Consultation Paper

ESMA's Technical Advice to the Commission on Fees for Trade Repositories

20 February 2013 | ESMA/2013/219

Date: 20 February 2013

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Responding to this paper

ESMA invites comments on all matters in this paper. 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 **6 March 2013**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation period, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically 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 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 'Disclaimer'.

Who should read this paper

Although all interested stakeholders are invited to respond to this consultation paper, it would primarily be of interest to financial and non-financial counterparties of OTC derivatives transactions, central counterparties (CCPs), and trade repositories (TRs), as well as any market participant which intends to apply for registration under Regulation 648/2012.

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I. Executive Summary

Reasons for publication

On 14 January 2013 ESMA received a formal request from the European Commission (the Commission) to provide technical advice to assist the Commission in formulating a Regulation on fees for Trade Repositories (TRs) by a delegated act. (Annex I)

In order to deliver its advice to the Commission, ESMA has considered possible fee structures for TRs applying for registration. In order to finalise its advice by the due deadline, ESMA considers it necessary to conduct a shortened consultation on the technical advice for fees structures in order to deliver robust advice to the Commission.

Respondents to this consultation are encouraged to provide the relevant data to support their arguments or proposals.

Contents

This document sets out the possible options ESMA has considered for the fee structures for TR registration and supervision in the EU and welcomes comments in order to assist in the finalisation of the advice.

For registration, ESMA is considering for its advice different fee bands based on objective criteria. Such criteria are taking into account the costs to be incurred in carrying out all the relevant actions regarding the applications submitted and aim to be proportionate to the estimated turnover of TRs.

For on-going supervisory fees, ESMA is considering for its advice a single periodic fee based on turnover of the TR relative to the turnover of other TRs registered in the EU. An option for a minimum supervisory fee is also considered.

ESMA has formulated an initial view on the appropriate method for considering the turnover of a TR in fees calculations. ESMA is also considering alternative methods for the calculation of turnover and fees.

ESMA proposes its preferred option on timing and modalities of payment.

Next steps

ESMA will consider the feedback it receives to this consultation until 6 March 2013 and will provide by 31 March 2013 its advice on technical aspects of delegated act which needs to be adopted by the Commission.

II. Introduction

1. In accordance with Article 72 of Regulation (EU) No 648/2012 of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories (EMIR), ESMA shall charge fees to the trade repositories that shall fully cover all ESMA necessary expenditure relating to the registration and supervision of trade repositories and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to EMIR and, in particular, as a result of any delegated tasks. From 2013 ESMA will have direct responsibilities regarding trade repositories (TR), central counterparties and OTC derivatives. The additional tasks assigned to ESMA under EMIR and the activities and resources needed in terms of human resources and IT developments are listed and analysed in the Report to the European Parliament, the Council and the Commission on the budgetary implications of EMIR, on staffing and resources[1] (report on staffing and resources).

2. With respect to European TRs, ESMA shall assess and examine their applications for registration and once the registration is granted, shall carry out on-going supervision. With respect of TRs established in a third country that want to provide services to European customers, when conditions provided in Article 77 (2) are satisfied, ESMA may perform a recognition procedure for these TRs of third countries. This report describes possible options to cover the costs related to these activities through fees to be charged to TRs, which in accordance with EMIR shall be proportionate to their turnover.

3. To ensure an efficient use of ESMA's budget and, at the same time, alleviate the financial burden for Member States and the Union, it is necessary to ensure that trade repositories pay for all the costs related to their registration and supervision.

4. On 14 January 2013 ESMA received a formal request from the European Commission (the Commission) to provide technical advice to assist the Commission in formulating an EU Regulation on fees for Trade Repositories by delegated act. The advice is to be delivered to the Commission by 31 March 2013.

5. Given the time period established for providing its advice, ESMA is compelled to conduct a limited period consultation on its technical advice to the Commission.

6. The tasks that ESMA will need to carry out in view of its responsibilities under EMIR are described in the above-mentioned report on staffing and resources. For each task the report analyses the implications in terms of processes and activities to be carried out. It also estimates the different processes that are expected to be followed and completed and it determines the resource implications that these will have.

7. It is important to emphasise that in the European Union there are currently no registered TRs subject to a specific regulatory framework, though some entities are already providing repository services under other types of administrative licenses (e.g. as service providers). In the United States of America, the Dodd–Frank Wall Street Reform and Consumer Protection Act provides different rules regarding the registration of swap data repositories (including the time that the relevant authority (CFTC) has to assess a registration is 180 days). Given the differences in rquierements, ESMA does not believe that the experience of authorities that have repositories operating in their territories can be used as a proxy to estimate the necessary supervisory effort for TR registration under EMIR.

[1] http://www.esma.europa.eu/content/Report-European-Parliament-Council-and-Commission-budgetary-implications-Regulation-EU-No-64

8. Finally, ESMA has taken into account the Commission Delegated Regulation (EU) No 272/2012[2] (Regulation on CRA Fees), with regard to fees charged to credit rating agencies (CRAs) and the previous technical advice provided by ESMA to the Commission in that respect.

III. Expected Costs for ESMA

9. In the report on staffing and resources, ESMA has estimated in a detailed manner all costs related to the implementation of EMIR, including registration, supervision and recognition of trade repositories. The expected level of expenditure for ESMA regarding trade repositories is as follows: 1.1 million euros in 2013, 1.5 million euros in 2014 and 1.4 million euros in 2015.

