genuinely useful to clients. Simply duplicating information that is already publicly available offers little added value.

Q4: Do you agree with the proposed level of disaggregation?

The fees charged by the CCPs can be provided by the CCPs directly. With regards to the disaggregation of onboarding fees and fixed fees at the level of IT systems, we consider this information to be unnecessary in light of the intended purpose of such disclosures – which is to allow clients to compare the overall cost of provision of clearing services, but not to dig deeper into the underlying drivers of the costs, which pertain to the CSPs' business operations and are not relevant to the client.

The RTS go beyond the Level 1 text which does not mandate a disclosure at the "level of the clearing service". Article 7c(2) indeed specifies that the requirement should apply to CSPs "for each CCP at which they provide clearing services", but not for each clearing service within these CCPs.

Appendix

ISDA's proposed amendments to the draft RTS – to be read in conjunction with the ISDA response

COMMISSION DELEGATED REGULATION (EU) No …/..

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 with regard to regulatory technical standards specifying the type of information to be disclosed by clearing members and clients that provide clearing services to clients

of [ ]

(text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July

2012 on OTC derivatives, central counterparties and trade repositories, in particular Article 7c(4)

thereof,

Whereas:

(1) Clearing members and clients that provide clearing services to clients ("clearing service providers") should disclose the fees and other associated costs for each CCP at which they provide clearing services, directly or indirectly, ~~including both~~at CCPs authorised under Article 14 of Regulation (EU) No 648/2012 ~~and CCPs recognised under Article 25 of Regulation (EU) No 648/2012~~. ~~To account for the difference of structure and internal organization among CCPs, s~~Such disclosure should be provided for each CCP ~~at the level of each different clearing service~~.

(2) In order to ensure a sufficient level of transparency and comparability across different clearing service providers, the disclosed fees should be broken down by category based on objective criteria and linked to the corresponding cost item or service provided. Where applicable, the different categories should include, but are not limited to, onboarding fees, fixed fees and transaction fees.

~~(3) The disclosure should cover the total cost of clearing, including potential discounts, rebates or fees caps, which should be based on objective criteria such as clearing volumes and patterns.~~

~~(4)~~(3) To ensure a fair commercial treatment and comparability of different offers, both existing and prospective clients should benefit from the disclosure of the fees and other associated costs, subject to appropriate non-disclosure agreements. Clearing service providers may refer to existing disclosures to achieve this.

~~(5) In order to account for the difference in the level of details that may be provided by third country CCPs, clearing service providers which are unable to identify or share part of the required information on the fees related to third country CCP clearing services should clearly explain the reasons thereof to their clients.~~

~~(6)~~(4) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

~~(7)~~(5) ESMA has developed the draft regulatory technical standards in consultation with the European Banking Authority (EBA). In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), ESMA has conducted open public consultations on such draft regulatory technical standards, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation applies to clearing members and clients which provide clearing services in the Union, whether those services are provided directly or indirectly ('clearing service providers') and where those services are provided in relation to CCP authorised under Article 14 of Regulation (EU) No 648/2012.

Article 1a

General provisions

1. For each CCP authorised under Article 14 of Regulation (EU) No 648/2012, c~~C~~learing ~~members and clients that provide clearing services to clients ("clearing~~ service providers~~")~~ shall disclose fees and costs associated with the clearing service provided, in a detailed and transparent manner that allows clients to easily understand and compare the fees charged for the clearing service offered.

2. Clearing service providers shall disclose fees and costs referred to under paragraph 1 to both existing and prospective clients upon request. This requirement may be met by referring to existing disclosures made under Article 24 of Directive (EU) No 2014/65, Article 4(3a) and Article 38(1) of Regulation (EU) No 648/2012.

3. Clearing service providers shall associate each fee with the corresponding service provided, and to the extent possible breakdown the fees charged in accordance with the categories set out under Articles 2, 3, and 4~~, and 5~~ of this Regulation, where appropriate.

4. The information on fees and costs shall clearly indicate any fees charged to the client which pass on costs related to the provision of clearing services ('pass-on costs').

~~5. Where relevant, clearing service providers shall breakdown the fees or costs at the level of each clearing service for each CCP at which they provide clearing services.~~

~~6. Where a clearing service provider applies discounts, caps, and rebates, it shall disclose the conditions for benefitting from such discounts, caps, and rebates and allow clients to understand how discounts, caps, and rebates are calculated, and on which category of fees they apply.~~

~~7. Where the information available from a CCP recognized as a Tier 1 CCP in accordance with Article 25(2a) of Regulation (EU) 648/2012 is limited, clearing service providers shall duly inform their clients on the legal or operational reasons justifying such limitations.~~

Article 2

On-boarding fees

~~1.~~ Where a c~~C~~learing service provider charges on-boarding fees, it~~s~~ shall disclose, separately where practicable, the on-boarding fees, which is the one-off cost for the client payable at the beginning of the contractual relationship with the clearing service provider to access the ~~clearing service~~CCP, or any extension thereof. This requirement may be met by referring to existing disclosures made under Article 24 of Directive (EU) No 2014/65, Article 4(3a) and Article 38(1) of Regulation (EU) No 648/2012.

~~2. The information on the onboarding fees shall include, where relevant: a. A registration fee; b. A fee for the set-up of IT systems at the clearing service provider and where relevant at the CCP; c. A fee for the initial assessment of the client.~~

Article 3

Fixed fees

~~1.~~ Where a c~~C~~learing service provider charges fixed fees, it~~s~~ shall disclose, separately where practicable, the fixed fees that are charged periodically to the clients, and which are designed to cover the fixed costs of providing access to clearing and are not linked to the level of clearing activity of the client. This requirement may be met by referring to existing disclosures made under Article 24 of Directive (EU) No 2014/65, Article 4(3a) and Article 38(1) of Regulation (EU) No 648/2012.

~~2. The information on the fixed fees shall include, where relevant: a. the recurring minimum fees; b. the recurring fees to cover the IT infrastructure costs; c. the recurring fees for maintaining different types of accounts; and d. the recurring fees for collateral management and transformation, unless these depend on the clearing activity of the client and are treated under Article 4.~~

Article 4

Transaction fees

1. Where a c~~C~~learing service provider charges transaction fees, it~~s~~ shall disclose separately the fees that depend on the number of transactions or on volumes related to the clearing activity of the client ("transaction fees"). This requirement may be met by referring to existing disclosures made under Article 24 of Directive (EU) No 2014/65, Article 4(3a) and Article 38(1) of Regulation (EU) No 648/2012.

2. The information on transaction fees shall clearly indicate whether they are linked to the number of transactions or volumes cleared by the client.

~~*Article 5*~~

~~**Other fees and costs**~~

~~All fees and other costs related to the provision of clearing services which are not covered in the categories set out under Articles 2, 3, and 4 of this Regulation shall be disclosed as "other fees". When a clearing service provider includes "other fees and costs" in the fee disclosure, the clearing service provider shall provide an explanation of the expenses that these fees and costs cover.~~

Article 6

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It shall apply from [3] [if ESMA follows our suggested approach] [18] [otherwise] months after entry into force. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels

For the Commission

The President

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 76 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on LinkedIn and YouTube.