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(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2021/1456

of 2 June 2021

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council by specifying 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

(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 ⁽¹⁾, and in particular Article 4(3a), third subparagraph, thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 has been amended by Regulation (EU) 2019/834 of the European Parliament and of the Council ⁽²⁾. Those amendments have, inter alia, introduced an obligation on clearing members and clients which provide clearing services, whether directly or indirectly, ('clearing service providers') to provide those services under fair, reasonable, non-discriminatory and transparent ('FRANDT') commercial terms. To provide legal certainty for clearing service providers and their prospective or existing clients, it is necessary to specify the conditions under which commercial terms are to be considered to be FRANDT.
- (2) Taking into account that the objective of Article 4(3a) of Regulation (EU) No 648/2012 is to facilitate access to clearing for clients that have a limited volume of activity in the OTC derivatives market and face difficulties in accessing central clearing, and given the importance of accessing central clearing for counterparties subject to the clearing obligation, this Regulation should apply to the provision of clearing services in relation to OTC derivative contracts that are subject to the clearing obligation pursuant to Article 4(1) of Regulation (EU) No 648/2012. To ensure a level playing field and that clients in the Union benefit from FRANDT commercial terms, this Regulation should apply where those clearing services are provided in the Union.
- (3) To ensure transparency, clearing service providers should describe the process leading to the agreement on contractual terms and setting up operational processes for clearing services ('on-boarding process') and provide a form for a request for proposal on their websites. For the same reason, all clearing service providers should disclose information on key commercial terms to prospective clients.

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

⁽²⁾ Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirement for trade repositories (OJ L 141, 28.5.2019, p. 42).

- (4) While clearing service providers should be able to control the risks involved in the provision of clearing services, a harmonised risk assessment of prospective and existing clients should ensure that commercial terms are fair and non-discriminatory, having regard to costs and risks. Some clearing service providers are already under an obligation to assess the risk posed by clients in accordance with the criteria laid down in Article 25 of Commission Delegated Regulation (EU) 2017/589 ⁽³⁾. To ensure a harmonised risk assessment of clients, while reducing the regulatory burden on clearing service providers and avoiding duplicative and conflicting rules, all clearing service providers should assess clients on the basis of the criteria laid down in Article 25 of that Delegated Regulation.
- (5) To ensure that commercial terms are reasonable, ensuring unbiased and rational contractual arrangements, fees, prices, and discounts should be based on objective criteria, including volumes cleared, clearing patterns and needs and requirements of a client. To avoid unbalanced pricing structures and conflicts of interests, fees, prices and discounts should be carefully designed. Fees charging costs to clients should clearly distinguish between costs directly related to the provision of clearing services to the client concerned and costs related to the provision of clearing services in general, separately for each cost item, including IT costs, licensing costs and costs for collateral management.
- (6) Contractual terms should specify the conditions and criteria for the acceptance of transactions submitted by clients for clearing and for the right of the clearing service provider to suspend clearing services and to liquidate or close out client positions. A derogation from those conditions and criteria should be possible where it is reasonable and duly justified, including to control the risks involved in the provision of clearing services.
- (7) To ensure predictability and continuity of clearing services, clearing service providers should apply a notice period of not less than six months for termination of contracts or for changes that materially affect the agreed terms and conditions. A shorter termination period should be possible where it is reasonable and duly justified, including to control the risks involved in the provision of clearing services.
- (8) Both prospective and existing clients should benefit from FRANDT commercial terms. Whereas the new conditions will benefit prospective clients from the date of application of this Regulation, clearing service providers and existing clients should be given sufficient time to review and, where appropriate, adapt commercial terms agreed before the entry into force of this Regulation.
- (9) Article 4(3a) of Regulation (EU) No 648/2012 has already entered into force and applies from 18 June 2021. To ensure legal certainty as to the conditions under which commercial terms are to be considered to be FRANDT, this Regulation should enter into force as a matter of urgency. However, to give clearing service providers sufficient time to prepare for the application of this Regulation, its application should be deferred,

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'), where those services are provided in relation to OTC derivative contracts that are subject to the clearing obligation pursuant to Article 4(1) of Regulation (EU) No 648/2012.

⁽³⁾ Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (OJ L 87, 31.3.2017, p. 417).

*Article 2***Fair, reasonable, non-discriminatory and transparent commercial terms**

Commercial terms for clearing services provided by clearing service providers shall be considered to be fair, reasonable, non-discriminatory and transparent where they meet the requirements laid down in the Annex.

*Article 3***Transitional provision**

Commercial terms for clearing services agreed before 9 September 2021 shall be reviewed and, where necessary to meet the requirements laid down in the Annex, modified by 9 September 2022.

