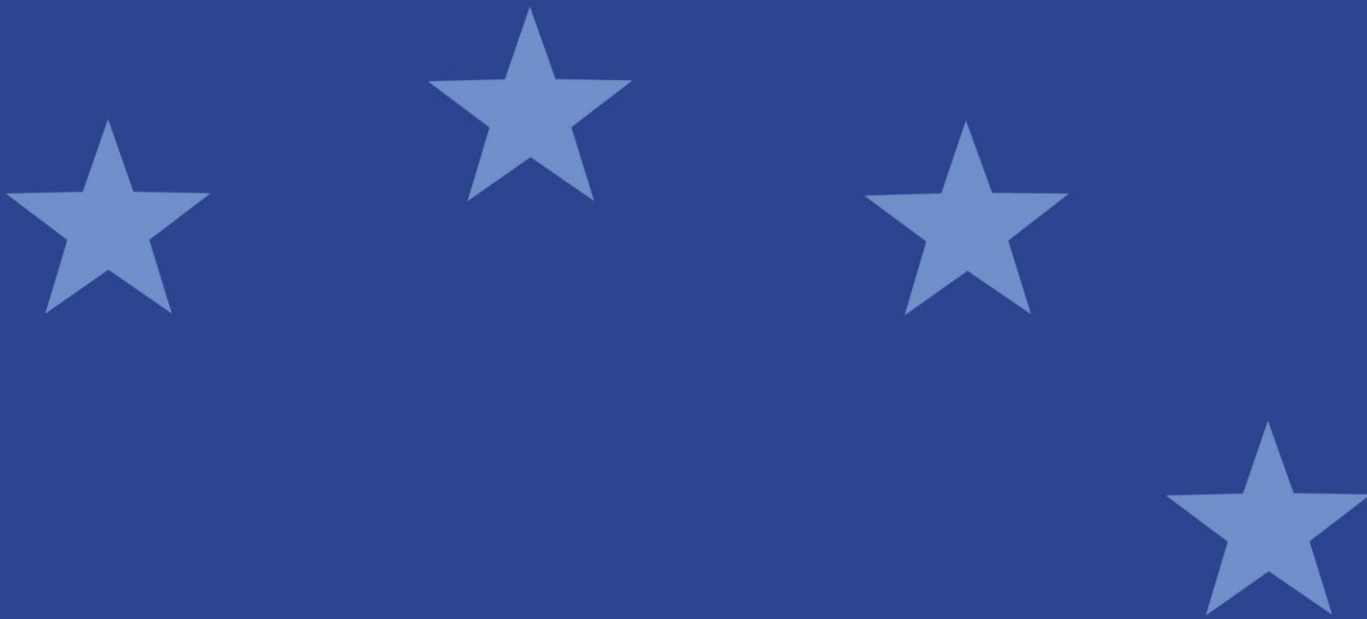




European Securities and
Markets Authority

Consultation Paper

ESMA fees for DRSP



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by **4 January 2021**

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

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

This consultation is looking for feedback from data reporting services providers, market participants and authorities.

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Executive Summary

Reasons for publication

This consultation paper is published to seek stakeholders' input on ESMA's proposals relating to fees for data reporting service providers (DRSPs) in relation to the new competences granted to ESMA under Regulation (EU) 600/2014 (MiFIR) as amended by Regulation 2019/2175 (ESA Review).

Contents

The consultation paper is comprised of twelve sections and two annexes. Section 1 includes the background of this consultation paper, as per the agreed text of MiFIR as amended by the ESA Review. Section 2 summarises ESMA's applicable budgeting and the management of the EC's advancement. Section 3 provides information on the main activities that ESMA will need to carry out and the relevant high-level costs for the supervision of DRSPs. Section 4 outlines the existing fees at national level. Section 5 specifies the general approach in setting the different types of fees. Section 6 outlines the types of application and authorisation fees in light of the possibility that a DRSP applicant might be authorised by an NCA. Section 7 details the calculation of the first-year supervisory fee. Section 8 sets out the framework for the calculation of annual fees and the determination of the applicable turnover. Section 9 includes the proposals with regards to the fees in 2022 when ESMA will take up the supervision of DRSPs. Section 10 clarifies the approach for attribution of costs related to the preparatory work. Section 11 specifies the applicable framework in the case of delegation of tasks to NCAs. Finally, Section 12 provides the conditions for payment and reimbursement of fees. Annex I comprises all the consultation questions, whereas, Annex II contains the provisional mandate received from the European Commission.

Next Steps

ESMA will consider the feedback it receives to this consultation and expects to publish a final report and submission of the advice to the European Commission in the first quarter of 2021.

1 Background

1. On 20 September 2017, the Commission adopted a package of proposals to strengthen the European System of Financial Supervision ('EFSF'). 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 signed Regulation (EU) 2019/2175, which reviews the powers, governance and funding of the ESAs thus amending Regulation (EU) No 600/2014 (MiFIR) and Regulation (EU) 1095/2010 (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) "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 (12), 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) 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 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 that backdrop, the ESA Review establishes within the EU exclusive supervisory competences for ESMA for DRSPs, except those DRSPs 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).
7. In this regard, paragraphs 1 and 2 of Article 38n MiFIR as amended by ESA Review provide that:

“1. ESMA shall charge fees to the data reporting services providers in accordance with this Regulation and in accordance with the delegated acts adopted pursuant to paragraph 3 of this Article. Those fees shall fully cover ESMA’s necessary expenditure relating to the authorisation and supervision of data reporting services providers and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to this Regulation, in particular as a result of any delegation of tasks in accordance with Article 38o.

