esma European Securities and Markets Authority

Final report

ESMA advice on the criteria for DRSP

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Executive Summary

Reasons for publication

This final report covers ESMA's technical advice to the Commission on delegated acts relating to the criteria to identify those ARMs and APAs that, by way of derogation from Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State. The technical advice includes feedback received by stakeholders to ESMA's consultation paper.

Contents

The final report is comprised of 9 sections and 2 annexes. Section 1 includes the background of this final report, as per the agreed text of MiFIR amended by the ESA Review. Section 2 specifies the content of the technical advice on DRSP derogation criteria requested by the European Commission. Section 3 sets forth the proposed method to determine if the APA or ARM services are provided to investment firms authorised in one Member State. It is envisaged that, an APA or an ARM, in order to be eligible for a derogation on the basis of this criterion, should provide services to investment firms authorised in less than 4 Member States and at least 70% of the firms should be authorised in the same Member State where the APA or the ARM is established, unless the number of firms in other Member States is lower than 3. Section 4 outlines the proposed calculation method with regard to the number of trade reports or transactions. In order to be eligible for a derogation, an APA or an ARM should report less than 0.5% of overall data made public or reported across the Union by all APAs or ARMs. Section 5 describes the method to determine whether the ARM or APA is part of a group. In order to qualify for a derogation under this criterion, an ARM or APA should not be part of a group of financial market participants operating cross-border. Section 6 presents other qualitative and quantitative elements to determine if ARMs should have a derogation on account of their limited relevance for the internal market. In particular, an ARM could be considered eligible for derogation if out of transactions reported by this ARM less than 30% are subject to exchange with another NCA. Section 7 sets out the criteria that determine upfront which data reporting services providers (already authorised in the EU) are derogated from ESMA supervision. Section 8 clarifies whether the elements to determine if an ARM or APA should have a derogation are cumulative or not and proposes a two-step process to assess the above-mentioned criteria. Section 9 details the considerations on the frequency of the assessment on the criteria and the frequency of the transfer of supervisory responsibilities from an NCA to ESMA or from ESMA to an NCA. It is envisaged that the criteria would be reassessed on a yearly basis and the supervision would be transferred only after the second assessment in which the same respective thresholds are reached, unless there is a significant change in which case the supervision could be transferred after the first reassessment.

Annex I contains the provisional mandate received from the European Commission.

Next Steps

Based on the technical advice the European Commission will draft the delegated acts specifying the DRSP derogation criteria. ESMA will determine in the course of 2021 for existing DRSPs, and going forward for any future DRSP applicant, whether the criteria for a derogation are met.

1 Background

1. On 20 September 2017, the Commission adopted a package of legislative proposals to strengthen the European System of Financial Supervision ('ESFS'). The proposals aim to improve the mandates, governance and funding of the 3 European Supervisory Authorities ('ESAs') and the functioning of the European Systemic Risk Board ('ESRB') to ensure stronger and more integrated financial supervision across the EU.

2. On 21 March 2019, the European Parliament and Member States agreed on the core elements of reforming the European supervision in the areas of EU financial markets. On 18 April 2019, the European Parliament endorsed the legislation setting the building blocks of a Capital Markets Union, including the review of the ESFS. On 18 December 2019, the European Parliament and the Council adopted Regulation (EU) 2019/2175[1], which reviews the powers, governance and funding of the ESAs thus amending Regulation (EU) No 600/2014[2] (MiFIR) and Regulation (EU) No 1095/2010[3] (ESMAR). This set of amendments are referred hereinafter as ESA Review.

3. While the legislative process for the adoption of the proposed regulation amending ESMAR was finalised, ESMA has initiated its preparatory work for the implementation of the new empowerments, inter alia, with regards to Data Reporting Services Providers (DRSPs). Authorised Reporting Mechanisms (ARMs), Approved Publications Arrangements (APAs) and Consolidated Tape Providers (CTPs) are the three types of DRSPs.

4. As indicated in Recital (46) of Regulation (EU) 2019/2175 "The quality of trading data and of the processing and provision of those data, including processing and provision of cross-border data, is of paramount importance to achieve the main objective of Regulation (EU) No 600/2014 of the European Parliament and of the Council, namely, strengthening the transparency of financial markets. The provision of core data services is therefore pivotal for users to be able to obtain the desired overview of trading activity across Union financial markets and for competent authorities to receive accurate and comprehensive information on relevant transactions."

5. Furthermore, Recital (47) of Regulation (EU) 2019/2175 states that "In addition, trading data is an increasingly essential tool for effective enforcement of requirements stemming from Regulation (EU) No 600/2014. Given the cross-border dimension of data handling, data quality and the necessity to achieve economies of scale, and to avoid the adverse impact of potential divergences on both data quality and the tasks of data

1 Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (Text with EEA relevance) (OJ L 334, 27.12.2019, p. 1)

2 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84)

3 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84)

reporting services providers, it is beneficial and justified to transfer authorisation and supervisory powers in relation to data reporting services providers from competent authorities to ESMA, except for those benefiting from a derogation, and to specify those powers in Regulation (EU) No 600/2014 enabling, at the same time, the consolidation of the benefits arising from pooling data-related competences within ESMA."

6. Against this background, the ESA Review establishes within the EU exclusive supervisory competences for ESMA for DRSPs, except those DRSPs (namely, APAs and ARMs) that, by way of derogation from this Regulation on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State.

7. In this regard, Article 2(3) of MiFIR as amended by ESA Review provides that:

> *3. The Commission shall be empowered to adopt a delegated act, specifying criteria to identify those ARMs and APAs that, by derogation from Regulation (EU) No 600/2014 on account of their limited relevance for the internal market, are subject to authorisation and supervision by a national competent authority. When adopting the delegated act, the Commission shall take into account one or more of the following elements:*
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> - The extent to which the services are provided to investment firms authorised in one Member State only
> - The number of trade reports or transactions
> - Whether the ARM or APA is part of a group of financial market participants operating cross-border

2 The European Commission request for technical advice

8. On 18 June 2020, ESMA received a request from the European Commission (EC) to provide technical advice to assist the latter on the possible content of the delegated act referred to in Article 2(3) of MiFIR. The request is enclosed in Annex II to this paper.

9. In its request the EC invited ESMA to provide technical advice to assist in formulating a delegated act on the criteria to identify those ARMs and APAs that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State. More specifically, ESMA was invited to:

> - advise on a method to determine if the APA or ARM services are provided to investment firms authorised in one Member State only;
> - advise on the calculation method with regard to the number of trade reports or transactions;

- advise on the method to determine whether the ARM or APA is part of a group of financial market participants operating cross-border;
- come forward with other qualitative and quantitative elements to determine if APAs or ARMs should have a derogation on account of their limited relevance for the internal market;
- come forward with criteria that determine upfront which data reporting services providers are derogated from ESMA supervision;
- clarify whether the elements to determine if an ARM or APA should have a derogation are cumulative or not.

10. When developing the criteria ESMA aimed to ensure their simplicity and unambiguity in order to provide for their direct and immediate application.

11. On 20 November 2020 ESMA presented its first reflections on the criteria in a consultation paper and invited stakeholders to provide comments by 4 January 2021. ESMA received responses from seven stakeholders, mainly DRSPs. The final report presents ESMA's initial approach, the feedback received to the consultation by stakeholders as well as ESMAs final technical advice on the criteria to determine whether an ARM or APA should be subject to authorisation and supervision by a national competent authority based on its limited relevance for the internal market.

3 The method to determine if the APA or ARM services are provided to investment firms authorised in one Member State only

ESMA's proposal in the CP

12. The first criterion to identify ARMs and APAs that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State relates to the jurisdictional perimeter within which the relevant services are provided. In particular, this criterion is focused on whether or not the APA or ARM services are provided to investment firms authorised in one Member State only. Indeed, in light of the overarching derogation principle based on the limited relevance of a given data reporting service provider for the internal market, it is necessary to establish (at any given point in time) whether the APA or ARM services are provided within just one jurisdiction.

