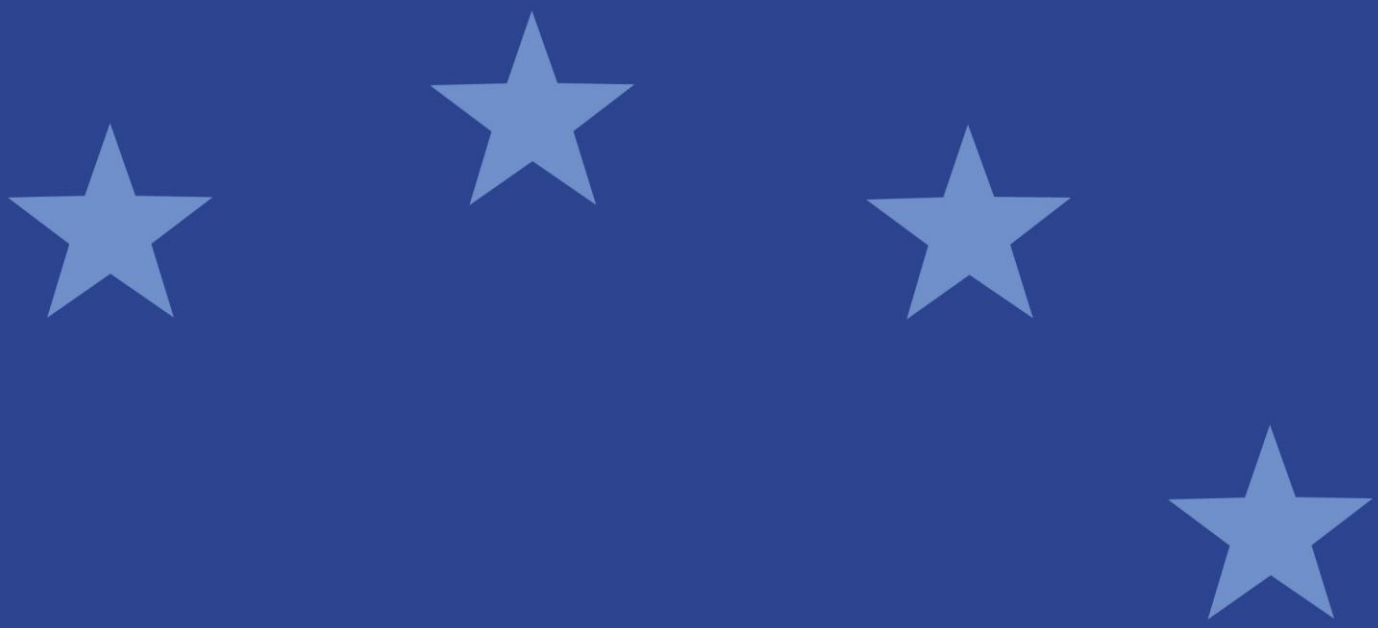
esma European Securities and Markets Authority

Consultation Paper

ESMA advice on the criteria for DRSP



20 November 2020 | ESMA74-362-932

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 for 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.

Contents

The consultation paper is comprised of 8 sections and 2 annexes. Section 1 includes the background of this consultation paper, 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. Section 4 outlines the proposed calculation method with regard to the number of trade reports or transactions. Section 5 describes the method to determine whether the ARM or APA is 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. 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.

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 technical advice to the European Commission in Q1 2021.

1 Background

1. On 20 September 2017, the Commission adopted a package of legislative 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 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

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)

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 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:*
>
> - 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. In light of the adopted legal framework for the supervision of DRSPs and the subsequent EC request to provide advice with regards to the criteria for ARMs and APAs that, by derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a national competent authority, ESMA is specifying in this consultation, and requesting feedback on, these two matters.
11. When developing the criteria ESMA aimed to ensure their simplicity and unambiguity in order to provide for their direct and immediate application.

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

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

[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)

and the list of jurisdictions (i.e. ISO 3166 country code) where investment firms to which specific data reporting services are provided are authorised.

Question 1: Do you agree with the proposed method to determine if the APA or ARM services are provided to investment firms authorised in one Member State only?

Question 2: Do you agree with the need for a periodic (e.g. annual) reassessment of adherence to this specific criterion?

Question 3: Do you have a view if a minimum threshold should be applied to a number of investment firms to which services are provided in a given Member State? If yes, please specify.

Question 4: Do you think another method for determination of the first criterion should be considered? If yes, please specify.

Question 5: Do you agree that the proposed method should rely on the information to be provided APAs a nd ARMs?

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

23. 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.

24. 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.

25. 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 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.

26. 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.

27. 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.

28. 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) 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.

29. 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 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.

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

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.

30. 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.

31. 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.

32. 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 or reported 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.

Question 6: Do you agree with the proposed calculation method for APA and ARM?

Question 7: Do you agree that consideration should be given not only to the number of trade reports or transaction, but also overall volumes made public by/reported within the trade reports/transactions?