2. The amount of an individual fee charged to a particular data reporting services provider shall cover all administrative costs incurred by ESMA for the authorisation and supervisory activities relating to that provider. It shall be proportionate to the turnover of the data reporting services provider.”

8. Furthermore, paragraph 3 of Article 38n MiFIR as amended by ESA Review provides that:

“3. The Commission shall adopt a delegated act in accordance with Article 50 supplementing this Regulation by 1 October 2021 to specify 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.”

9. Accordingly, on 18 June 2020, ESMA received a request from the EC to provide technical advice to assist the latter on the possible content of this delegated act. The request is enclosed in Annex II in this paper.
10. In light of the adopted framework for the supervision of DRSPs and to provide advice to the EC with regards to the fees related to the ESMA’s work for the authorisation and supervision of DRSPs, ESMA is specifying in this consultation and requesting feedback on the fees applicable to DRSPs. The fees on which ESMA is consulting relate only to the authorisation and supervision of DRSPs by ESMA. These fees have no effect on the fees

charged by NCAs which supervise DRSPs that are authorised and supervised pursuant to Article 2(3) MiFIR.

2 ESMA's budgeting model and management of EC advancement

11. In order to enable ESMA to conduct its tasks related to DRSPs effectively as well as to ensure an efficient use of ESMA's budget, it is necessary that DRSPs, private sector entities with a profitmaking objective, cover all costs of doing business, including the costs related to ESMA's authorisation and supervision of DRSPs.
12. ESMA applies a universal budgeting approach, which means that income from fees is treated as general revenue. This is in line with the standard practice of other partially funded EU agencies, as recommended by DG Budget of the EC.
13. ESMA's budget is managed on the basis of an activity-based management methodology. ESMA prepares its annual budget aiming at balancing income through fees with the incurred expenditure, understanding that deficits or surpluses are to be balanced by the rest of ESMA's income sources.
14. In case of deficits (ESMA collecting less than incurred), ESMA does not recover the deficit from the supervised entities. If the deficit is recurrent or significant, ESMA should analyse the reasons why it happened, drawing up lessons for the next budgeting period. For surpluses (ESMA collecting more than incurred) the same reasoning should be followed. Hence, no excess of fees is paid back to the supervised entities. This mechanism is already in place at ESMA for credit rating agencies, trade repositories and third country CCPs (ESMA fee regulations) and is expected to apply also for securitisation repositories.
15. Through the existing mechanisms in place (EU budgetary procedure, annual reporting, single programming document), the ESMA Management Board and Board of Supervisors, of which the EC is a permanent Member, remain fully in control of the fees' collection and expenditure levels.
16. On a yearly basis, the correct implementation of ESMA's budget, in particular of the fee-funded budget, versus the EU Financial Regulation is checked by the European Court of Auditors. The final audit report is communicated to the European Parliament and Council.
17. The total amount of the estimated costs is presented together with the annual work plan in September of the year N-1, and the approved budget is published on ESMA's website in January of the year N.

18. In addition, ESMA has been requested by the Internal Audit Service of the EC to further simplify and harmonise, to the extent feasible, its fee models. Therefore, in this consultation, ESMA is consulting on fee proposals that are in line with this general objective.
19. Furthermore, ESMA aims also at collecting fees in the first quarter of a calendar year so as to ensure the availability of resources for its activities. The determination of fees needs to be based on the latest available information. More detailed information on the payment and reimbursement conditions is specified in section 12.
20. Finally, to facilitate the set-up of ESMA's new tasks with regards to DRSPs, the EC has foreseen an advancement of ESMA's fee revenues for 2020 (€1,244,198) and 2021 maximum €3M in order to cover ESMA's overall cost for DRSP for these two years (preparatory work and IT projects). As a result, any amount advanced by the EC to cover ESMA's yearly costs in relation to DRSPs will need to be recovered in the years 2022, 2023 and 2024. These costs will be distributed across the years in which they need to be returned to the EC. This is a one-off situation and constitutes a deviation from the general framework under which ESMA's fees, revenues, and costs operate.

ESMA establishes a harmonised framework for dealing with surpluses and deficits and for treating the annual fees under DRSPs as general revenue as follows:

- a. In case of deficits (ESMA collects less than incurred), ESMA does not recover the deficit from supervised DRSPs.
- b. In case of surpluses (ESMA collects more than incurred), ESMA does not pay back the surplus to supervised DRSPs.
- c. Fees are to be paid by the end of first three months of the calendar year for which fees are due to ensure availability of resources for the performance of ESMA's tasks.

Fees charged for ESMA's activities related to supervised DRSPs should be set at a level such as to avoid a significant and recurrent accumulation of deficit or surplus.

By way of derogation to the previous paragraph, in relation to the period 2020-2021 for which an advancement from the European Commission will be given to ESMA, in 2022-2024 ESMA will collect from DRSPs the amount of the advancement on top of the annual supervisory fees and will give it back to the Commission. ESMA will allocate the relevant costs proportionately to all DRSPs whose supervision is transferred to ESMA.