10. In accordance with Article 72 of EMIR, ESMA shall charge fees that cover all the necessary administrative expenditure relating to TR registration and supervision and these fees shall be proportionate to the turnover of the TR concerned.

11. Based on its initial research and on several subsequent rounds of contacts maintained with market participants, ESMA has already identified a relevant proportion of the companies that are likely to apply for registration as trade repositories under EMIR. According to a preliminary internal classification[3] carried out to determine the level of workload and supervisory effort, on the basis of TRs estimated turnover, ESMA expects that between 2 and 4 high expected turnover TRs, and the same number of medium expected turnover TRs and of low expected turnover TRs would apply for registration in 2013 and 2 more low expected turnover TRs would apply in 2014. According to our report on staffing and resources, 2.6 full-time equivalent officers (FTE) are expected to process these applications in 2013 and 0.4 FTE in 2014.

IV. Turnover

12. For its advice to the Commission on trade repository fees, ESMA is considering the approach for determining the applicable turnover of TRs and if it should be similar or not to the one already in place for CRAs. Article 3 of the Regulation on CRA Fees provides that applicable turnover for a given financial year (n) shall be the revenues of a CRA as published in its audited accounts of the previous year (n-1) generated from rating activities and ancillary services and where the CRA did not operate during the full year (n-1), the applicable revenue shall be estimated by extrapolating that amount for the whole financial year.

13. We shall point out that the credit rating industry has existed for more than a century and its market structure is well-established and consolidated. There are three global CRAs and a wide variety of local CRAs. On the other hand, the trade repository industry is still in a very early stage of its existence. The TR industry may be characterized by the following aspects:

    a. It is formed on the basis of a new service, which arises partly as a consequence of regulatory development;

    b. There is an emergence of new suppliers and new customers, appearance of different business models and variety of additional/ancillary products and services;

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[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:090:0006:0010:en:PDF

[3] Please refer to the section VI. Registration Fees for a detailed explanation of the method of internal classification

c. There is an uncertainty regarding the demand for the TR's product and the growth potential;

d. There is a limited track record and market conditions of the companies and the industry itself are still largely unknown;

e. Different commercial and business practices may arise; and

f. Cross sector spill-overs could take place, since TRs may use already existing technology and know-how from other market infrastructures, such as CSDs or IT solutions providers.

14. In that context, it would not be unlikely that Trade Repositories:

    a. Face different cost structures and, therefore, apply pricing policies that vary significantly between them, causing significant revenue variability;

    b. Lack previous financial track records or these are based on very short periods; and

    c. Produce financial estimates and business plans that are either over-conservative or over-ambitious.

15. The above circumstances could make (real or projected) revenues a biased or inaccurate indicator of expected turnover. This was already considered when the Commission invited ESMA to provide its technical advice on an appropriate method for considering the turnover of the TR in fee calculations, since it included the use of activity indicators when revenue figures are not yet existent, are not reliable or are not an adequate measure of the trade repository activity. In this vein, ESMA is accordingly considering the use of a number of alternatives to revenue figures. For the determination of ESMA's fees, such alternatives shall be in place, either if TRs are not able to provide audited data on revenues or even when, if provided, revenues are neither reliable nor an adequate measure of trade repository activity.

16. ESMA expects TR business activity to address the two main functions set out in EMIR: (i) centrally collecting and (ii) maintaining records of derivatives, as well as (iii) the provision of relevant ancillary services, such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services. For this purpose, ESMA considers that the activity in terms of trades recorded by each trade repository is an appropriate indicator for turnover, that complements the financial revenue. Some measures of level of activity would be: (i) number of trades reported to a given trade repository for a certain period (i.e. one year) and (ii) number of recorded outstanding trades at the end of each period.

17. Furthermore, ESMA needs to establish appropriate weightings for the relevant parameters. At this stage and without prejudice to further recalibration, the only practical solution appears to be the use of equal proportion of each one of the activity indicators in combination with revenues from repository and ancillary activities. The proportion of turnover of a particular TR to the total turnover of all supervised TRs should be determined as the sum of three terms, each one equally weighted, according to the following formula:

$$\frac{Turnover\ TRi}{\sum Turnover\ TR} = \frac{1}{3} \times \frac{Revenues\ TRi}{\sum Revenues\ TR} + \frac{1}{3} \times \frac{Trades\ reported\ TRi}{\sum Trades\ reported\ TR} + \frac{1}{3} \times \frac{Outstanding\ trades\ TRi}{\sum Outstanding\ trades\ TR}$$

Where a TR did not operate during the full year (n-1), the applicable indicators shall be estimated by extrapolating the relevant data for the whole financial year.

18. ESMA's understanding is that activity-related indicators may constitute a good approximation to turnover, in the phase where the TR industry is still nascent, when reliable data on revenues do not exist. Furthermore, it will enable ESMA to be consistent with the approach already set in EMIR that fees shall be proportionate to the turnover of a TR and shall cover all administrative costs incurred. ESMA proposes to prepare a report for the European Commission by 2016, regarding the possibility of simplifying the approach for the determination of the applicable turnover and, if certain conditions are met, to propose to the Commission the application of a similar method to the one provided in Article 3 of the Regulation on CRA Fees.