13. In case these services are provided to investment firms authorised in more than one jurisdiction, they (the services) inherently obtain a cross-border dimension of data handling. This cross-border dimension of data handling, data quality, the necessity to achieve economies of scale, and to avoid the adverse impact of potential divergences on both data quality and the tasks of data reporting services providers is among the

reasons underlying the transfer of supervisory powers from the national competent authorities to ESMA[4].

14. Furthermore, in case of ARMs, provision of services to investment firms authorised in more than one Member State *de facto* implies that an ARM is required to establish multiple connections to various national competent authorities (NCAs) authorising investment firms in respective Member States. This obligation stems from the fact that under Article 26(1) of MiFIR an investment firm is obliged to report executed transactions to the competent authority that authorised it.

15. The provisions under Article 27c(1) and c(4) of MiFIR on "Authorisation of data reporting service providers" stipulate that DRSPs shall be authorised by ESMA or a national competent authority where relevant, that the authorisation shall be effective and valid for the entire territory of the Union and shall allow the DRSP to provide the services for which it has been authorised, throughout the Union.

16. The permission granted upon authorisation under Article 27c(4) to a given DRSP to provide the service throughout the Union implies that i) such services may be provided in multiple jurisdictions, ii) provisions of the services in a given jurisdictions may commence/cease at any given point in time.

17. Currently applicable Commission Delegated Regulation (EU) 2017/571 [5] on the authorisation, organisational requirements and the publication of transactions for data reporting services providers does not contain a specific requirement for an applicant seeking an authorisation to provide an indication of jurisdictions (other than those in which it is seeking an authorisation) in which it subsequently intends to provide respective services.

18. Furthermore, Article 59(3) of Directive 2014/65/EU[6] (MiFID II) mandates ESMA to publish and keep up to date a list[7] of all DRSPs in the Union on its website. This list contains information on the services for which the DRSP is authorised. However, it does not include information regarding individual jurisdictions in which these services are provided.

19. One further element to consider for APAs is that only one investment firm party to a transaction is required to make transactions post-trade transparent via an APA. In particular, according to Article 12(4) to (6) of Commission Delegated Regulation (EU)

[4] Recital (47) of ESAs' review Regulation
[5] Commission Delegated Regulation (EU) 2017/571 of 2 June 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the authorisation, organisational requirements and the publication of transactions for data reporting services providers (OJ L 87, 31.3.2017, p. 126)
[6] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349)
[7] https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_upreg#

2017/587[8] and Article 7(5) to (7) of Commission Delegated Regulation (EU) 2017/583[9], where two investment firms conclude an OTC-transaction the seller is required to publish the transaction. Hence, considering only the investment firm reporting to the APA when assessing the cross-border dimension of the activity of an APA does not take into account that the other investment firm that is party to a transaction (i.e. the buyer) may be from another jurisdiction, thereby implicitly resulting in the provision of cross-border services.

20. In light of the applicable legal provisions that do not contain an obligation for DRSPs (namely, APAs and ARMs) to inform the authorising authority about the intended geography of provided services, such information remains predominantly available at the level of the respective data reporting service providers. Therefore, the method to determine if the APA or ARM service are provided to investment firms authorised in one Member State only should rely on the information to be provided by i) the applicant seeking an authorisation and ii) each of the already authorised data reporting service providers. In particular, the information should specify in which jurisdictions respective services will be/are being provided (i.e. in which jurisdiction investment firms – to which services are provided – are authorised).

21. In addition, the requirement to submit the information specified in the above paragraph should be supplemented with an ongoing requirement to keep the originally provided information up-to-date and notify the authorising authority about any changes to it without undue delay. The notified changes should form the basis for a periodic (e.g. annual) reassessment of the ongoing adherence to this specific criterion. When considering the frequency of periodic reassessment, a fair balance needs to be achieved between its administrative burden and timely identification in the change of relevance of a given APA of ARM for the internal market.

22. The new applicants seeking an authorisation should be required to provide such information during the application process. In case of already authorised DRSPs respective information should be provided further to a one-off ad-hoc request. To ensure consistency of information provided by each APA and ARM, a common standard template for self-declaration should be prescribed. It should include the identification (i.e. ISO 17442 Legal Entity Identifier) of the notifying data reporting service provider and the list of jurisdictions (i.e. ISO 3166 country code) where investment firms to which specific data reporting services are provided are authorised.

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[8] Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser (OJ L 87, 31.3.2017, p. 387)

9 Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (OJ L 87, 31.3.2017, p. 229)

Feedback received by stakeholders

23. The majority of stakeholders responding to the consultation agreed with the proposed method to determine if an APA or ARM provides services to investment firms in one Member State only. While there was overall support for the method proposed in the CP, some respondents encouraged ESMA to consider that an ARM or APA providing services to investment firms in one Member State only could, dependent of the size and activity of the firms still be of importance in the EU internal Market for a particular asset class or for all financial instruments. One respondent suggested to consider for ARMs whether investment firms act on behalf of clients as a submitting firm in more than one Member State, which would result in the cross-border provision of services.

24. All respondents to the consultation were supportive of the proposed annual reassessment of the criterion. In order to ensure quick access to the relevant data one respondent suggested adding the requirement to provide information on the investment firms to which DRSP services are provided to the existing reporting obligations specified in Commission Delegate Regulation (EU) 2017/571 on the authorisation, organisational requirements and the publication of transactions for DRSPs (RTS 13) and Commission Implementing Regulation (EU) 2017/1110 on standard forms, templates and procedures for the authorisation of data reporting services providers and related notifications pursuant to Directive 2014/65/EU (ITS 3).

25. Most respondents to the CP were supportive of setting a minimum threshold for this criterion. Various proposals were made for setting such a threshold ranging from a relative approach (e.g. more than 50% of investment firms are authorised in another Member State than the DRSP), an absolute approach (e.g. more than 3 investment firms to which the DRSP provides services are authorised in another Member State than the DRSP) to a combination of a relative and absolute approach (e.g. at least 10 investment firms to which the DRSP provides services are authorised in another Member State than the DRSP; and 2) at least 25% of the DRSP's clients are investment firms authorised in another Member State).

26. Respondents disagreeing with setting a minimum threshold stressed that DRSPs providing services to investment firms only in one Member State could nevertheless be of importance for the internal market.

27. Concerning alternative methods for determining the first criterion given that most respondents agreed with the proposed method only few proposals were made. One respondent suggested that ESMA supervision should include APAs and ARMs providing services to investment firms, authorized in only one Member State, where the reporting is of importance for a specific asset class.

28. Most respondents agreed that the information should be provided by ARMs and APAs. Respondents disagreeing suggested that national competent authorities (NCAs) should provide the information.

ESMA assessment and recommendations

29. Given the broad support from stakeholders ESMA maintains its recommendation for the method for assessing the first criterion and to reassess the criterion on an annual basis. Therefore, the method to determine if the APA or ARM service is provided to investment firms authorised in one Member State only should rely on the information to be provided by i) the applicant seeking an authorisation and ii) each of the already authorised DRSPs. In particular, the information should specify in which jurisdictions respective services will be/are being provided (i.e. in which jurisdiction investment firms – to which services are provided – are authorised).

30. The assessment should be based on the average number of investment firms to which an APA or ARM provides services, including both investment firms within the same Member State as well as from other Member States, for a reference period of one calendar year, i.e. 1 January to 31 December of the preceding calendar year. For the first assessment of already authorised APAs and ARMs, the assessment should be based on the average number of investment firms to which services are provided for a reference period of 1 January 2021 to 30 June 2021. For applicants seeking an authorisation as an APA or ARM the first assessment should be carried out based on estimates included in the business plan of the applicant

31. As suggested in the CP, ESMA will gather the necessary data for the first assessment in 2021 from NCAs, whereas data for the subsequent assessments will be directly gathered from APAs and ARMs.