3 ESMA's activities and costs

3.1 ESMA's supervisory activities

21. In terms of supervisory and administrative activities that ESMA will need to perform vis-à-vis DRSPs, the following ones are included in MiFIR as amended by the ESAs Review Regulation:
- a. Prior authorisation of the operation of an APA, a CTP or an ARM as a regular occupation or business in accordance with Article 27b or of the provision of services of an APA, a CTP or an ARM by an investment firm or a market operator operating a trading venue
 - b. Prior authorisation for the extension of data reporting services provided by an authorised data reporting services provider
 - c. Regular review of the compliance of an APA, a CTP or an ARM with Title IVa of MiFIR;
 - d. Assessment of a withdrawal of authorisation of a data reporting services provider.
22. Some of the ESMA activities will be one-off activities and will take place in the early years of the entry into force of ESAs Review until shortly after 1 January 2022. They would include the set-up of DRSP supervision and the transfer from NCAs to ESMA of all the relevant supervisory information. This will form part of the so-called preparatory work. In addition, it is not excluded that some new entities apply for authorisation with ESMA in order to be able to provide services for the Union.
23. Furthermore, ESMA will apply its risk-based approach in identifying the relevant areas of supervision of DRSPs. As a result, there might be some supervisory work, carried out jointly for all, when more efficient, and some other targeted to a given type of DRSP.
24. To sum up, ESMA's supervisory activities with regards to the DRSPs include, among others, the following:
- a. Assess the suitability of the members of the management body described in paragraph 27f(1) MiFIR, taking into account different roles and functions carried out by them and the need to avoid conflicts of interest between members of the management body and users of the APA, CTP or ARM;
 - b. Supervise the compliance by APAs with the organisational requirements under Article 27g of MiFIR;

- c. Supervise the compliance by CTPs with the organisational requirements under Article 27h of MiFIR;
 - d. Supervise the compliance by ARMs with the organisational requirements under Article 27i of MiFIR;
 - e. Exercise the powers under Articles 38a – 38d MiFIR; and
 - f. Impose supervisory measures under Article 38g MiFIR.
25. Last but not least, when ESMA carries out its tasks, support staff in the horizontal departments of ESMA, such as legal, resources management and governance is needed. While these areas are not directly involved in the supervision, they perform essential activities for the efficient and effective functioning of the organisation, an increase in their number is needed to better undertake the required new tasks. These resources are therefore taken into account when defining the annual budget.
26. The proposed amounts of fees in the subsequent sections therefore cover the cost estimates related to (i) average FTE cost including support staff (e.g. staff in support areas such as legal, resources, corporate affairs, data and risk), as well as (ii) impact of the associated costs for these staff relating to the extra office space, IT systems/applications, missions, training and others.
27. As an example, a fee of 100,000 EUR fee would comprise the overall cost of approx. 0,5 FTE (including the associated costs mentioned above). 0,5 FTE is equal to either two staff members working for one quarter or one staff member working for six months.

3.2 ESMA's expected total costs

28. In the Legislative Financial Statement accompanying the ESA Review Regulation, the EC has included an extensive assessment of the objectives, tasks and resources needed by ESMA for the supervision of DRSPs. Based on this assessment, the fees to be paid by DRSPs should cover the costs of up to 20 full-time equivalent staff members (FTEs), as well as the costs of an IT system to support the data collection and supervision of DRSPs. Under this assumption, the DRSPs maximum budget in the steady state is around €5.5M, including, among others, costs related to initial authorisation, as well as the on-going supervision of DRSPs.
29. ESMA calculates yearly the budget to cover all cost related to DRSPs' supervisory work on the basis of its Activity-Based Management model.
30. As explained in section 2, ESMA assesses on an annual basis its budget, which comprises not only the number of staff needed to perform a given task but also the related logistics,

IT, communications and general costs. This structure is developed consistently with the ESMA fee regulations for TRs¹ and CRAs², as well as securitisation repositories and third country CCPs.

4 NCAs' fees

31. To illustrate the current setting, ESMA has prepared the below table with the relevant NCAs fees for DRSPs.

32. It is worth noting that, as mentioned in section 2, ESMA's fees collected from the DRSPs should cover ESMA's costs of their authorisation and supervision. Cross-subsidisation with other ESMA's revenue sources (e.g. fees from other supervised entities or the EU budget contribution) is not allowed. This is not necessarily the case for the NCAs shown in the table, hence the comparison is only for illustrative purposes. Moreover, in 3 out of the 11 NCAs below, the annual supervisory fees are determined, similarly to the ESMA ones, i.e. on the basis of a budgetary plan.

Table 1. NCAs fees for DRSPs			
NCA	Authorisation	Supervision	Specific acts
FMA (AT)	EUR 8,000 for authorisation EUR 2,000 assessment of investment firm willing to operate DRSP	Minimum flat rate fee: EUR 500 for investment firm.	EUR 3,000 extension of authorisation
BaFIN	EUR 3,075	Actual supervisory fee per entity is determined yearly on the basis of the budgetary plan	
AMF	No specific fee for DRSPs	EUR 450	
AFM	200 EUR/hour max 100,000 EUR	No specific fee for DRSPs	
CBol	EUR 5,000 to 60,000	No specific fee for DRSPs	
Consob	No specific fee for DRSPs	EUR 5,000 per each service provided	

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:279:0004:0009:EN:PDF>

² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:090:0006:0010:EN:PDF>

Table 1. NCAs fees for DRSPs			
NCA	Authorisation	Supervision	Specific acts
CSSF	EUR 15,000	EUR 50,000	Renewal of authorisation: EUR 8,000
NO FSA	No specific fee for DRSPs	Actual supervisory fee per entity is determined yearly on the basis of the budgetary plan	
SE FSA	No specific fee for DRSPs	Minimum flat rate: EUR 5,683. Actual supervisory fee per entity is determined yearly on the basis of the budgetary plan.	
FCA	GBP 1,500 to 25,000	GBP 26,265	

5 General approach to fee determination

33. With regards to the fee structure, ESMA proposes to follow a similar approach to the one existing for the rest of ESMA's supervised entities:

- a. Fixed application fee for each of the type of DRSPs;
- b. Fixed authorisation fee;
- c. First-year fee; and
- d. Annual supervisory fee for each type of DRSP proportionate to their turnover.