Question 8: Do you have a view below what threshold (both, in terms of number of trade reports/transactions and their volumes) an APA or an ARM should be considered to be of limited relevance for the internal market?

Question 9: Do you agree that calculation for APA would be carried out based on transparency quantitative data submitted to FIRDS Transparency system (FITRS)?

Question 10: Do you agree that calculations for ARM would be carried out based on transactions reported under Article 26(1) of MiFIR?

Question 11: Do you agree with the need for a periodic (e.g. annual) reassessment of initial calculations in order to confirm their ongoing relevance?

Question 12: Do you think another method for determination of the second criterion should be considered? Please specify?

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

33. 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.

34. 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.

35. 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".

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

37. 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

[11] 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

market participants operating cross-border seems to be particularly relevant for these two behavioural requirements based on the following provisions:

38. 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*';

39. 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*".

40. 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 ".

41. 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:

    a. The information to be required from each ARM or APA regarding individual undertakings with which they have close-links and which are thus identified by ARM or APA in accordance with requirements of Articles 5 and 6 of Delegated Regulation (EU) 2017/571 and vis-à-vis whom respective arrangements have been put in place;

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

i. whether undertakings identified under point a. fall within the definition a group as envisaged under Article 4(1)(34) of MiFID II,

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

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

42. 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 part of a group of financial market participants operating cross-border. Namely:

    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. 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

    such ARM or APA will be considered to be part of a group of financial market participants operating cross-border. Therefore, it would not fulfil this criterion for derogation.

Question 13: Do you agree with the proposed method?

Question 14: Do you think another method for determination of the third criterion should be considered? Please specify?

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

43. 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).

44. 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.

45. 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[12] 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 an 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;

    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).

46. 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.

47. 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

[12] 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.

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.

Question 15: Do you agree with this additional criterion for ARMs? If not, please explain why.

Question 16: Do you think another additional criterion should be considered for APAs? If yes, please specify.

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

48. 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. More specifically, assessment of eligibility for derogation of currently operating ARMs and APAs authorised at the national level should be carried out based on fulfilment of the following criteria:
    a. Provision of services to investment firms authorised in one Member State only;
    b. Number and volumes of trade reports published by APAs and number and volumes of transactions reports made by ARMs;
    c. Not being part of a group of financial market participants that operate cross-border;
    d. Additional criterion outlined in section 2.4
49. Such assessment should be carried out sufficiently prior to the transfer of respective supervisory tasks and responsibilities from the relevant NCAs to ESMA taking into account:
50. 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;
51. 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.

52. To ensure that the above anticipate a process that should take place before 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.

Question 17: Do you agree that criteria to determine upfront which data reporting services providers are derogated from ESMA supervision should be the same as those, to be applied for possible future applicants? If no, please explain why and propose alternative criteria.

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

53. 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.

54. 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.

55. 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.

Question 18: How do you think the elements to determine if an ARM or APA have a derogation should apply: cumulatively or not? Please explain why.

Annexes

Annex I Summary of questions

Question 1: Do you agree with the proposed method to determine if the APA or ARM services are provided to investment firms authorised in one Member State only?

Question 2: Do you agree with the need for a periodic (e.g. annual) reassessment of adherence to this specific criterion? Question 3: Do you have a view if a minimum threshold should be applied to a number of investment firms to which services are provided in a given Member State? If yes, please specify.

Question 4: Do you think another method for determination of the first criterion should be considered? If yes, please specify.

Question 5: Do you agree that the proposed method should rely on the information to be provided APAs a nd ARMs?

Question 6: Do you agree with the proposed calculation method for APA and ARM?

Question 7: Do you agree that consideration should be given not only to the number of trade reports or transaction, but also overall volumes made public by/reported within the trade reports/transactions?

Question 8: Do you have a view below what threshold (both, in terms of number of trade reports/transactions and their volumes) an APA or an ARM should be considered to be of limited relevance for the internal market?

Question 9: Do you agree that calculation for APA would be carried out based on transparency quantitative data submitted to FIRDS Transparency system (FITRS)?

Question 10: Do you agree that calculations for ARM would be carried out based on transactions reported under Article 26(1) of MiFIR?

Question 11: Do you agree with the need for a periodic (e.g. annual) reassessment of initial calculations in order to confirm their ongoing relevance?

Question 12: Do you think another method for determination of the second criterion should be considered? Please specify?

Question 13: Do you agree with the proposed method?

Question 14: Do you think another method for determination of the third criterion should be considered? Please specify?

Question 15: Do you agree with this additional criterion for ARMs? If not, please explain why.

Question 16: Do you think another additional criterion should be considered for APAs? If yes, please specify.

Question 17: Do you agree that criteria to determine upfront which data reporting services providers are derogated from ESMA supervision should be the same as those, to be applied for possible future applicants? If no, please explain why and propose alternative criteria.

Question 18: How do you think the elements to determine if an ARM or APA have a derogation should apply: cumulatively or not? Please explain why.

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 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

[3]

European Parliament and the European Commission (the "**Framework Agreement**").

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.

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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 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.