32. ESMA agrees with respondents to the CP that a threshold should be introduced for assessing the first criterion. Only where such threshold would not be exceeded, could the APA or ARM meet this derogation criterion. ESMA considers such an approach as proportionate because it would allow for the possibility of still meeting the derogation criterion in cases where an APA or ARM provides limited services to investment firms in another Member State compared to the overall size of the services provided by an APA or ARM.

33. ESMA notes that respondents suggested either an absolute or relative threshold or a combination thereof. ESMA is not in favour of a purely relative approach since it doesn't sufficiently take the size of the APA or ARM into account, in particular for large entities. At the same time relying only on an absolute threshold risks disproportionally affecting small APAs or ARMs. Therefore, ESMA recommends a combination of an absolute and relative threshold.

34. Given the very heterogeneous proposals made by stakeholders for setting a relative threshold, and considering that only few stakeholders provided feedback to the consultation, ESMA carried out its own data analysis, based on data provided by NCAs, for determining the minimum absolute threshold for meeting the criterion.

35. The data analysis was carried out based on a questionnaire distributed to NCAs in early February 2021 covering the reporting period of January 2021, i.e. excluding UK data. ESMA appreciates that this period is short, however ESMA considers that it is more appropriate to calibrate the assessment criteria in a short reference period than including UK data in the analysis, which may distort the picture and result in a flawed calibration.

36. This analysis revealed that there are a couple of ARMs and APAs providing services only to investment firms from the same Member State (MS) as the MS of establishment of the ARM or APA and, typically, these ARMs and APAs report very low volumes of data (less than 0.05% in most cases). There are also a few ARMs and APAs providing services to investment firms from 1 or 2 other MS but the number of these firms is low and the reported data volumes remain very low. E.g. one APA provides services to firms in 3 MS but 71% of these firms are authorised in the same MS as the APA and remaining 29% firms are authorised in two other MS and the volume of data reported by this APA, in relation to the total volume of data reported by all APAs, is below 0.01%. Another example is an ARM which provides services to firms from two MS and for which 96% of investment firms are from the same MS as the ARM, the remaining 4% are from another MS and this ARM reports 0.09% of transactions.

37. As regards ARMs and APAs providing services to investment firms in 4 or more MS, they typically represent higher volumes of data and the concentration of clients in the same MS where the ARM or APA is established is in general lower, e.g. one ARM provides services to firms authorised in 4 different MS and only 45% of these firms are authorised in the same MS as the ARM, while the number of transactions reported by this ARM is 1.3% of the total number of transactions reported by all ARMs.

38. Based on this analysis, ESMA suggests the following thresholds for assessing this criterion. An APA or ARM meets the criterion on whether services are provided to investment firms in one MS where it provides services to investment firms authorised in less than 4 MS) including the MS where the ARM or APA is authorised. Furthermore, the investment firms from the MS where the ARM/APA is authorised should represent at least 70% of the investment firms served by the ARM/APA (relative threshold).

39. Where the relative threshold is not reached, for the criterion to be met, the ARM/APA must provide services to less than three investment firms from another MS than the MS where the ARM/APA is authorised (absolute threshold).

40. ESMA considers that this approach strikes the right balance between capturing the cross-border activity of an APA or ARM, while avoiding that already very minor cross-border activity results in the APA or ARM not meeting the criterion and not being eligible for the derogation.

4 The calculation method with regard to the number of trade reports or transactions

ESMA's proposal in the CP

41. The second criterion to identify APAs and ARMs that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State relates to the number of trade reports made public by an APA or transaction reports made to competent authority on behalf of an investment firm by an ARM.

42. Trade report disclosure obligations are specified in Article 20(1) of MiFIR that requires investment firms which, either on own account or on behalf of clients, conclude transactions in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a TV, to make public the volume and price of those transactions and the time at which they were concluded. Similarly, Article 21(1) of MiFIR requires investment firms which, either on own account or on behalf of clients, conclude transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue, to make public the volume and price of those transactions and the time at which they were concluded. In both instances the relevant information is required to be made public through an APA.

43. Consequently, by estimating the number of trade reports made public by a given APA and assessing it against the overall number of trade reports made public by APAs across the Union, the relative significance of the APA for the internal market would be determined. Importantly, such estimations and assessments should be done both – in relative and absolute terms, to ensure fair representation for the purpose of determination of a given APA's significance. Furthermore, in addition to the number of trade reports, consideration should also be given to the overall volumes of trading activity in trade reports made public by each APA. Incorporation of this additional parameter into the calculation methodology will provide for assessing given APA's relevance for internal market also in the context of the significance (and thus impact on price/supply/demand formation) of individual trades published through it.

44. Additional consideration should be given to the fact that certain APAs specialise in specific assets classes only. In such instances, looking at the overall number of trade reports and overall volumes of trading activity made public in these reports will not provide for a fair representation of the specialised APAs relevance for the internal market within the asset class in which it specialises. Therefore, estimations referred to in this and the previous paragraphs should be assessed per type of financial instruments in accordance with the current practice of data publication by APAs, namely, equity and non-equity financial instruments.

45. Calculations for APAs may be performed centrally by ESMA on the basis of daily equity and non-equity transparency quantitative data submitted to Financial Instruments Reference Data System (FIRDS) Transparency system[10] (FITRS). Initial calculation would need to be supplemented with a periodic (e.g. annual) reassessment in order to confirm its ongoing relevance. When considering the frequency of periodic reassessment, a fair balance needs to be achieved between its administrative burden and timely identification in the change of relevance of a given APA for the internal market. Proposal for an annual reassessment strives to achieve such balance.

46. Transaction reporting obligations are specified in Article 26(1) of MiFIR that requires investment firms which execute transactions in financial instruments to report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. Article 26(7)

[10] https://www.esma.europa.eu/sites/default/files/library/esma65-11-1183_firds_transparency_reporting_instructions_v2.0.pdf

envisages that a report shall be made to the competent authority either by the investment firms itself, an ARM acting on its behalf or by the trading venue through whose system the transaction was completed.

47. Similarly to APAs, by estimating the number of transaction reports made by a given ARM to all competent authorities and assessing it against the overall number of transaction reports made by ARMs across the Union, the relative significance of the ARM for the internal market would be determined. Furthermore, in addition to the number of transaction reports, consideration should also be given to the overall volumes of trading activity in transaction reports made to NCAs by each ARM. Incorporation of this additional parameter into the calculation methodology will provide for assessing a given ARM's relevance for the internal market also in the context of the significance (and thus impact on price/supply/demand formation) of individual transaction reported through it. At the same time, differentiation of the numbers and volumes of transaction reports per type of financial instruments is not relevant for ARMs, given such profiling of their services is not typical for ARMs.

48. Until January 2022, the respective information required for such assessment is only available to the national competent authorities under article 26(1) of MiFIR. Thus, an initial estimation would need to be carried out through a survey of the NCAs in 2021. The initial calculation would need to be supplement with a periodic (e.g. annual) reassessment in order to confirm its ongoing relevance. However, starting from 2022, such periodic reassessment could be carried out centrally by ESMA following the implementation of the third paragraph of Article 26(1) of MiFIR, as stems from the ESA Review, that obliges the national competent authorities to make available to ESMA any information reported in accordance with this Article without undue delay.

49. The calculation method outlined above (for APAs and ARMs) should be applied at a unique transaction level identified through the respective applicable identifiers to eliminate superfluous distortion of actual number of trade reports and transactions which would occur if cancellation/modification reports were to be taken into account.

50. As such, an APA or an ARM will be considered to fulfil this criterion and qualify for the derogation if it makes public or reports to NCAs not more than a certain percentage (i.e. threshold) of overall data otherwise made public by APAs or reported by ARMs to NCAs across the Union. Justification and substantiation of a specific proposal for the relevant thresholds, would need to be based on data analysis reflecting current overall volumes and each individual APAs and ARMs contribution to them. However, data available at present includes, among others, contributions from the UK entities. Therefore, accurate estimations could be performed only starting from January 2021, once contributions by UK entities are eliminated and respective volumes readjust accordingly. Nevertheless, respondents to this consultation paper are welcome to indicate if they have a view on the appropriate level of such thresholds.