34. While cognisant that some NCAs, as evidenced in Table 1 apply fees for specific administrative approvals, ESMA does not plan to establish such fees. ESMA understands that the aforementioned framework will provide the DRSPs with enough certainty and predictability.

35. The detailed proposals are included in the following sections.

Q1. Do you agree with the proposed approach for DRSP fees? Please elaborate in detail the reasons for your answer.

6 Application and authorisation fees for DRSPs

36. As mentioned above, the initial authorisation of DRSPs under the ESA Review implies that certain activities are performed by ESMA. This includes when an entity applies for

authorisation under MiFIR to its NCA between 1 October 2021 and 31 December 2021; in this case the authorisation fee will be paid in the beginning of 2022 and as soon as the Commission's fee management delegated act will enter into force. The process is a two-step one including:

- a. Assessment of completeness of the application, and
- b. Assessment of compliance of the applicant DRSP with Title IVa of MiFIR

37. ESMA will need to collect, process and assess information from the DRSPs regarding their organisation, services and activities in order to authorise them. In particular under Article 27d(1) "The applicant data reporting services provider shall submit an application providing all information necessary to enable ESMA, or the national competent authority where relevant, to confirm that the data reporting services provider has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Title, including a programme of operations setting out, inter alia, the types of services envisaged and the organisational structure"
38. ESMA will assess the completeness of this information in order to be able to assess subsequently the compliance of the applicant DRSP with the requirements under title IVa of MiFIR.
39. While the requirements for the different types of DRSPs, except those related to the management body, are somehow different given the different nature of reporting service provided, the timeline for assessment of compliance with Title IVa is the same - six months.
40. Currently EMIR and SFTR envisage somehow different timeline for registration of TRs - 20 days for assessment of completeness and 40 days for examination of compliance. In practice however, given that the assessment of compliance cannot be undertaken without having complete and up-to-date documentation regarding the compliance with the requirements, the completeness phase might take up six months.
41. Therefore, in terms of the workload, ESMA understands that the assessment of an application for authorisation of a DRSP is similar to the assessment of an application for registration under EMIR or SFTR. In accordance with the existing fee regulations under EMIR³ and under SFTR⁴, the registration fee for a high turnover TR is EUR 100,000.
42. Based on the FTEs expected to be dedicated to assessing an application for authorisation, in the case of APAs and ARMs, ESMA proposes a total fee of EUR 100,000 covering the costs of assessing an application for authorisation. In case an applicant DRSP applies

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:279:0004:0009:EN:PDF>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R0360>

simultaneously, or once it is authorised by ESMA, for more than one type of DRSP authorisation, it will pay EUR 50,000 for each additional authorisation. This is because an important part of the documentation to be assessed, in particular the one related to the management body, will be substantially the same. Similar approach is in place when an entity applies simultaneously under EMIR and SFTR.

43. Under the current framework, following the assessment of a complete set of information by an applicant DRSP, ESMA might determine that a given applicant DRSP is subject to authorisation and supervision by a competent authority of a Member State (Article 2(3) MiFIR). Such review would imply certain costs for ESMA. ESMA will therefore set an application fee of EUR 20,000 EUR for the first data reporting service for which the entity applies for authorisation and EUR 10,000 for the following.
44. Once it is determined that the applicant is subject to ESMA's authorisation and supervision, the applicant DRSP will pay authorisation fee of EUR 80,000 for the first data reporting service for which the entity applies for authorisation and 40,000 EUR for the following. In case it is determined that the applicant is subject to national supervision, it will have to liaise with the relevant authority for the payment of the applicable national authorisation fees.
45. In the case of CTP, ESMA, same as for critical benchmarks, proposes an initial fee of EUR 250,000. The fee is substantially greater than the one for the other two types of DRSPs, given the expected additional supervisory effort to assess the compliance with the regulation in order to authorise such entity.

ESMA proposes the following one-off fees:

A. For APAs and ARMs:

- Application fee of EUR 20,000 for the first data reporting service
- Application fee of EUR 10,000 for following data reporting service
- Authorisation fee of EUR 80,000 for the first data reporting service;
- Authorisation fee of EUR 40,000 for the following data reporting service

B. For CTP:

- Application and authorisation fee of EUR 250,000

Q2. Do you agree with the proposed application fee for ARMs and APAs? Please elaborate on the reasons for your answer.

- Q3. Do you agree with the proposed authorisation fee for ARMs and APAs? Please elaborate on the reasons for your answer.**
- Q4. Do you agree with the reduced additional application and authorisation fee for each additional DRSP type in the case of a simultaneous application? Please elaborate on the reasons for your answer.**
- Q5. Do you agree with the proposed application and authorisation fee for CTP? Please elaborate on the reasons for your answer.**

7 First-year fee following an authorisation by ESMA

46. It is unusual that an authorisation decision would take place on the last day of a calendar year and it will enter into force on the first day of the subsequent calendar year. Normally, administrative decisions take place during the calendar year. This requires that the costs until the end of a given year are covered by fees which are not the authorisation fees.
47. Under EMIR and SFTR, ESMA indicated that the supervisory activities in the first year after registration are linked to the registration process and included a formula for calculating the first-year fee as a percentage of the registration fee.
48. The percentage should be related to the period of time during which the DRSP is supervised in its first year of operations under MiFIR as amended by ESA Review. This period of time should, of course, be linked to the period of time under which the DRSP operates in the first year.

$$DRSP \text{ first-year fee} = \text{Min} (\text{Authorisation fee}, \text{Authorisation fee} * \text{Coefficient})$$

$$\text{Coefficient} = \frac{\text{Number of calendar days from the date of authorisation until 31 December}}{\text{Number of calendar days in year } (n)}$$

49. ESMA understands that this is the most proportionate approach and the one ensuring greater alignment with other types of fees already charged by ESMA, in line with the harmonisation principles across fees charged by ESMA.
50. Furthermore, in case a DRSP is authorised during the month of December, ESMA proposes that they should not pay a first-year supervisory fee, as the administrative cost linked to such fee is not proportionate to the fee itself.