19. Finally, it should be noted that although ancillary services are not covered by the EMIR authorisation, the provision of these services will make the TR's processes more complex, will increase the supervisory effort towards them and it may also impact on the overall stability of the trade repository. Therefore, the impact of ancillary services to the core services should be duly assessed by ESMA in the course of its supervisory activity. For this purpose, the total revenues, including those related to ancillary services, should be calculated to assess the level of turnover of the specific TR.

V. Trade Repositories Fees Framework

20. According to EMIR, there are two main supervisory actions regarding trade repositories:, (i) authorisation for registration and (ii) on-going supervision, and both actions should be carried out by ESMA. The assessment of completeness of an application and the examination of compliance of that application with EMIR and relevant implementing regulations are the two main stages of the registration process. Furthermore, immediately after registration is granted, two main activities should be deployed: (i) desk-based supervision and (ii) on-site inspections of registered TRs.

21. In order to establish a homogeneous and sound framework for TRs supervisory fees, consistent with Commission Regulation on fees for CRAs, ESMA considers that only ESMA shall charge fees for the registration, recognition and supervision of trade repositories operating under EMIR. National competent authorities shall not charge fees to trade repositories, including (i) cases where those authorities carry out tasks on behalf of ESMA, according to Article 74 of EMIR[4], or (ii) in cases of previous registrations under national regimes or (iii) where TRs carry out ancillary services, unless registration or authorisation for the provision of such services is required by EU or national law.

22. For the purposes of this consultation on fees, ESMA requested several non-EU data repository authorities for their fees relating either to registration, supervision or recognition. From the responses received no fees for registration were identified (which is a natural consequence of the fact that the regulation of TRs is being implemented only in a reduced number of jurisdictions and only very recently). Furthermore, relating to supervision, the responding authorities stated that they were in the early stages of defining the scope of their supervisory actions and had not defined any fee structure in this respect.

23. In order to prepare this consultation on fees, ESMA has considered three basic methods of levying fees:

- A general flat fee,
- A specific administrative actions fee, and
- A mixed system.

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[4] Please refer to section XIII XIIIReimbursement of costs to national competent authorities for a detailed explanation

Each of these three methods may also take into account the level of turnover of the TRs.

24. A general flat fee stays for a single (i.e. annual) fee charged to entities that are registered under EMIR and its aim is to cover ESMA's annual overall budget. This fee does not take into consideration the number or type of actions (application for registration, desk-based supervision or on-site inspections, among others) between TRs and ESMA, but only takes into account the fact that there is a supervisory interaction. For the determination of a general flat fee applicable to TRs, ESMA may take into account the relevant turnover of a TR according to certain thresholds or levels of turnover.

25. The specific administrative actions fee method is envisaged to recover the cost of each action (application for registration, desk-based supervision or on-site inspections, among others) that takes place between TRs and ESMA. While applying this method, ESMA may also establish different fees for each administrative action based on the turnover of TRs.

26. A mixed system method proposes a fee structure that brings together specific administrative actions fees, such as those charged for each supervisory action performed by ESMA and general annual fees, related to the on-going supervision.

27. The benefits of general flat fees are that they are simpler to calculate and implement than specific administrative action ones. They create greater budgetary certainty both for ESMA and for TRs than the specific ones and they allow ESMA to perform all the pertinent actions without specific budgetary constraints. However, with general flat fees TRs that require or initiate fewer actions would probably be overcharged and the ones requiring more interaction with ESMA would likely be undercharged. General flat fees might also be less effective in reflecting the real supervisory effort dedicated to a particular entity.

28. The advantages of having activity specific fees for each type of action are that they better represent and align supervisory fees with the workload and supervisory effort conducted with respect to each TR, they allow for quick reclamation of fees relating to tasks and could reduce risk of under- or overcharging fees. Nevertheless, this approach may reduce the ability of TRs to plan the total supervisory fees they should pay and increases the complexity of fees calculations. This method is deemed highly recommended for actions initiated by the TRs.

29. ESMA considers that the optimal solution is to establish a mixed system, where some fees are applicable to specific administrative actions and some others are charged on a periodical basis. Such methodology should allow ESMA to allocate fees on the processes it performs according to their nature (once or on-going), taking into account the supervisory effort and FTE dedicated to any specific phase of the authorisation and supervision process.

30. Fees related to specific actions are ideal for processes that are initiated at the request of the Trade Repository, like registration or modification of registration conditions. The registration process takes place only once and requires a thorough analysis of the application, because initial compliance with the conditions set in EMIR and the technical standards needs to be determined. ESMA doesn't consider charging fees annually for the initial authorisation to be the correct approach, but believes that the registration fee should be the established as a specific action fee. In such a way it would be better aligned with the duties to be performed by ESMA staff during this phase.

31. On the other hand, supervision is a continuous process aimed at ensuring the on-going compliance by TRs with the conditions for registration or the fulfillment of any commitments made during the registration process. It is possible that additional measures need to be taken to ensure TR compliance with EMIR and the technical standards. Furthermore, ESMA believes that post-registration supervisory fees shall take into account the spectrum of all supervisory tasks to be carried out, for

example on-site inspections or desk-based supervision, as a whole and not as separate supervisory actions, since they all abide a common goal which is the assurance of the proper functioning of the TR and it is for ESMA to decide on the mix of actions to be conducted.