<u>Feedback received by stakeholders</u>

51. The majority of respondents agreed with the proposed calculation method and the periodic reassessment on an annual basis. Some respondents suggested complementing the method for determining the second criterion by i) considering for APAs also pre-trade data published since this is part of a service provided by many APAs and/or ii) including the number of amendments and cancellation in transaction report or transactions published. One respondent advised against using this criterion and another suggested to consider the income generated by the APA or ARM.

52. A slight majority of respondents was against considering not only the number of transactions and trade reports but also the overall volumes made public or reported. In general, stakeholders considered that the number of transactions reported/made public would be a more meaningful measure to determine whether the activity of an APA or ARM is of Union-wide relevance. In particular, respondents stressed that APAs and ARMs determine their fees based on the number of transaction published/reported and not based on the trading volumes. Moreover, one respondent raised concerns that looking at volumes might work against some specialised ARMs or APAs reporting/publishing only a sub-set of instruments (e.g. high trading volumes and few transactions for non-equity instruments as compared to many small transactions in the equity space due to high frequency trading).

53. Concerning the threshold to be used, respondents suggested both relative and absolute thresholds. For the relative thresholds, proposals ranged from 5 to 15% of transactions reported/made public by an ARM or APA compared to all transactions reported/made public by ARMs/APAs in the EU in order to meet this criterion. Respondents did not specify whether this would apply to only the number of trades or also the trading volume. For an absolute threshold, proposals ranged from 500 trades per year and an annual turnover of 1 Mio. EUR to 1,000,000 trades. Respondents did not distinguish between equity and non-equity instruments for both the relative and absolute threshold.

54. All respondents agreed to use FITRS data for carrying out the calculations for APAs and transaction reporting data under Article 26(1) of MiFIR for ARMs. For the latter, respondents suggested that the denominator should include all transaction reports submitted, i.e. including transaction report submitted directly by investment firms.

<u>ESMA assessment and recommendations</u>

55. In view of the support provided by stakeholders on the method for determining the number of transaction reports and trade reports published and the annual reassessment, ESMA maintains it approach. Hence, for APAs, the calculations should be performed centrally by ESMA on the basis of daily equity and non-equity transparency quantitative data submitted to FIRDS and FITRS by comparing the number of transactions submitted by a given APA to FITRS to the overall number of transactions submitted to FITRS by APAs. For ARMs, the criterion should be assessed by comparing the number of transaction reports made by a given ARM to all competent authorities against the overall number of transaction reports made by ARMs across the Union. Since as of 2022 ESMA will also have access to transaction reporting data only the first annual calculation in 2021 would be carried out on basis of data provided by

NCAs whereas the subsequent assessments would be carried out based on transaction data available to ESMA.

56. As regards the proposal to include pre-trade data, ESMA agrees that some APAs offer the additional service to publish such data. However, the authorisation of APAs, and hence also the scope of supervision, only covers the publication of post-trade data. ESMA therefore does not consider it appropriate to include pre-trade data for assessing this criterion. Moreover, ESMA is not supportive of also including cancelled or amended transactions both for APAs and ARMs since this would, as highlighted in the CP, inflate or distort the number of transactions to be assessed.

57. Concerning ESMA's suggestion to extend this criterion by assessing also the volume of transactions, and while noting the reluctance of some stakeholders to such approach, ESMA recommends maintaining this approach since it allows assessing the importance of an ARM or APA for the internal market from another perspective. Including the volume appears particularly relevant for APAs given that these often specialise in only a subset of asset classes and that there is not always a clear link between the number and volume of transactions. For instance, as highlighted by one stakeholder, transactions in non-equity markets tend to be of high volume with only a small number of transactions. Therefore, both the volume and the number of transactions published should be assessed.

58. Furthermore, ESMA maintains the proposal to assess this criterion per type of instruments, i.e. equity and non-equity instruments, to appropriately reflect the specialisation of some APAs in only certain asset classes. The volume of transactions for non-equity instruments should be determined based on the volume metrics specified in table 4 of Annex of Commission Delegated Regulation (EU) 2017/583 (RTS 2)[11]

59. Concerning the appropriate reference period to be used, ESMA suggests covering one calendar year. For the first assessment ESMA recommends basing it on the first 6 months of 2021, i.e. 1 January to 30 June, since 2020 data still includes data from the UK. Given that such data is not available for applicants for an authorisation as APA or ARM, ESMA recommends that the first assessment for applicants should be based on estimates from the applicant's business plan.

60. Whenever the threshold for either the number or the volume of transactions is reached, the second criterion should be considered to be not met and in consequence the APA or ARM would not be eligible for the derogation based on this criterion.

61. ESMA recommends going for a relative approach and not an absolute approach for setting the minimum thresholds since the thresholds for an absolute approach would have to be regularly adjusted to account for inflation (for the assessment of the volume of transactions). Therefore, a relative approach provides for more stability. Concerning the level of such a threshold, respondents to the CP did not provide clear feedback and

[11] Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives, OJ L 87, 31 March 2017, p.229.

made very diverging proposals. Therefore, as for the first criterion, ESMA carried out a data analysis covering the reference period of January 2021 to properly calibrate the minimum relative threshold for both the number and volume of transactions.

62. This analysis has revealed that the ARMs and APAs which offer services to investment firms solely in the MS where they are established, typically submit a very low volume of data, in most cases less than 0.05% of the overall volume. In case of ARMs and APAs providing services to investment firms from multiple MS, the volume of data is usually at least tenfold higher, e.g. one APA which provides services to firms in 17 MS reports 0.24% of number of trades, an ARM which provides services to firms in 8 MS reports 0.5% of transactions, another ARM which provides services to firms in 17 MS reports 0.9% of transactions.

63. Therefore, ESMA recommends setting the threshold at 0.5% of the number or volume of transactions published by an APA or reported by an ARM as, according to collected data, ARMs and APAs exceeding this threshold demonstrate also cross-border activity. The numerator for this assessment would be the number and volume of transactions published (APA) or reported (ARM). The denominator would be the total number and volume of transactions published by APAs (APAs) or reported by ARMs (ARMs).

64. Where an APA, for either equity or non-equity instruments, or ARM, for transactions reported across all financial instrument, would be above these thresholds, the criterion would be considered not met.

5 The method to determine whether the ARM or APA is part of a group of financial market participants operating cross-border

ESMA proposal in the CP

65. The third criterion to identify APAs and ARMs that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State relates to a determination whether the ARM of APA is part of a group of financial market participants operating cross-border.

66. Given the objective of the criteria developed in the context of this advice, it is understood that in order to qualify for a derogation on the basis of limited relevance for the internal market under this specific criteria, an ARM or APA should not be part of a group of financial market participants operating cross-border. In other words, if a given ARM or APA is part of a group of financial market participants operating cross-border, its relevance for the internal market is more prominent than the relevance of those ARM or APA that are not part of such group. Therefore, it would not fulfil this specific criterion for derogation.

67. Article 4(1) of ESMAR states that " 'financial market participant' means any person in relation to whom a requirement in the legislation referred to in Article 1(2) [of ESMAR] or a national law implementing such legislation applies".

68. Article 4(1)(34) of MiFID II states that " 'group' means a group as defined in Article 2(11) of Directive 2013/34/EU[12]. Namely, according to the latter, " 'group' means a parent undertaking and all its subsidiary undertakings".