ESMA proposes the following first-year fees for entities authorised by ESMA:

$$DRSP \text{ first-year fee} = \text{Min} (\text{Authorisation fee}, \text{Authorisation fee} * \text{Coefficient})$$

$$\text{Coefficient} = \frac{\text{Number of calendar days from the date of authorisation until 31 December}}{\text{Number of calendar days in year (n)}}$$

By way of derogation, where a DRSP is authorised during the month of December, it shall not pay first-year supervisory fee.

- Q6. Do you agree with the proposed approach to calculate first-year fees for DRSPs authorised by ESMA under MiFIR? Please elaborate on the reasons for your answer.**

8 Annual supervisory fees

8.1 Introduction

51. As indicated in section 2, ESMA's budget is defined prior to the beginning of a given calendar year, and all fee revenues are considered as general revenue.
52. ESMA is assigned with several recurrent tasks. Establishing a separate fee for each activity will overcomplicate the fee schedule, thus run contrary to the principles included in section 2. In addition, it could create a misperception of potential conflict of interest to perform those activities that require higher fees. Therefore, consistently with other annual fees already charged by ESMA, such as those to TRs and CRAs, ESMA is proposing to establish fees that are not linked to specific tasks, but rather cover all activities related to DRSPs.
53. Moreover, as a supervisor of DRSPs in the EU, ESMA will have several fixed costs related to requests for information, on-going monitoring and, investigations. In that regard, similarly to what happens with the rest of ESMA's supervised entities, a minimum fee should be put in place.
54. ESMA believes that the predictability of the annual fees for DRSP is relatively high, having regard to (i) the fact that the universe of entities that will be supervised by ESMA will be publicly available and (ii) budgeting approach indicated in section 2.

- Q7. Do you agree with the proposed approach for the calculation of annual fees for DRSPs supervised by ESMA? Please elaborate on the reasons for your response.**

8.2 Applicable turnover

55. Consistently to the approach proposed in its recent technical advices to the EC on fees for TRs and for SRs, ESMA proposes to calculate the turnover of the DRSPs based on the revenues from the relevant data reporting services provided by the DRSP. In addition, and to the extent that the DRSP provides other services, those should be considered for the purposes of applicable turnover, if they are linked to the core data reporting services.
56. With regards to activity figures, ESMA advised the EC on adopting them to complement revenues in the case of TRs under EMIR when the following conditions were applicable: (a) formed on the basis of a new service, which arises partly as a consequence of regulatory development; (b) an emergence of new suppliers and new customers, appearance of different business models and variety of additional/ancillary products and services; (iii) an uncertainty regarding the demand for the TR's product and the growth potential; (iv) a limited track record and market conditions of the companies and the industry itself are still largely unknown; (v) potential for different commercial and business practices; and (vi) cross sector spill-overs, since TRs may use already existing technology and know-how from other market infrastructures, such as CSDs or IT solutions providers.
57. Currently, ESMA understands that the business models for ARMs and APAs⁵ are sufficiently tested, hence there is no need to introduce for the purpose of calculating the applicable turnover, in addition to the revenues, activity figures. Furthermore, the use of activity figures for the fees calculation would require additional administrative efforts to monitor their consistency, comparability and overall accuracy. This can also result in additional costs for DRSPs in terms of auditing the activity figures on an annual basis.
58. However, leveraging on the experience with supervising TRs and CRAs, ESMA understands that the revenues from services ancillary to the data reporting ones, i.e. the ARM or APA ones, should also be taken into account, as they are closely related to the core ones. On the one hand, the ancillary services are supporting the provision of core services and on the other, those ancillary services might provide further incentives to entities to enrol with a given DRSP.
59. To that extent, ESMA proposes that for the purpose of calculating the applicable turnover under MiFIR, the revenues from each data reporting services, together with the revenues from ancillary services attributable to that data reporting service are considered. In case the audited accounts are not available at the time of calculation of the applicable turnover, the previous year's annual accounts should be used.

⁵ Except CTPs, as none has yet been authorised.