32. Against this background, ESMA considers that a mixed system for levying fees should be put in operation, where fees charged to a TR cover all administrative costs incurred by ESMA for its registration and supervision and are proportionate to its turnover.

33. Without prejudice to the principle of proportionality set in EMIR, ESMA has also reflected whether a minimum fee should be charged to all registered TRs irrespective of their turnover, given that there are likely to be certain fixed costs relating to ESMA duties regarding TR registration and supervision.

34. For its advice on supervisory fees ESMA would therefore favour the option of a mixed system, levying specific administrative actions fees for the registration process and an annual fee proportionate to the level of turnover of the TRs for on-going supervision. Furthermore, and in order to cover ESMA's fixed costs relating to supervision, a minimum annual supervisory fee may be established. The following chapters of this consultation paper describe how this mixed system will work in practice.

VI. **Registration Fees**

35. During the registration process, ESMA staff should perform two main supervisory tasks: assessment of the completeness of an application and examination of its compliance with EMIR. Both are of utmost relevance for ESMA and for the objectives of EMIR, since the relevant decision on registration or refusal of registration of an applicant trade repository would be adopted based on the actions carried out while performing such tasks.

36. ESMA considers that the level of the administrative costs incurred during the assessment and examination of an application for TR registration would depend, among others, on the following characteristics:

   a. Types and classes of derivatives covered;

   b. Type of venue of execution, i.e. regulated market or OTC;

   c. Type and number of ancillary services provided;

   d. Number of transactions processed and recorded;

   e. Number of reporting parties (effective or expected);

   f. Number of clients (effective or expected);

   g. Complexity of IT infrastructure; and

   h. Number of employees.

37. When an application for registration is submitted it is highly probable that accounting and financial data does not exist and even if existing, it may not be a clear indicator for their expected turnover once registration is granted. The result of the above characteristics of an application for registration may also constitute an indicator of both the complexity (and the cost) of the registration assessment and of the expected turnover level. It is unlikely for a TR that registers under EMIR for one asset type that traded on a regulated market and offers no ancillary services to its clients to obtain higher turnover in

comparison to its peers. On the other hand, a TR which covers different asset classes, traded both OTC and on-exchange, and offers different value-added ancillary services may potentially build a strong business model and obtain important turnover.

38. Although all the above characteristics would be taken into account while assessing the expected level of turnover, for its advice to the Commission, ESMA believes that the first three of them, i.e. (i) types and classes of derivatives, (ii) type of venue of execution and (iii) types and number of ancillary services, appear to be the most reliable ones. In order to determine TR expected level of turnover, ESMA proposes the following criteria:

a) A TR receives reports for derivatives traded over the counter;

b) A TR covers at least three derivative classes[5]; and

c) A TR offers ancillary services.

If a particular TR meets all of the above criteria, it would be deemed to be a high expected turnover (HET). In case a TR fulfils two of the above criteria or only criterion c), it should be considered medium expected turnover (MET). In case a TR fulfil only criterion a) or b), or it does not fulfil any of the above criteria, it would be deemed low expected turnover (LET).

39. It is worth noting that in case a material change to the conditions of registration a particular TR takes place and it affects any of the criteria used to estimate the level of turnover of that TR, an appropriate adjustment to the registration fees should be done, according to the above-mentioned classification on the basis of expected turnover. This will further align ESMA necessary expenditure regarding a registered TR with its expected turnover.

40. ESMA has studied two potential options for registration fees:

a. A flat fee; or

b. Different bands of fees based on objective factors.

41. The benefits of flat fees are their clarity and simplicity. Set against this, high expected turnover applicants may be undercharged relative to the resource needed for their applications to be processed and low expected turnover applicants may be overcharged. This would be incompatible with the EMIR requirements.

42. The benefits of a banded approach to registration fees are that they better associate the fees with the expected cost of assessing and examining an application for registration and are proportionate to (expected) turnover. On the basis of ESMA experience with CRA registration, estimates for registration fees are included in this consultation paper.

43. For its advice to the Commission, ESMA currently favours the option of bands for registration fees based on the level of expected turnover and which takes into consideration all ESMA expenditure, as stated in EMIR. For the purposes of setting the registration fee band, ESMA believes that they should reflect the foreseen turnover of the applicant on the basis of the criteria described above.

44. Using the estimated workload and the expected turnover of applicant TRs, ESMA proposes the following three bands of registration fees:

[5] Interest, credit, commodities, foreign exchange, equity and others

	Full Time Equivalents (FTE)	Bands for Fees
Low expected turnover (LET) TR	0.20-0.25	**40,000 € – 50,000 €**
Medium expected turnover (MET) TR	0.30-0.35	**60,000 € – 70.000 €**
High expected turnover (HET) TR	0.40-0.60	**80,000 € – 120,000 €**

45. The above approach for calculation of registration fees is designed to be fully consistent with EMIR. On one hand, it takes into account the level of the expected turnover, based on the assessment of objective factors and on the other hand, it abides by the principle that fees charged by ESMA must cover all administrative costs incurred by ESMA in assessing and examining the application.

VII. Annual Supervisory Fees

46. Once a TR is registered, annual supervisory fees shall be levied. They should fully cover all ESMA necessary expenditure and they also need to be proportionate to TR turnover.