69. Furthermore, ARMs and APAs obligations pertaining to the organisations requirements under Articles 5 and 6 of Delegated Regulation (EU) 2017/571 should be considered. These requirements concern Conflicts of interest and Organisation requirements regarding outsourcing respectively and, among others, refer to the concept of 'close link'. The criterion to determine whether ARM or APA is part of a group of financial market participants operating cross-border seems to be particularly relevant for these two behavioural requirements based on the following provisions:

70. Article 5 of Delegated Regulation (EU) 2017/571 requires DRSP to have policies and procedures in place for identifying, managing and disclosing existing and potential conflicts of interest and, as specified in Article 5(1)(c) such procedure should contain '*a description of the fee policy for determining fees charged by the data reporting services provider and undertakings to which the data reporting services provider has close-links*';

71. Article 6 of Delegated Regulation (EU) 2017/571 requires DRSP to ensure that the third-party service provider to whom it outsources activities has the ability and the capacity, to perform the activities reliably and professionally. In particular, it makes a general reference to the third-party service provider and clarifies in paragraph 1 that this also includes "*undertakings with which it has close-links*".

72. The concept of 'close-links' referred to in both Articles mentioned above is defined in Article 4(35) of MiFID II:

> " 'close links' means a situation in which two or more natural or legal persons are linked by:
>
> (a) participation in the form of ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking;
>
> (b) 'control' which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 22(1) and (2) of Directive 2013/34/EU, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered to be a subsidiary of the parent undertaking which is at the head of those undertakings;
>
> (c) a permanent link of both or all of them to the same person by a control relationship ".

[12] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC

73. Taking account of the above provisions and requirements, determination of whether an ARM or APA is part of a group of financial market participants operating cross-border could be carried out based on:

74. The information to be required from each ARM or APA regarding the individual undertakings with which they have close-links and which are thus identified by the given ARM or APA in order to ensure compliance with requirements of Articles 5 and 6 of Delegated Regulation (EU) 2017/571;

75. The information about the assessment to be carried out by each ARM or APA on:

    a. whether undertakings identified according to the above paragraph fall within the definition a group as envisaged under Article 4(1)(34) of MiFID II,

    b. whether such undertakings fall within the definition of financial market participant under Article 4(1) of ESMAR, and

    c. whether such undertakings operate in jurisdictions other than the jurisdiction where a given ARM or APA is authorised or intends to apply for authorisation.

76. Provided information will subsequently be verified by ESMA in terms of its accuracy and completeness. Further to the verification, ESMA will determine whether the ARM or APA is not part of a group of financial market participants operating cross-border and, as such, it would meet this criterion for derogation. In other words, the APA or ARM would be considered part of a cross-border group only if the following conditions are met:

    a. if a given ARM or APA and specific undertakings, with which it has close links as defined in Article 4(35) of MiFID II, fall within the definitions of a group; and

    b. if these undertakings are financial market participants; and

    c. these undertakings operate in jurisdiction(s) other than the one where a given ARM or APA is authorised.

<u>Feedback received from stakeholders</u>

77. The majority of small DRSP entities as well as one representative of the bigger APAs/ARMs did not raise objections to the proposed method while a large APA/ARM, two regional trade associations as well as a small APA raised some concerns.

78. The regional associations as well as the small APA highlighted that APAs and ARMs are typically operated by trading venues and would therefore meet the *close link* criterion. Consequently, they argued that, as a minimum, the criterion should only apply if there is a cross-border element, i.e. the entity is accepting clients/IFs from other member states. In addition, the Austrian respondents argued that the criterion should only be considered as relevant if part of the activities related to the provision of the data reporting service are outsourced to another entity within the group.

79. Finally, the large APA/ARM argued that DRSPs that are part of groups are most likely to be the most sophisticated and better resourced to meet the EU requirements and for this reason do not need to be supervised by ESMA. Instead, they suggested to consider the number of incidents reported by DRSP as a proportion of their overall reporting

activity to assess which DRSP are not performing well and thus should be subject to ESMA supervision.

ESMA assessment and recommendations

80. Firstly, with respect to the concerns relating to the potential inclusion of ARMs/APAs that are part of local data centres providing a broader set of IT services to reporting entities. ESMA considers important to clarify that, in order to be eligible for this derogation criterion, all the conditions under paragraph 76 above should be fulfilled. This means that this criterion is only intended to apply to cases where the undertakings with which close links have been established (i) are 'financial market participants' (letter b above) and (ii) operate in jurisdiction(s) other than the one where a given ARM or APA is authorised (letter c above). This means that, in the cases where a given ARM/APA is part of a data centre not providing financial services and/or which is based in the same jurisdiction as the ARM/APA, this criterion for derogation should still be considered fulfilled. In addition, ESMA considers this latter aspect as sufficient in order to determine the cross-border element for the purpose of this criterion. There is no need to also assess whether the ARM/APA in question provides services to foreign clients as this aspect will be assessed under the separate criterion outlined in Section 3 above. As outlined in Section 8 below, such criterion would take precedence over the criterion described in this section.

81. Second, with respect to the expressed need to have part of the DRSP-related activities outsourced in another jurisdiction as an additional condition for the ARM/APA to be considered part of a group of financial market participants operating cross-border, ESMA notes that the *'close link'* concept is not only relevant to monitor compliance with the DRSP outsourcing requirements[13] but it is also relevant to monitor compliance with the conflict of interests requirements[14]. In particular, these requirements require DRSP to have policies and procedures in place for identifying, managing and disclosing existing and potential conflicts of interest and that such procedure should contain "*a description of the fee policy for determining fees charged by the data reporting services provider and undertakings to which the data reporting services provider has close-links*. ESMA considers that the monitoring of this provision at the national level would be more complex in the cases where such undertakings are not in the same jurisdiction of the DRSP.

82. Third, with respect to the arguments made by the large APA/ARM, while acknowledging that DRSPs that are part of groups are most likely to be the most sophisticated and better staffed ones, ESMA considers that the derogation was envisaged for the less sophisticated and smaller entities, so the argument raised confirms the correctness of ESMA assessment.

83. Lastly, ESMA considers that the concerns about this being a potential "catch all" criterion given that most of DRSP are typically operated by trading venues deserve attention.

[13] Detailed in Article 6 of the Delegated Regulation (EU) 2017/571
[14] Article 5 of Delegated Regulation (EU) 2017/571.

The approach outlined in Section 8 would address these concerns by clarifying how the different criteria should be assessed.

6 Other qualitative and quantitative elements to determine if APAs or ARMs should have a derogation on account of their limited relevance for the internal market

84. An additional criterion that should be considered when determining if ARMs should have a derogation on account of their limited relevance for the internal market could be derived from the second subparagraph of Article 26(1) of MiFIR that requires the competent authorities to *"establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives that information"* (i.e. transactions in financial instruments).

85. The primary purpose of transaction data exchange between NCAs under the above provision is to enable all relevant CAs to detect and investigate potential cases of market abuse as well as to monitor the fair and orderly functioning of markets.

86. Practical implementation of this requirement was carried out through the establishment of Transaction Reporting Exchange Mechanism (TREM). The process for its operation was set out in the Functional specification[15] commonly agreed by the NCAs. In addition to the exchange reason specified in the second subparagraph of Article 26(1) of MiFIR, the Functional specification envisage the following list of reasons based on which a CA that receives a transaction report systematically exchanges it with (an)other CA(s) through TREM:

    a. Another CA is the relevant competent authority (RCA) for the underlying in case of OTC derivative transaction or transaction executed on a non-EEA organised trading platform;

    b. Another CA is the relevant competent authority (RCA) for one of the basket constituents in case of instruments where a basket is the underlying;

    c. Another CA is relevant for the branch of the buyer;

    d. Another CA is relevant for the branch of the seller;

    e. Another CA is relevant for the branch whose market membership was used to execute the transaction;

    f. Another CA is relevant for the branch making the investment decision;

    g. Another CA is relevant for the branch executing the transaction;

    h. Another CA is the competent authority of the trading venue or Systematic Internaliser where the transaction took place;

[15] The document specifying the IT functions related to the transaction data reporting by the submitting entities to National Competent Authorities and the exchange interface for the transaction data exchange between NCAs.

i. Another CA has registered an interest in the index in case the underlying instrument is an index listed in reference data;

j. There is a request by one or more CAs for the information (so called standing request).