60. The fees should be calculated for each data reporting service and the applicable annual fee should be calculated as the proportion of the turnover of a given DRSP as part of the turnover of all the DRSP supervised by ESMA. Where an entity provides more than one data reporting service, the revenues of each service should be considered for the calculation of the relevant turnover. Where ancillary services are provided in relation with two or three DRSP services altogether, a portion of those revenues would be assigned to the turnover calculation for annual supervisory fees under each of the core reporting services. From 2022, the annual audited accounts (including the ones related to 2021) will need to be provided to ESMA.

$$\frac{\textit{Turnover ARM}_i}{\sum \textit{Turnover}} = \frac{\textit{Revenue ARM}_i}{\sum \textit{Revenues ARM}}$$

$$\frac{\textit{Turnover APA}_i}{\sum \textit{Turnover}} = \frac{\textit{Revenue APA}_i}{\sum \textit{Revenues APA}}$$

$$\frac{\textit{Turnover CTP}_i}{\sum \textit{Turnover}} = \frac{\textit{Revenue CTP}_i}{\sum \textit{Revenues CTP}}$$

61. Against this backdrop, the DRSPs would need to present in their audited financial accounts separately the different streams of revenues as per the following categorisation, if applicable:

- a. ARM services
- b. APA services
- c. CTP services
- d. Ancillary services to ARM activity
- e. Ancillary services to APA activity
- f. Ancillary services to CTP activity
- g. Non-EMIR and non-SFTR services, such as EMIR services of centrally collecting and maintaining records of derivatives, SFTR core services of centrally collecting and maintaining records of SFTs, custody or safekeeping activities, REMIT reporting, etc. In general in this category would include all those services provided under regulations different from MiFIR.

62. Furthermore, when assessing an application for authorisation or for extension of authorisation or in the course of the on-going supervisory activities, the DRSP (or the NCA as part of the transition) would provide ESMA with the necessary information to assess and assign the services directly provided by the DRSPs to one of the above categories.

For the purposes of ESMA's fees for supervision of DRSP activities, the relevant revenues, as included in the annual accounts, resulting from core and ancillary services related to data reporting services under MiFIR should be taken into account. Where the revenue from an ancillary service cannot be explicitly allocated between different data reporting services, it will be taken into account for those calculations in proportionate terms to the revenues received from each of the core data reporting services. The revenues from non-DRSP related services will not be taken into account for calculating the turnover of a DRSP.

$$\frac{\text{Turnover } ARM_i}{\sum \text{Turnover}} = \frac{\text{Revenue } ARM_i}{\sum \text{Revenues } ARM}, \text{ where}$$

$$\text{Revenue } ARM_i = \text{Revenue Core } ARM \text{ services at } DRSP_i + \text{Revenue Ancillary } ARM \text{ services at } DRSP_i$$

$$\frac{\text{Turnover } APA_i}{\sum \text{Turnover}} = \frac{\text{Revenue } APA_i}{\sum \text{Revenues } APA}, \text{ where}$$

$$\text{Revenue } APA_i = \text{Revenue Core } APA \text{ services at } DRSP_i + \text{Revenue Ancillary } APA \text{ services at } DRSP_i$$

$$\frac{\text{Turnover } CTP_i}{\sum \text{Turnover}} = \frac{\text{Revenue } CTP_i}{\sum \text{Revenues } CTP}, \text{ where}$$

$$\text{Revenue } CTP_i = \text{Revenue Core } CTP \text{ services at } DRSP_i + \text{Revenue Ancillary } CTP \text{ services at } DRSP_i$$

In case the relevant audited figures for year n-1 are not available at the time of calculation of the applicable turnover, the previously provided audited figures should be used.

- Q8. Do you agree with the use of revenues for the purposes of calculation of the applicable turnover? Please elaborate on the reasons for your response.**
- Q9. With regards to the revenues, do you agree with including both revenues from core and ancillary services? How complex is to identify and report the revenues from ancillary services attributable to each data reporting service separately? Please elaborate on the reasons for your response.**
- Q10. In those cases, where ancillary services cannot be directly allocated to each data reporting service, do you agree with allocating them in accordance with the revenues from the respective core services? Please elaborate on the reasons for your response.**

8.3 Minimum supervisory fees

63. The supervision of DRSPs requires the performance of certain activities towards all DRSPs. These activities are stemming from ESMA's supervision workplan. ESMA adopts a risk-based approach to supervision and prioritises the supervisory action that it will take each year in accordance with its objectives of promoting financial stability and orderly markets and enhancing investor protection⁶. While the supervisory actions may vary per TR, to be able to perform its tasks, ESMA always needs to undertake a minimum level of supervisory activities.
64. To that extent, and given that the risk-based approach for supervision most probably would be extended also for supervision of DRSPs, as it is the case of the rest of ESMA supervised entities, such as TRs under EMIR and SFTR, SR under STS, ESMA proposes a minimum annual supervisory fee to be paid by an ARM or an APA supervised by ESMA and it should be similar as the one set out for TRs, i.e. it should be 30,000 EUR.
65. Furthermore, the minimum set of common activities at the level of each regulation would be based on the risk-based approach and would be most likely specific, hence existence of potential synergies would be hardly achievable. Therefore, ESMA understands that the minimum supervisory fee for each data reporting service should be the same irrespective of whether it refers to a DRSP authorised to provide one, two or three data reporting services.

⁶ Link to the latest one can be found here https://www.esma.europa.eu/sites/default/files/library/2016-234_esma_2015_annual_report_on_supervision_and_2016_work_plan.pdf

66. For the avoidance of doubt, in case an entity is subject to minimum supervisory fees as an ARM and an APA, it would be required to pay two minimum supervisory fees, one under each authorisation, totalling 60,000 EUR.
67. Given the nature of the CTP, i.e. one single entity, ESMA understands that minimum fee should not be established for CTP.

Concerning the establishment of a minimum supervisory fee for DRSPs, ESMA proposes to set it out at the same amount as under EMIR, i.e. a minimum annual supervisory fee of 30,000 EUR for ARMs and for APAs.

In case an entity is subject to minimum supervisory fees for more than one data reporting service, it should pay a minimum supervisory fee for each authorisation.

No minimum fee is proposed for CTP.