47. For its advice to the Commission, ESMA has taken into consideration the approach for determination of the relevant amount of fees to CRAs in each year. The relevant amount for the calculation of the annual supervisory fee charged to registered CRAs for a given year is based on the estimate of expenditure relating to the supervision of such CRA as included in ESMA's budget for that year. The budget is set out and approved in accordance with Article 63 of Regulation (EU) No 1095/2010 and is decreased by the annual supervisory fee to be charged to certified CRAs and increased by any deficit from the previous financial year. A registered CRA shall pay as an annual supervisory fee a part of the relevant amount which corresponds to the ratio of the CRA's applicable turnover to the total applicable turnover of all registered CRAs required to pay an annual supervisory fee.

48. ESMA believes this approach is appropriate and deems it applicable to Trade Repositories. It takes into account all EMIR provisions regarding ESMA's fees, since they shall cover all administrative costs incurred by ESMA and be proportionate to a TR's turnover. Furthermore, ESMA considers that surplus (or deficit) from the previous year, if any, should be subtracted from (added to) the relevant amount used to calculate the present year annual supervisory fees.

49. To this extent, ESMA considers that the annual supervisory fees paid by each TR shall be calculated as the proportion of the relevant expenditure amount which corresponds to the ratio of the TR turnover to the total turnover of all registered TRs.

50. ESMA proposes that, the relevant amount for the calculation of the annual supervisory fee charged to a registered TR for a given year, as in the case of CRAs, should be based on the estimate of expenditure relating to the supervision of TR as included in ESMA budget for that year set out and approved in accordance with Article 63 of Regulation (EU) No 1095/2010, decreased by (i) recognition fees charged to third country TRs, (ii) registration fees and annual supervisory fees paid by new TRs, or by already registered TRs, in case a material change to their registration takes place and (iii) surplus of annual supervisory fees from the previous year, and increased by the deficit of annual supervisory fees from the previous year.

51. Although the approach described above for the determination of the annual supervisory fees would expose registered TRs to the uncertainty on the fees to be paid, it will have the following advantages: i) it will ensure that the exact costs sustained by ESMA will be covered by fees; ii) it will limit the

existence of surplus or deficits to be reimbursed or levied; iii) it is an already existing practice for CRAs supervisory fees. In addition, ESMA's estimates on staffing and resources, this consultation paper and its final advice to the European Commission will provide a good indication to TRs on the fees they might expect to pay.

52. Given that there are some fixed administrative costs regarding post-authorization supervision of TRs, ESMA is considering the introduction of a minimum fee (floor). ESMA is considering a minimum annual supervision fee of between 20,000 and 40,000 euro.

53. Since a newly registered TR will lack (i) the financial information regarding revenues from core and ancillary services and activity-related measures such as (ii) number of transaction reported during the year and (iii) number of transactions recorded at the end of the year, the supervisory fees for the first year of operation of a TR need to be determined in an alternative way to the general approach. ESMA has explored the possibility to use the financial information and/or the business plan provided by the applicants during the process of assessment and examination of a registration. Such information may give ESMA some reference guidance on the expected turnover of a TR and furthermore, may prevent TRs from submitting unrealistic business plans. Notwithstanding this, neither the financial information, nor the estimation of future level of activity included in the business plans, may be deemed appropriate tools to evaluate TR turnover.

54. Taking into consideration the overall supervisory effort during the registration process, ESMA believes that supervisory fees in the first year could be based on the registration fees determined according to the expected level of turnover and further adjusted by a coefficient. The coefficient may be the ratio between the working days until the end of the year from the date the registration is granted, and ESMA's deadlines for assessment and examination of an application, which as stated in Articles 56 and 58 of EMIR are a total of 60 working days[6] (20 for assessment and 40 for examination). ESMA considers the total registration period of 60 days, because it is the only reference in terms of supervisory effort for a newly registered TR. The maximum amount due for annual supervisory fee by a TR in its first year of operation shall be equal to the amount of the relevant registration fee.

$$TR\ supervisory\ fee\ in\ year\ 1 = Min\ (TR\ Registration\ fee,\ TR\ Registration\ fee * coefficient)$$

$$Coefficient = \frac{Supervisory\ working\ days\ in\ year\ 1}{60}$$

Supervisory working days in year 1 ≥ 60, then -> TR supervisory fee = TR registration fee

Supervisory working days in year 1 < 60, then -> TR supervisory fee < TR registration fee

55. Any surplus or deficit arising as a consequence of annual supervisory fees shall be taken into account for the purposes of determination of the relevant amount of supervisory fees for the following year.

VIII. **Recognition of third country TR**

56. As described in the report on staffing and resources, ESMA estimates that the cost of equivalence assessment for a complex jurisdiction would be around 50,000 euro (this would include the overall assessment of rules on OTC derivatives, reporting to TRs, TRs and CCPs requirements). Of those, 15,000 euro can be considered to be the cost for assessing the equivalence of trade repositories rules.