*Article 4***Entry into force and application**

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 9 March 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 2 June 2021.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

1. Transparency of the on-boarding process

- 1.1. The clearing service provider publishes on its website a description of the process leading to the agreement on contractual terms and setting up operational processes for clearing services ('on-boarding process'). The description includes the following:
- (a) the different steps of that process;
 - (b) the estimated timeline to complete the different steps of that process;
 - (c) a form to request a proposal from the clearing service provider to become a client ('form for a request for proposal'), as set out in point 2;
 - (d) the key documentation that the prospective client is to submit to the clearing service provider together with the form for a request for proposal.
- 1.2. Prospective clients have a choice whether or not to use the form for a request for proposal set out in point 2, or any other form of request for proposal.
- 1.3. A clearing service provider that decides not to make a proposal in reply to the request for proposal informs the prospective client thereof without undue delay.

2. Form for a request for proposal

- 2.1. The form for a request for proposal includes the following:
- (a) information about the prospective client:
 - (i) legal name;
 - (ii) legal entity identifier (LEI);
 - (iii) whether the prospective client is a financial or non-financial counterparty and whether it is subject to the clearing obligation in accordance with Articles 4a or 10 of Regulation (EU) No 648/2012;
 - (iv) the sector of activity;
 - (b) information about the documentation that the prospective client is to provide to the clearing service provider as part of the on-boarding process;
 - (c) information about the OTC derivative contracts concerned, including whether those contracts are subject to the clearing obligation in accordance with Article 4 of Regulation (EU) No 648/2012;
 - (d) any information or documentation that is to be provided by the prospective client to the clearing service provider to enable the clearing service provider to make a well-informed and detailed proposal on the following:
 - (i) the scope of any clearing service in terms of OTC derivative contracts;
 - (ii) the fees, costs and discounts;
 - (iii) the result of the assessment referred to in Article 25 of Delegated Regulation (EU) 2017/589;
 - (iv) the contractual terms and conditions;
 - (v) the collateral accepted;
 - (vi) the applicable haircuts;
 - (vii) the criteria for acceptance of orders;
 - (viii) the conditions for the suspension of any clearing services or the liquidation or close out of any positions;
 - (ix) the conditions for the termination of the agreement for the provision of clearing services;
 - (x) IT requirements.

3. Disclosure of commercial terms

- 3.1. A proposal made by the clearing service provider in reply to a complete request for proposal includes, in a clear and structured manner, the following:
- (a) the information referred to in the following provisions:
 - (i) Article 38(1) of Regulation (EU) No 648/2012;
 - (ii) Article 39(7) of Regulation (EU) No 648/2012;
 - (b) the terms and conditions under which the clearing service provider offers its clearing services, including terms and conditions which are specific to the prospective client;
 - (c) the collateral accepted;
 - (d) the applicable haircuts;
 - (e) the criteria for acceptance of orders;
 - (f) the conditions for the suspension of any clearing services or the liquidation or close out of any positions;
 - (g) the conditions for the termination of the agreement for the provision of clearing services;
 - (h) any applicable IT solutions and requirements.

4. Risk control assessment

- 4.1. The clearing service provider makes an assessment of the prospective client or the client in accordance with Article 25 of Delegated Regulation (EU) 2017/589.
- 4.2. The clearing service provider informs the prospective client or the client of the outcome of the assessment referred to in point 4.1.

Where that outcome is negative, the clearing service provider informs the prospective client or the client, upon request, of the main reasons for the negative assessment and of the criteria laid down in Article 25(1) of Delegated Regulation (EU) 2017/589 which have not been fulfilled.

5. Commercial terms

- 5.1. The commercial terms for the provision of clearing services agreed between the clearing service provider and the client are laid down in writing, are clear and complete and cover all the essential terms and conditions for the provision of the clearing services.

6. Fees and pass-on costs

- 6.1. Fees, prices and discounts are transparent and based on objective criteria.
- 6.2. Information is provided in the commercial terms about any fees charged to the client which pass on costs related to the provision of clearing services ('pass-on costs').
- 6.3. All fees, prices, discounts and pass-on costs, as agreed between the clearing service provider and the client, are clearly specified in the commercial terms.

7. Refusal of clearing orders, suspension, liquidation or close out of client positions and notice periods

- 7.1. The clearing service provider cannot refuse the client's request for clearing of an OTC derivative contract ('clearing order') that fulfils the agreed conditions and criteria for the acceptance of such orders, unless such refusal is reasonable and duly justified, in which case the clearing service provider, upon request, provides the client with the reasons for refusal in writing.

- 7.2. The clearing service provider can only suspend clearing services, liquidate or close out positions of the client where the agreed conditions and criteria for such suspension, liquidation or close-out are fulfilled, unless such suspension, liquidation or close out is reasonable and duly justified, in which case the clearing service provider, upon request, provides the client with the reasons for doing so in writing.
- 7.3. The client is informed, at least six months in advance, unless a shorter notice period is reasonable and duly justified, of the following:
- (a) the termination of the agreement of the provision of clearing services;
 - (b) any material change to the terms and conditions under which the clearing service is provided.
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