87. Taking into account the general requirement for NCAs to exchange transaction data and acknowledging the broad list of reasons why such exchange could be taking place, it is accurate to conclude that an ARM making a transaction report (on behalf of an investment firm) that subsequently is exchanged between two or more NCAs under one or several of the above reasons is providing a service with an important cross-border dimension. In other words, the transaction report it makes to one CA is shared and exchanged between several different NCAs and is taken into account for, among others, market abuse surveillance purposes across several jurisdictions.

88. Consequently, an additional element to determine if an ARM should have a derogation on account of their limited relevance for the internal market could relate to the fact of whether transactions made by it to a CA fall within the scope of the exchange between NCAs as envisaged in second subparagraph of Article 26(1) of MiFIR and TREM Functional specifications. In particular, if such transactions are not (or only to a limited extent, i.e. below a specific threshold) exchanged between NCAs, such ARM could be considered eligible for a derogation.

Feedback received from stakeholders

89. With the exception of two small DRSP entities, respondents did not support the inclusion of the additional criterion arguing that such inclusion would add unnecessary complexity to the assessment.

90. One small APA observed that this criterion would discriminate between jurisdictions where the traditional stock exchanges are more present as opposed to the jurisdictions where, for best execution purposes, securities orders are often routed to a trading venue in another Member State. The proposal has the unintended consequence of considering ARMs operating in the same Member State as the exchanges to be covered by the exemption - even if the number and volume of reported transactions were much higher - because there is no cross-border element in their reports.

ESMA assessment and recommendations

91. ESMA understands the concerns expressed by entities who considers themselves entitled to the derogation and has therefore reflected the concerns expressed in the process to perform the assessment of the different criteria (see Section 8). However, ESMA considers that this criterion is still particularly relevant for determining the cross-border nature of ARMs. In this respect, ESMA has observed that there is no necessary correlation between the size of an ARM in terms of number of transactions reported and the cross-border relevance of such transactions (i.e. how many of these transactions are routed to another NCA). For this reason, this derogation criterion should apply below a relatively higher threshold than the one set for number/volumes of transactions (Section 4). Accordingly, ESMA recommends that an ARM reporting transactions out of

which less than 30% are routed to one or more other NCAs can be derogated from ESMA supervision.

92. With respect to the concerns raised regarding the complexity of the assessment of this criterion, ESMA clarifies that this criterion can only be assessed by the NCAs on the basis of the figures relating to the TREM; thus, it will not be up to the DRSP applicants to provide the evidence to evaluate this criterion.

7 Criteria that determine upfront which data reporting services providers are derogated from ESMA supervision

ESMA's proposal in the CP

93. To ensure the fair and consistent treatment of existing DRSPs and possible future applicants, it is justifiable to apply the same set of criteria in either case.

94. The assessment of the criteria should be carried out sufficiently prior to the transfer of respective supervisory tasks and responsibilities from the relevant NCAs to ESMA taking into account:

    a. The need to ensure that the transitional measures contained in MiFIR, providing for NCAs to assist and advise ESMA to facilitate effective and efficient transfer and taking-up of supervisory and enforcement activity as well as, in particular, ensuring that relevant documentation is transferred to ESMA as soon as possible and in any event by 1 January 2022, are effectively implemented in the course of 2021;

    b. The need to provide clarity to the relevant individual market participants currently authorised as ARMs and APAs regarding the change of the authority in charge of their supervision and provide them sufficient time to get acquainted with ESMA's supervisory approach.

95. To ensure that the above process can take place prior to 1 January 2022, i.e. before the date on which all competences and duties related to the supervision and enforcement activity in the field of data reporting service providers are set to be transferred to and taken-up by ESMA, it is essential that the delegated acts are in place well ahead of that same date.

Feedback received by stakeholders

96. All respondents to the CP agreed with the proposal that the criteria to determine upfront which DRSPs should be derogated from ESMA supervision should be the same as those to be applied for future applicants.

ESMA assessment and recommendation

97. In view of the strong support from stakeholders, ESMA maintains its approach that the criteria to determine upfront which DRSPs should be derogated from ESMA supervision should be the same as those to be applied for future applicants. As explained in the

previous sections, for the assessment of criterion 1,2 and 4 the assessment for applicants should be based on estimates provided in the business plan.

8 Clarification whether the elements to determine if an ARM or APA should have a derogation are cumulative or not

ESMA's proposal in the CP

98. The Criteria outlined above are developed to identify those ARMs and APAs that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State. In other words, fulfilment of any of the criteria signifies the given ARM's or APA's limited relevance for internal market within the scope of that criteria only.

99. In practice this would mean that while fulfilling one of the criteria but not the other, a particular ARM or APA might be considered as having limited relevance for the internal market only in accordance with the criterion that it fulfils. However, by virtue of not fulfilling the other criteria, they would *de facto* be considered as having material relevance for the internal market within the scope of those criteria.

100. The elements to determine if an ARM or an APA should have a derogation should be applied cumulatively (i.e. in order to qualify for a derogation, each and every criterion needs to be fulfilled). Cumulative application will allow to ensure that every ARM or APA that has material relevance for the internal market under one or several of the criteria are subject to supervision at the EU, rather than national, level.

Feedback received by stakeholders

101. Concerning the cumulative application of the derogation criteria, views of respondents representing big and small APAs and ARMs were split. Big DRSPs were supportive of the cumulative application, whereas small DRSPs opposed it and considered that the derogation should be possible where at least one criterion is not met. Most respondents reiterated their responses provided to the previous questions in the CP. One respondent considered that a combination of criterion 1 and 2 could be considered for determining whether an APA or ARM should be eligible for the derogation, while stressing that ideally the determination should be made based on the revenues of APAs and ARMs.

ESMA assessment and recommendations

102. ESMA notes the strong opposition of stakeholders to the cumulative application of the derogation criteria. At the same time, ESMA observes that the responses to questions on the cumulative application are mainly driven by the interests of small DRSPs to be exempted from ESMA supervision.

103. ESMA agrees with the view made by stakeholders to the various assessment criteria that not all criteria have the same ranking and that some criteria appear more relevant for assessing whether the activity of an APA or ARM is of relevance for the

internal market. In particular, the first two criteria, number of investment firms in another Member State to which services are provided and the number and volume of transactions, appear to be of most relevant. Furthermore, the first criterion appears relevant for assessing whether an ARM is of relevance for the internal market, whereas the second criterion seems of particular importance for assessing the relevance of an APA for the internal market.

104. Therefore, ESMA suggests an adjusted approach based on a two-step assessment. As a first step, ESMA should only assess the first two criteria: number of investment firms in another Member State (Section 3) and number and volume of transactions (Section 4). Where an ARM or APA meets both of these derogation criteria, the assessment should continue to the second step. Whereas, if at least one of the criteria is not met, the assessment would stop, and the ARM or APA would not be eligible for a derogation.

105. As a second step, ESMA would assess whether APAs or ARMs meeting both criteria of the first step meet the remaining two criteria in Section 5 and 6. If at least one of the remaining criteria is met by an APA or ARM, the entity would be eligible for a derogation.

106. Notably, in the cases where the same entity operates both an APA and an ARM, the criteria will be assessed separately for the APA and ARM activities. If, following the assessment, one of the two is not eligible for derogation, the derogation would equally not apply to the ARM/APA operated by the same entity, in accordance with the third subparagraph of Article 2(3) of MiFIR.

107. ESMA believes that such assessment would address the concerns of small stakeholders that a cumulative approach would make too many small entities subject to ESMA supervision, while at the same time addressing the concerns of big entities that basing the assessment on only one criterion would not properly assess the relevance of an APA or ARM for the internal market.