- Q11. Do you agree with the proposed level of minimum supervisory fee? Please elaborate on the reasons for your response.**
- Q12. Do you agree with the proposed level of minimum supervisory fees in case more than one data reporting service is provided? Please elaborate on the reasons for your response.**

9 Fees in 2022 for DRSPs already authorised by NCAs

68. ESMA proposes that the 2022 annual supervisory fees for DRSPs already authorised by an NCAs and whose supervision pursuant to Article 54a of MiFIR as amended by the ESAs review is transferred to ESMA should pay an annual supervisory fee to ESMA calculated in the same way as the annual supervisory fee indicated in section 8. This stems from the fact that the activity of the DRSPs does not experience any change, it is only their supervision that changes. It is worth confirming that the DRSPs authorised at national level whose supervision will be transferred to ESMA will not need to be re-authorised.
69. In this regard, the relevant DRSPs should provide to ESMA the financial information about the data reporting services provided in 2020, so that ESMA should be in a position to calculate the relevant fees.
70. With regards to the financial information related to 2020, the audited accounts should include, as a minimum, separate revenues from each of the data reporting services. In the subsequent years the DRSPs are expected to include also the relevant ancillary services revenues.

ESMA proposes that in 2022 each DRSP that is already authorised should pay an annual supervisory fee calculated in the same way as the annual supervisory fee indicated in Section 8.

The DRSPs should provide ESMA with the relevant financial information to allow the calculation of annual fees.

The DRSPs annual audited figures or otherwise accounts for 2020 should include, as a minimum, separate revenues from each of the data reporting services

Q13. Do you agree with the approach for determining the fees in 2022 for already authorised DRSPs? Are there any difficulties in identifying the revenues from data reporting services provided in 2020? Please elaborate on the reasons for your response.

10 Supervisory fees related to the preparatory work

71. As mentioned in section 2 of this document, for the years 2020 and 2021 ESMA receives from the European Commission a total amount of around EUR 4.2 million to cover the expenditures related to the preparatory work needed for the fulfilment of ESMA supervisory tasks for DRSPs. ESMA will have to reimburse the Commission in a three-year period: from 2022 to 2024.
72. For the years 2022, 2023 and 2024 ESMA will therefore have to collect extra-fees for a total amount of EUR 4.2 million, i.e. roughly EUR 1.4 million per year.
73. In order to recover this amount of money from the supervised DRSPs in the three relevant years, ESMA proposes that each DRSP supervised by ESMA pays an additional fee (in 2022, 2023 and 2024) proportionally to the share of the relevant annual supervisory fees paid by that DRSP for that year.
74. For example, if in the year 2022 ESMA's ARM supervisory budget is fixed to EUR 5 million, and an authorised ARM is asked to pay EUR 250,000 as annual supervisory fee, its contribution to the ARM supervisory budget is equal to 5% of the total ARM supervisory budget. This authorised DRSP will have therefore to pay, in addition to its annual supervisory fee of EUR 250,000, an extra-amount of EUR 70,000, corresponding to the 5% of the EUR 1.4 million that ESMA has to charge in 2022 to repay the advancement to the European Commission.

In addition to the annual supervisory fee, for the years 2022, 2023 and 2024, ESMA will charge the DRSPs it supervises with an additional fee needed for the repayment of the advancement received by ESMA from the European Commission in the period 2020 – 2021.

Each DRSP supervised by ESMA should pay an additional fee proportionate to the share of the annual supervisory fees paid by the given DRSP for that year.

This additional fee should be paid on top and together with the annual supervisory fee for the years 2022, 2023 and 2024. The supervisory fees related to the preparatory work are not reimbursed.

Q14. Do you agree with the proposed approach for the supervisory fees related to preparatory work? Please elaborate.

11 Delegation of tasks to NCAs

75. Any delegation of tasks has to follow the principles established in MiFIR. Prior to any delegation of a task to the relevant competent authority, ESMA should consult and agree with such authority the scope and complexity of the task, the timetable for its performance and the transmission of necessary information to ESMA. Any costs incurred by national competent authorities while carrying out supervisory tasks delegated by ESMA will be covered by ESMA's supervisory fees and the NCA will not look to recover these costs directly from the DRSP.
76. Stemming from the above, and similarly with what is already in place under CDR 1003/2013 and under CDR 2019/360 the costs to be reimbursed to national competent authorities need to fulfil the following conditions:
- a. they should be previously agreed between ESMA and the NCA;
 - b. they should be calculated in accordance to the method used to determine ESMA's total administrative costs regarding DRSPs;
 - c. they should be proportionate to the turnover of the relevant DRSP; and
 - d. they should not be greater than the total amount of supervisory fees paid by the relevant DRSP.

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

Therefore, ESMA, proposes that any costs incurred by NCA while carrying out supervisory tasks delegated by ESMA will be covered by ESMA's supervisory fees and the NCA will not look to recover these costs directly from the DRSP.

The costs to be reimbursed to national competent authorities need to fulfil the following conditions:

- a. they should be previously agreed between ESMA and the NCA;
- b. they should be calculated in accordance to the method used to determine ESMA's total administrative costs regarding DRSPs;
- c. they should be proportionate to the turnover of the relevant DRSP; and
- d. they should not be greater than the total amount of supervisory fees paid by the relevant DRSP.

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

12 Payment and reimbursement conditions for DRSPs

12.1 Fees for application, authorisation or extension of authorisation

78. Similar to the established practice under other fee regulations, ESMA understands that the fees for initial authorisation or an extension of authorisation are due at the time of application for initial authorisation or for an extension of authorisation and should be paid by DRSPs upon the initiation of the administrative process.