[6] ESMA working days are defined in http://www.esma.europa.eu/system/files/esma_closing_dates_2013.pdf

57. In addition to the cost of the equivalence assessment, ESMA expects that the burden of processing the application for recognition will be significantly lower than the cost for processing an application for registration, given that such TR will already be registered with a third country competent authority and subject to its supervision. However such a process would need to include the establishment of a cooperation agreement with a third country authority, which will imply negotiations and possibly travel costs. According to the estimates included under the section on the recognition of trade repositories of the Report on staffing and resources, the cost in terms of dedicated human resources for processing an application for recognition would be around 20,000 euro, plus additional 20,000 euro for establishing and negotiating the cooperation agreement.

58. ESMA considers that it would not be appropriate to distinguish the fees on whether a TR comes from a more or less complex jurisdiction. Therefore, to fully recover its costs (equivalence, recognition process and establishment of the cooperation agreement) ESMA considers that the recognition fee for third country trade repositories should be equal to 35,000 euro per application.

59. It is likely that only a limited number of foreign trade repositories will apply for recognition. ESMA does not expect two or more trade repositories applying from the same jurisdiction but, should that occur, the fees applied to the second and subsequent trade repositories should be smaller than the first one, provided they are supervised by the same competent authority. This is due to the fact that the equivalence assessment and the MoU with the foreign supervisor will have already been completed before the first recognition process and should not be double counted in the second and subsequent ones. ESMA proposes a fee of 15,000 euro for recognition of a second or subsequent trade repository from a certain jurisdiction, supervised by the same authority with which ESMA has an active MoU. An alternative approach ESMA considers is to recalculate the fees charged to all recognised entities and further level them out by reimbursing the already recognised entities.

60. Given that the supervision will be carried out by the third country competent authority and ESMA will only need to ensure that the provisions of the co-operation agreement works properly and data are rightly received by all the relevant authorities, ESMA considers that a 5,000 euro on-going fee for third country trade repositories will be sufficient to cover the costs generated by the above-mentioned activity.

IX. Managing surpluses/deficits

61. ESMA considers essential to cater for a mechanism to adjust surpluses and deficits in a manner that ensures that EMIR's requirement to cover fully the costs is met in a consistent manner. While it could occur occasionally in one budget year, it would not be appropriate that other funding sources end up being used, in a recurrent manner, to cover TR registration or supervision. Nor would it be compliant with EMIR that a potential surplus coming from TR fees ends up subsidizing other ESMA activities (unrelated to TR registration supervision) or lowers the contribution of the EU or National Competent Authorities budgets. Both these situations would, in ESMA's views, contravene EMIR.

62. The approach outlined in the section on annual supervisory fees, either to add or to subtract any negative or positive balance between ESMA revenues and costs regarding TR supervision from the previous year to the relevant amount of fees due the following year, addresses the existence of any surplus or deficit for ESMA and it serves as a practical way to manage surpluses and deficits. Furthermore, it takes into consideration and aligns the total expenditure as a result of supervisory actions and ESMA's revenues based on fees.

63. In case that in year (n) they were charged fees which exceeded ESMA total expenditure, ESMA will reduce in year (n+1) the amount of their total fees. If in year (n) a deficit took place, TRs would be charged an additional amount in year (n+1) in order to restore the equilibrium of TRs supervision.

64. A possible drawback to this approach would be changes in the number of authorized TRs after the effective date when the reduction or increase of fees arising from previous surpluses or deficits takes place. This would impede the exiting TRs to benefit from the devolution of previous surpluses and could also capture entering TRs in facing the previous deficit. ESMA proposes that any correction to fees coming from previous years is applied only to the TRs that were already registered in the year in which the deficit or the surplus arose and that are still registered with ESMA in the date when the reduction or increase takes place.

X. Modalities of Payment

65. ESMA has explored different modalities of payment for registration fees. On the one hand, ESMA may collect the fees once the relevant decision regarding the registration or refusal of registration is adopted or at the end of the calendar year. This approach may pose some difficulties to ESMA for collecting fees from entities that are not registered and as a consequence, entities that are not going to be further supervised by ESMA. Notwithstanding this, such modality of payment may introduce greater certainty of payments for applicant TR.

66. On the other hand, it is important to highlight that usual practice among national competent authorities is to charge registration fees in the act of submission of an application. The Regulation on CRAs fees provides that fees related to registration shall be payable in full at the time the CRA applies for registration. This allows the relevant authority to cover its expenditure relating to the authorisation process and ESMA believes that a similar approach to the one already in place for CRAs should be applicable to TRs. It also ensures that ESMA always disposes of the necessary resources to finance its activities regarding the registration of applicant TRs. Finally, this approach will disincentive spurious applications.

67. Regarding annual supervisory fees for a given year there are also several alternatives: one upfront payment, semiannual payments or quarterly payments. The option of one payment reduces invoice handling costs both for ESMA and for the TRs. Nevertheless, it may be unlikely for ESMA to have all the information regarding the relevant amounts of turnover of TRs at the beginning of the year. The other options increase the handling cost for invoices, but bring greater flexibility for ESMA to adjust the amounts of fees paid by TRs and reduce the deviations between fees due and fees paid.

68. The Regulation on CRA fees establishes a calendar of two payments, in February and in August. ESMA deems a similar calendar appropriate for TRs. The first installment shall be due by the end of February of each year and shall amount to two thirds of the estimated annual supervisory fee. If the applicable turnover is not yet available at that time, ESMA shall base the calculation on the last turnover available. The second installment shall be due by the end of August. The amount of the second installment shall be the annual supervisory fee reduced by the amount of the first installment. Any adjustments due to previous years deficits or surpluses will be applied in the second installment.