9 Considerations on the periodicity of the assessment

9.1 Frequency of the assessment

108. As explained in the CP, ESMA has gathered the necessary data for the first assessment in 2021 from NCAs as the respective information required for such assessment is only available to the national competent authorities under article 26(1) of MiFIR. This initial assessment would need to be supplemented with a periodic (e.g. annual) reassessment in order to confirm the ongoing relevance of the APA/ARM for the internal market. Starting from 2022, such periodic reassessment could be carried out centrally by ESMA.

109. With respect to the assessment of the second and last criteria (i.e. number of transactions/volumes and routing via TREM), the data for the subsequent assessments will be provided by the NCAs on an ongoing basis. Indeed, following the implementation of the third paragraph of Article 26(1) of MiFIR, as stems from the ESA Review, the national competent authorities will need to make available to ESMA any information reported in accordance with this Article without undue delay.

110. With respect to the assessment of the first and third criteria (i.e. number of foreign clients and groups), the data for the subsequent assessments could be gathered directly from APAs and ARMs. ESMA takes note of the suggestion of some stakeholders to integrate information necessary for assessing this criterion (and the other criteria) through a notification requirement in RTS 13 or ITS 3. However, ESMA considers that the legal mandate for developing these technical standards is not sufficiently broad for including such notification requirements. Nevertheless, ESMA recommends that the Commission adds an annual notification requirement for APAs and ARMs covering the necessary information to assess the derogation criteria in its delegated act. ESMA intends to develop templates and reporting instructions for APAs and ARMs to notify the necessary data in a consistent manner; an explicit requirement in Level 1 will facilitate the enforcement of such obligation.

111. When considering the frequency of the periodic reassessment of the criteria, ESMA aimed at striking a fair balance between the administrative burden of a regular notification and timely identification in the change of relevance of a given APA for the internal market. The proposal for an annual reassessment strives to achieve such balance.

9.2 Frequency of the transfer of supervisory responsibilities

112. While the assessment of the criteria will be carried out on an annual basis, ESMA considers that this assessment should not automatically lead to an immediate change in supervision. If there is a significant increase/decrease in the adherence to criteria, the switch in supervision should occur as soon as feasible. Otherwise, the handover in the supervision responsibilities should occur within the two-years timeframe, i.e. after the increase/decrease is assessed a second time.

113. In case an ARM/APA that is supervised by an NCA stops meeting one of the first two derogation criteria or both of the remaining two criteria in two consecutive annual assessments, the supervisory responsibility should be transferred to ESMA after the second annual assessment during which the same derogation criteria/criterion were/was not met. However, if the increase is significant, for example, if there is a significant change in the volumes **or** number of clients and this ARM/APA stops meeting the derogation criteria by significantly exciding at least one of the respective thresholds, the supervisory responsibility should be transferred to ESMA immediately after the assessment in which the thresholds were exceeded significantly.

114. On the contrary, in case an ARM/APA supervised by ESMA meets the first two derogation criteria and at least one of the remaining two criteria in two consecutive annual assessments, the supervisory responsibility should be transferred to the respective NCA after the second annual assessment during which the derogation criteria were met. However, if the decrease is significant, for example, if there is a significant change in the volumes **and** number of clients and this ARM/APA meets the derogation criteria by significantly exciding both of the respective thresholds, the supervisory responsibility should be transferred to the respective NCA immediately after the assessment in which the thresholds were exceeded significantly.

115. For the change to be significant, when assessing the derogation criteria, the respective thresholds should be exceeded by more than 50%.

Annex I Commission mandate to provide technical advice

With this mandate, the Commission seeks ESMA's technical advice on delegated acts to supplement certain elements of the Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 (the "**Regulation**"). In particular we seek ESMA's advice on the Regulation's Article 4 amending Regulation (EU) No600/2014 on markets in financial instruments (the "**MiFIR**") and the Regulation's Article 5 amending Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the "**BMR**").

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 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**"),[1] 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**"),[2] and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").[3]

The formal mandate consists of two parts.

Part I (MiFIR)

The technical advice for the following delegated acts ('DA') should be received by the Commission:

1. DA specifying the criteria to identify those ARMs and APAs that, by way of derogation from this Regulation on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State (Article 2(3) of Regulation (EU) No 600/2014);
2. DA specifying the conditions in determining ESMA's suspension possibility for FIRDS and the circumstances under which the suspension ceases to apply (Article 27(4) of Regulation (EU) No 600/2014);
3. DA with regard to imposing fines or penalty payments to DRSPs, specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporallimitation periods for the imposition and enforcement of fines and periodic penalty payments (Article 38k(10) of (EU) No Regulation 600/2014);
4. DA with regard to the supervisory fees to be charged to DRSPs, specifying 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 (Article 38n(3) of Regulation (EU) No 600/2014).

The deadline set to ESMA to deliver the technical advice is 31 January 2021.

Part II (BMR)

The technical advice for the following delegated acts ('DA') should be received by the Commission:

5. DA with regard to imposing fines or penalty payments to benchmark administrators, specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments (Article 48i(10) of Regulation (EU) 2016/1011);
6. DA with regard to the supervisory fees to be charged to benchmark administrators, specifying 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 (Article 48l(3) of Regulation (EU) 2016/1011).

The deadline set to ESMA to deliver the technical advice is 31 January 2021.

***

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

CONTEXT

On 20 September 2017, the Commission adopted a package of proposals to strengthen the European System of Financial Supervision ('ESFS'). The proposals aim to improve the mandates, governance and funding of the 3 European Supervisory Authorities ('ESAs') and the functioning of the European Systemic risk Board ('ESRB') to ensure stronger and more integrated financial supervision across the EU. On 21 March 2019, the European Parliament and Member States agreed on the core elements of reforming the European supervision in the areas of EU financial markets. On 18 April 2019, the European Parliament endorsed the legislation setting the building blocks of a capital markets union, including the review of the ESFS. On 18 December 2019, the European Parliament and the Council signed Regulation (EU) 2019/2175, which reviews the powers, governance and funding of the ESAs.

With regard to the changes foreseen for MiFIR and BMR, the main objective is additional supervisory power for ESMA with regard to data reporting services providers and certain benchmark administrators.

Certain elements of the Regulation need to be further specified in delegated acts and shall be adopted by the Commission no later than 1 October 2021. Those elements refer to the possibility for ESMA to impose fines or penalty payments and to charge supervisory fees.
Other elements of the Regulation provide the Commission with the empowerment to adopt delegated acts. The Commission has decided to also ask for technical advice on the derogation for data reporting services providers and the suspension of the financial instrument reference data reporting obligation.

PRINCIPLES THAT ESMA SHOULD TAKE INTO ACCOUNT

In developing its technical advice, ESMA should take account of the following principles:

- **Lamfalussy:** The principles set out in the de Larosière Report and the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.

- **Internal Market:** The need to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to the financial markets, and a high level of investor protection.

- **Proportionality:** The technical advice should not go beyond what is necessary to achieve the objectives of the Regulation. It should be simple and avoid creating divergent practices by national competent authorities in the application of the Regulation.

- **Comprehensiveness:** ESMA should provide comprehensive advice on all subject matters covered by the mandate regarding the delegated powers included in the Regulation.

- **Coherence**: While preparing its advice, ESMA should ensure coherence within the wider regulatory framework of the Union.

- **Autonomy in working methods**: ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different strands of work being carried out by ESMA.

- **Consultation**: ESMA is invited to consult market participants (practitioners, consumers and end-users) 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.

- **Evidence and justification**:

    - ESMA should justify its advice by identifying, where relevant, a range of technical options and undertaking an evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its delegated acts. Where administrative burdens and compliance costs on the side of the industry could be significant, ESMA should where possible quantify these costs.

    - ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.
    - ESMA should provide comprehensive technical analysis on the subject matters described below, covered by the delegated powers included in the relevant provisions of the Regulation, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.

- **Clarity**: 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 used in the field of securities markets and company law at European level.

- **Advice, not legislation**: ESMA should provide the Commission with 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 used in the field of securities markets in the Union.

- **Responsive**: ESMA should address to the Commission any question it might have concerning the clarification on the text of the Regulation, which it should consider of relevance to the preparation of its technical advice.