ESMA proposes that the fees for application, authorisation or extension of authorisation are paid upon the application by the DRSP and within 30 days from the date of issuance of ESMA's relevant debit note.

Q15. Do you agree with the proposal for the payment conditions by DRSPs of the fees for application, authorisation or extension of authorisation under MIFIR? Please elaborate on the reasons for your answer.

12.2 No reimbursement of fees in case of withdrawal of application by a DRSP before ESMA's authorisation

79. ESMA proposes to not reimburse fees to a DRSP which decides to withdraw its application before authorisation is granted by ESMA. This is because the handling of its application and the preparatory work related to the assessment of completeness and compliance are costs that are being incurred already by ESMA. The same approach is taken with regards to fees for registration and extension of registration under EMIR and SFTR. The main reasons supporting this proposal are the following ones:

- a. Lowering the expected cost of an incomplete process (by reimbursing a part of the fee) could allow for spurious applications, from companies aiming at providing clearing services without fulfilling a minimum set of requirements;
- b. ESMA will in such case sustain the costs of analysing all the application dossiers submitted and any follow-up action required until the withdrawal; and
- c. ESMA has to concentrate the limited resources available on the applications that carry a true intention of becoming a DRSP and to discourage the submission of spurious applications.

ESMA proposes to not reimburse fees to a DRSP that decides to withdraw its application for authorisation, including during completeness phase.

Q16. Do you agree with the proposal to not reimburse DRSPs in case they decide to withdraw their application for authorisation or extension of authorisation before authorisation is granted? Please elaborate on the reasons for your response.

12.3 Annual supervisory fees

80. To fully support its activities vis-à-vis DRSPs, ESMA will need to receive their annual fees at the start of the calendar year and no later than 31 March. This approach is aligned with the ESMA's budgeting approach outlined in section 2. ESMA proposes that all the annual supervisory fees are paid in a single instalment and they are not reimbursed.

ESMA proposes that DRSPs pay their relevant annual supervisory fees to ESMA in the first three months of the calendar year and at the latest on 31 March of the year for which they are due. The fees should be calculated on the basis of the latest available information for annual fees. The annual fees paid are not reimbursed.

Q17. Do you agree with the proposal that DRSPs pay their annual fees by 31 March of the year for which the fees are due? Please elaborate on the reasons for your response.

12.4 2022 DRSP fees

81. ESMA proposes that relevant 2022 fees are paid by the DRSPs once the delegated act on fees enters into force or by 31 March 2022, whichever is the latest.

ESMA proposes that DRSPs pay their 2022 annual fees by 31 March 2022 or once the delegated act on fees enters into force. The fees should be calculated on the basis of the latest available information for annual fees.

Q18. Do you agree with the proposal for the timing of payment of the 2022 fees? Please elaborate on the reasons for your response.

13 Annexes

13.1 Annex 1 Summary of questions

- Q1. Do you agree with the proposed approach for DRSP fees? Please elaborate in detail the reasons for your answer.
- Q2. Do you agree with the proposed application fee for ARMs and APAs? Please elaborate on the reasons for your answer.
- Q3. Do you agree with the proposed authorisation fee for ARMs and APAs? Please elaborate on the reasons for your answer.
- Q4. Do you agree with the reduced additional application and authorisation fee for each additional DRSP type in the case of a simultaneous application? Please elaborate on the reasons for your answer.
- Q5. Do you agree with the proposed application and authorisation fee for CTP? Please elaborate on the reasons for your answer.
- Q6. Do you agree with the proposed approach to calculate first-year fees for DRSPs authorised by ESMA under MiFIR? Please elaborate on the reasons for your answer.
- Q7. Do you agree with the proposed approach for the calculation of annual fees? Please elaborate on the reasons for your response.
- Q8. Do you agree with the use of revenues for the purposes of calculation of the applicable turnover? Please elaborate on the reasons for your response.
- Q9. With regards to the revenues, do you agree with including both revenues from core and ancillary services? How complex is to identify and report the revenues from ancillary services attributable to each data reporting service separately? Please elaborate on the reasons for your response.
- Q10. In those cases, where ancillary services cannot be directly allocated to each data reporting service, do you agree with allocating them in accordance with the revenues from the respective core services? Please elaborate on the reasons for your response.
- Q11. Do you agree with the proposed level of minimum supervisory fee? Please elaborate on the reasons for your response.
- Q12. Do you agree with the proposed level of minimum supervisory fees in case more than one data reporting service is provided? Please elaborate on the reasons for your response.
- Q13. Do you agree with the approach for determining the fees in 2022 for already authorised DRSPs? Are there any difficulties in identifying the revenues from data reporting services provided in 2020? Please elaborate on the reasons for your response.
- Q14. Do you agree with the proposed approach for the supervisory fees related to preparatory work? Please elaborate.

Q15. Do you agree with the proposal for the payment conditions by DRSPs of the fees for application, authorisation or extension of authorisation under MIFIR? Please elaborate on the reasons for your answer.

Q16. Do you agree with the proposal to not reimburse DRSPs in case they decide to withdraw their application for authorisation or extension of authorisation before authorisation is granted? Please elaborate on the reasons for your response.

Q17. Do you agree with the proposal that DRSPs pay their annual fees by 31 March of the year for which the fees are due? Please elaborate on the reasons for your response.

Q18. Do you agree with the proposal for the timing of payment of the 2022 fees? Please elaborate on the reasons for your response.

13.2 Annex II

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 prejudice 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, 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 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 ('EFSF'). 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 prejudice 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 invited 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.