XI. Supervisory Fees in 2013. Transitional provisions

69. Registration fees shall be payable in full at the time the TR applies for registration and payment must be received by ESMA no later than the adoption of the decision on registration or refusal of registration.

70. ESMA has also considered the appropriateness of levying a fee for supervision on the completion of the application process given that supervision of the firm will need to start at this time. Given that there would be no trade repository turnover, other measures appear to be more advisable.

71. ESMA has considered several alternatives for 2013. In the Regulation on fees to CRAs regarding year 2011, all entities registered were charged an amount of fees equal to the product of a minimum monthly fee multiplied by the number of months the CRA was operating. ESMA deems that although this approach is very practical, a further balance with EMIR should be procured, in order take into consideration the level of turnover and the total supervisory effort regarding any particular TR.

72. Another alternative ESMA is considering regarding annual supervisory fees in 2013 is to apply the method[7] already outlined in paragraphs 53 and 54 of this Consultation Paper. On the one hand, it is fully consistent with EMIR, since it takes into consideration the supervisory workload and it is proportionate to the expected level of turnover. On the other hand, according to ESMA estimations it will fully cover ESMA supervisory costs in 2013. Furthermore, this method gives registered TRs enough certainty regarding the annual supervisory fees they should satisfy to ESMA in their first year of operations.

XII. Reimbursement of TRs withdrawing from the registration process

73. An additional consideration should be given to the case of withdrawal from the registration process by some entities. There are ESMA resources dedicated to the assessment and examination of each TR application. It is important to emphasise that it is not usual practice for European national competent authorities to reimburse any proportion of upfront registration fees.

74. The Commission Regulation on CRA Fees, provides that, in case a CRA withdraws its application, ESMA shall reimburse the relevant CRA a certain amount of the upfront registration fee. At present, CRAs which withdraw during the assessment phase are reimbursed ¾ of the registration fee and in case they withdraw during the examination phase, they are reimbursed ¼ of such fee.

75. ESMA believes that the situation in the trade repositories industry is quite different from CRAs and that the reimbursement of registration fees in the case of trade repositories should not be foreseen. In the first place, the fact that reporting to TRs is a legal obligation creates a market in itself, there may be a number of undertakings willing to access that market. Lowering the expected cost of an incomplete process (by reimbursing a part of the fee) could allow for spurious applications, from companies aiming at establishing a TR without fulfilling a minimum set of requirements. Furthermore, the fact that ESMA does not have all the resources that it would need for the full activity of registration/supervision (because of the absence of a special budget attached to EMIR, as shown in the above-mentioned report on staffing and resources) requires us to concentrate the limited resources available on the applications that carry a true intention of becoming a trade repository and to discourage the submission of spurious applications. The possibility of reimbursement runs contrary to that goal and the applications that end up withdrawing would reduce the available resources for those that do not, compromising the proper review of the latter.

XIII. Reimbursement of costs to national competent authorities

76. Any delegation of tasks has to follow the principles established in EMIR. Prior to any delegation of a task to the relevant competent authority, ESMA shall consult and agree with such authority the scope and complexity of the task, the timetable for its performance and the transmission of necessary information to ESMA. To this extent, the costs to be reimbursed to national competent authorities need to fulfil the following conditions:

[7] Please see in section VII, the example on supervisory fees calculation for the first year of operation

a) they should be previously agreed between ESMA and the NCA;

b) they should be calculated in accordance to the method used to determine ESMA's total administrative costs regarding TRs;

c) they should be proportionate to the turnover of the relevant TR; and

d) they should not be greater than the total amount of supervisory fees paid by the relevant TR.

77. Any delegation of tasks by ESMA to national competent authorities will be determined on an independent basis, may be revoked at any time and will not impact the amount of fees charged to a particular TR.

Comments are welcome on all the sections of this CP. Respondents are invited to clearly highlight the section and provisions to which their comments refer and provide supporting data whenever possible.

Annex I

FORMAL REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE SUPERVISORY FEES TO BE CHARGED TO TRADE REPOSITORIES

With this formal mandate the Commission seeks ESMA's technical advice on possible delegated acts concerning the Regulation No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ('EMIR' or the "**legislative act**"). These delegated acts should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudge the Commission's final decision.

The mandate follows the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),[8] the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),[9] and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").[10]

According to Article 72(3) of the legislative act and with regard to the supervisory fees to be charged to trade repositories, the Commission shall adopt a delegated act to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

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The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee,[11] the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 82 of the legislative act. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

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[8] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 84 15.12.2010.

[9] Communication of 9.12.2009. COM (2009) 673 final.

[10] OJ L304/47, 20.11.2010, p. 47-62.

[11] Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L191, 17.7.2001, p.45-46.

1. Context

1.1 Scope

The Regulation on OTC derivatives, central counterparties and trade repositories (EMIR) entered into force on 16 August 2012. On 19 December 2012, the Commission adopted the regulatory technical standard pursuant to Article 56 of EMIR specifying the details of the application for registration as a trade repository. Following the publication at the Official Journal and entry into force of this technical standard, which is expected in Q1 2013, trade repositories will start applying to ESMA for registration.