The Commission requests the technical advice of ESMA for the purpose of the preparation of the delegated acts to be adopted pursuant to the legislative act.

This mandate is made in accordance with the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the ESMA Regulation, the 290 Communication and the Framework Agreement.

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

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, the Commission will continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the Regulation.

Moreover, in accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts 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 Commission has informed the European Parliament and the Council about this mandate. As soon as the Commission adopts delegated acts, it will simultaneously notify to the European Parliament and the Council.

ISSUES ON WHICH ESMA IS INVITED TO PROVIDE TECHNICAL ADVICE

Part I (MiFIR)

1) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act on the criteria to identify those ARMs and APAs that, by way of derogation from this Regulation on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State. More specifically, ESMA is invited to:

- advise on a method to determine if the APA or ARM services are provided to investment firms authorised in one Member State only;
- advise on the calculation method with regard to the number of trade reports or transactions;
- advise on the method to determine whether the ARM or APA is part of a group of financial market participants operating cross border;
- come forward with other qualitative and quantitative elements to determine if APAs or ARMs should have a derogation on account of their limited relevance for the internal market;
- come forward with criteria that determine upfront which data reporting services providers are derogated from ESMA supervision;
- clarify whether the elements to determine if an ARM or APA should have a derogation are cumulative or not.

2) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying the conditions under which ESMA can suspend the FIRDS reporting obligations for certain or all financial instruments. More specifically, ESMA is invite to advise on:

- the criteria to determine if the suspension is necessary in order to preserve the integrity and quality of the reference data subject to reporting obligation which may be put at risk, including:
  (i) serious incompleteness, inaccuracy or corruption of the submitted data, or
  (ii) unavailability in a timely manner, disruption or damage of the functioning of systems used for the submitting, collecting, processing or storing the respective reference data by ESMA, national competent authorities, market infrastructures, clearing and settlement systems, and important market participants;
- the criteria to determine that the existing Union regulatory requirements that are applicable do not address the threat;
- the criteria to determine that the suspension does not have any detrimental effect on the efficiency of financial markets or investors that is disproportionate to the benefits of the action;
- the criteria to determine that the suspension does not create any regulatory arbitrage;
- the criteria to determine that the measure ensures the accuracy and completeness of the reported data;
- the method to notify the relevant competent authorities of the proposed suspension;
- the circumstances under which the suspension ceases to apply.

3) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or penalty payments to DRSPs including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments. More specifically, ESMA is invited to advise on:

- the procedure regarding the persons' subject to the investigations rights to be heard by the investigation officer upon his or her completion of the investigation but before the

file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.

- the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding data reporting services providers.
- the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.
- the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information.
- the limitation periods for the imposition of fines and penalty payments.
- the limitation periods for the enforcement of fines and penalty payments.
- the calculation of periods, dates and time limits to be laid down in the delegated act.
- the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

4) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the supervisory fees to be charged to DRSPs including 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. More specifically:

- ESMA is invited to reflect on the type of fees that could be levied. Fees could be provided for specific supervisory actions 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 data reporting services providers should be distributed to the individual supervised data reporting services providers. ESMA is invited to advise on whether fees should be yearly adjustable or fixed.

- According to Article 38n(1) of the Regulation, the amount of fees charged to data reporting services providers shall fully cover all necessary expenditure incurred by ESMA for its supervision under the MiFIR. Accordingly, ESMA is invited to detail its assessment of the necessary expenditure it will incur for the registration and supervision of data reporting services providers, and provide information on its estimates and methods of calculation. ESMA should also advise on how the surpluses/deficits in ESMA's supervision budget for data reporting services providers should be managed.
- According to Article 38n(2) of the Regulation, the amount of fees charged to data reporting services providers shall be proportionate to the turnover of the data reporting services providers concerned. ESMA is invited to provide its technical advice on the appropriate method for considering the turnover of the data reporting services providers 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 data reporting services provider's activity.
- According to Article 38o(3) of the Regulation, the fees charged to data reporting services providers shall also fully cover the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to the Regulation in particular as a result of any delegation of tasks in accordance with Article 38o(1) of the Regulation. ESMA is invited to suggest a method for calculating 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 data reporting services providers for undertaking a supervisory action.
- ESMA should suggest the timing and appropriate modalities of the payment of the fees. ESMA is invited to advise on appropriate schedules for the collection of fees (one single payment vs several payments). It has to be ensured that ESMA has at its disposal the resources to finance its activities related to data reporting services providers. This could for instance be achieved by requiring the supervised data reporting services providers to pay the expected fees upfront, drawing up an account at the end of the year.

Part IIBMR

5) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or penalty payments to benchmark administrators, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments. More specifically, ESMA is invited to advise on:

   - the procedure regarding the persons' subject to the investigations rights to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation

officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.
- the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding benchmark administrators.
- the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.
- the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information.
- the limitation periods for the imposition of fines and penalty payments.
- the limitation periods for the enforcement of fines and penalty payments.
- the calculation of periods, dates and time limits to be laid down in the delegated act.
- the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

6) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the supervisory fees to be charged to benchmark administrators including 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, 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 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 supervision of benchmark administrators should be distributed to the individual supervised

benchmark administrators. ESMA is invited to advise on whether fees should be yearly adjustable or fixed.

- According to Article 48l(1) of the Regulation, the amount of fees charged to benchmark administrators shall fully cover all necessary expenditure incurred by ESMA for its supervision under the BMR. Accordingly, ESMA is invited to detail its assessment of the necessary expenditure it will incur for the registration and supervision of benchmark administrators, and provide information on its estimates and methods of calculation. ESMA should also advise on how the surpluses/deficits in ESMA's supervision budget for benchmark administrators should be managed.
- According to Article 48l(2) of the Regulation, the amount of fees charged to benchmark administrators shall be proportionate to the turnover of the benchmark administrator concerned. ESMA is invited to provide its technical advice on the appropriate method for considering the turnover of the benchmark administrators 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 benchmark administrator's activity.
- According to Article 48m(3) of the Regulation, the fees charged to benchmark administrators shall also fully cover the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to the Regulation in particular as a result of any delegation of tasks in accordance with Article 48m(1) of the Regulation. ESMA is invited to suggest a method for calculating 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 benchmark administrators for undertaking a supervisory action.
- ESMA should suggest the timing and appropriate modalities of the payment of the fees. ESMA is invited to advise on appropriate schedules for the collection of fees (one single payment vs several payments). It has to be ensured that ESMA has at its disposal the resources to finance its activities related to benchmark administrators. This could for instance be achieved by requiring the supervised benchmark administrators to pay the expected fees upfront, drawing up an account at the end of the year.

INDICATIVE TIMETABLE

This mandate takes into consideration the date of application of the Regulation, that ESMA needs enough time to prepare its technical advice, and that the Commission needs to adopt the delegated acts in accordance with Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 4(10) (amending Article 50 MiFIR) and Article 5(20) (amending Article 49 of BMR) of the Regulation.

The delegated acts provided for by the Regulation and addressed under this mandate should be adopted no later than **1 October 2021**. Therefore the deadline set to ESMA to deliver the technical advice is **31 January 2021**.

Deadline	Action
30 December 2019	Date of entry into force of the Regulation (third day following that of its publication in the Official Journal of the European Union)
31 January 2021	ESMA provides its technical advice.
Until October 2021	Preparation of the draft delegated acts by Commission services on the basis of the technical advice by ESMA. The Commission will consult with experts appointed by the Member States within the Expert Group of the European Securities Committee (EG ESC) and will publish for feedback on the Better Regulation portal.
1 October 2021	Translation and adoption procedure of draft delegated acts.
Until end December 2021	Objection period for the European Parliament and the Council (three months which can be extended by another three months) followed by the publication in the Official Journal of the European Union
1 January 2022	Date of application of Article 4 (MiFIR) and Article 5 (BMR) of the Regulation and delegated acts.