EMIR grants ESMA direct registration and supervisory powers over trade repositories. In accordance with Article 72 of EMIR, ESMA shall charge fees to trade repositories and those fees shall fully cover ESMA's necessary expenditure relating to the registration and supervision of trade repositories.

The Commission shall adopt a Regulation on fees, to be adopted in the form of a delegated act, to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

This mandate focuses on the technical aspects of the Regulation on fees. In providing its advice, ESMA should build upon its previous experience in advising on supervisory fees for Credit Rating Agencies (CRAs) and from the experience of relevant national authorities in setting supervisory fees for financial institutions.

1.2 Principles that ESMA should take into account

On the working approach, ESMA is invited to take account of the following principles:

- It should respect the requirements of the ESMA Regulation, and, to the extend that ESMA takes over the tasks of CESR in accordance with Art 8(1)(l) of the ESMA Regulation, take account of the principles set out in the Lamfalussy Report[12] and those mentioned in the Stockholm Resolution of 23 March 2001[13].

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the delegated acts set out in the legislative act. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens for trade repositories.

- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.

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[12] Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, chaired by M. Lamfalussy, Brussels, 15 February 2001. (http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf)

[13] Results of the Council of Economics and Finance Ministers, 22 March 2001, Stockholm Securities legislation, (http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/105&format=HTML&aged=0&language=EN&guiLanguage=en).

- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.

- ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.

- In accordance with the ESMA Regulation, ESMA should, where relevant, involve the European Banking Authority and the European Insurance and Occupational Pensions Authority in order to ensure cross-sectoral consistency. It should also cooperate with the European Systemic Risk Board on any issues related to systemic risk.

- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.

- ESMA is invited to justify its advice by providing a financial analysis of the options proposed.

- The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology at European level.

- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the legislative act, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.

- The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology in the Union.

- ESMA should address to the Commission any question they might have concerning the clarification on the text of the legislative act, which they should consider of relevance to the preparation of its technical advice.

2 Procedure

The Commission is requesting the technical advice of ESMA in view of the preparation of the possible delegated acts to be adopted pursuant to the legislative act and in particular regarding the questions referred to in section 3 of this formal mandate.

The mandate takes into account the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate will not prejudge the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the legislative act.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts possible delegated acts, it will notify them simultaneously to the European Parliament and the Council.

3 ESMA is invited to provide technical advice on the following issues

ESMA is invited to provide technical advice to assist the Commission in formulating a Regulation on fees for Trade Repositories by delegated act, and more specifically on the following aspects:

- ESMA is invited to reflect on the type of fees that could be levied. Fees could be provided for specific supervisory actions (e.g. registration fees) or a general flat fee (for example annual) could be levied which would cover all supervisory activity for a year. A mixed system (fees for individual supervisory actions complemented by a general flat fee to cover the remaining expenditure) could also be considered.

- In case ESMA suggests fees for specific supervisory actions, ESMA should draw up a list of supervisory actions with the corresponding amounts of fees. ESMA is also invited to advice on whether exceptional circumstances need to be foreseen in the fees structures to take into account potential exceptional/non-routine supervisory activities.

- In case ESMA suggests annual flat fees, ESMA should indicate how the flat fee should be calculated, i.e. how its expenditure necessary for the registration and supervision of trade repositories should be distributed to the individual supervised trade repositories. ESMA is invited to advice on whether fees should be yearly adjustable or fixed.

- According to Article 72(2) of EMIR, the amount of fee charged to a trade repository shall cover all administrative costs incurred by ESMA for its registration and supervision activities. ESMA is invited to detail its assessment of the administrative costs it will incur for the registration and supervision activities of trade repositories, and provide information on its estimates and methods of calculations. ESMA could build upon its existing experience of registering and supervising credit rating agencies to inform its analysis. ESMA should also advice on how the surpluses/deficits in ESMA supervision budget for trade repositories should be managed.

- According to Article 72(2) of EMIR, the amount of fee charged to a trade repository shall be proportionate to the turnover of the trade repository concerned. ESMA is invited to provide its technical advice on appropriate method for considering the turnover of the TR in fee calculations, including the use of activity indicators when revenue figures are not yet existent, are not reliable or are not an adequate measure of the trade repository activity.

- According to Article 72(1), the fees charged to trade repositories shall also fully cover the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to

EMIR in particular as a result of any delegation of tasks in accordance with Article 74 of EMIR. ESMA is invited to suggest a method for the calculation of the amount that competent authorities may claim from ESMA. The amount should depend on the scope and complexity of the task to be delegated and should be consistent with any specific supervisory fee that ESMA can claim from the trade repository for undertaking a supervisory action.

- ESMA should suggest the timing and appropriate modalities of the payment of the fees. ESMA is invited to advice on appropriate schedules for collection of fees (one single payment vs several payments). It has to be ensured that ESMA always disposes of the necessary resources to finance its activities related to trade repositories. This could for instance be achieved by requiring the supervised trade repositories to pay the expected fees upfront, drawing up an account at the end of the year.

4. Indicative timetable

This mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of the legislative act which allows the European Parliament and the Council to object to a delegated act within a period of 3 months, extendible by 3 further months. The delegated act will only enter into force if neither European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

The deadline set to ESMA to deliver the technical advice is 31 March 2013.