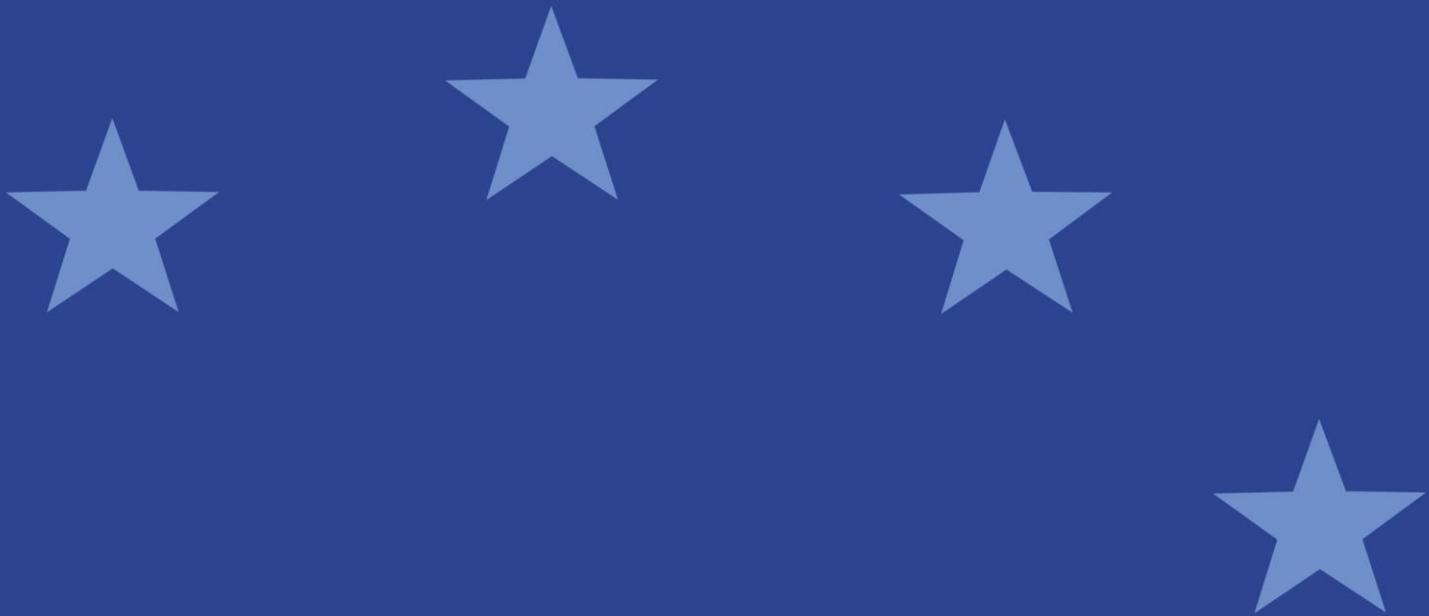




European Securities and
Markets Authority

Final Report

ESMA's technical advice to the Commission on fees for benchmark administrators under BMR





European Securities and
Markets Authority

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1 Executive Summary

Reasons for publication

Article 5 of Regulation (EU) 2019/2175 amended Regulation (EU) 2016/1011 (BMR) providing ESMA with new direct supervisory powers under BMR. In particular, the amended BMR designates ESMA as the competent authority of both administrators of critical benchmarks, as referred to in points (a) and (c) of Article 20(1) of BMR, and of third country administrators recognised under Article 32 of BMR. These new ESMA supervisory responsibilities will start on 1 January 2022.

On 17 June 2020, ESMA received a formal request from the European Commission to provide technical advice to assist the Commission in formulating a delegated act on fees to be paid by administrators that will be supervised by ESMA under BMR.

On 23 September 2020, ESMA published the Consultation Paper on the technical advice to the Commission on fees for benchmark administrators under BMR. The consultation period ended on 6 November 2020 and this Final Report takes into account the feedback received.

Contents

This Final Report contains ESMA's technical advice on supervisory fees to be paid to ESMA by critical benchmark administrators and third country administrators under the recognition regime. The technical advice distinguishes between: one-off recognition fee to be paid by third country administrators applying for recognition; one-off authorisation fee to be paid by administrators of critical benchmarks applying for authorisation; annual supervisory fee to be paid by third country administrators and annual supervisory fee to be paid by critical benchmark administrators. The Annex contains the Commission's mandate to ESMA for this technical advice.

Next Steps

ESMA will publish the final report and will submit its advice to the European Commission.

2 Background

1. Article 5 of the Regulation (EU) 2019/2175 (ESAs Review Regulation¹) amended Regulation (EU) 2016/1011 (BMR), granting new supervisory powers to ESMA in relation to benchmarks. In particular, the new Article 40(1) of BMR states that, starting on 1 January 2022, ESMA should be the competent authority for:
 - administrators of a critical benchmark as referred to in points (a) and (c) of Article 20(1); and
 - third country administrators of benchmarks as referred to in Article 32, i.e. third country administrators under the recognition regime of BMR.
2. The new Article 48l of BMR requires ESMA to charge fees to the administrators of benchmarks it supervises. These fees should fully cover ESMA's necessary expenditure relating to the supervision of the administrators of benchmarks. In particular, the total yearly amount of the fees charged to the administrators in a specific year should cover all costs incurred by ESMA for its activities in relation to the supervision of the administrators in the same year. The amount of the individual fees should be proportionate to the turnover of each administrator.
3. The new Article 48m of BMR allows ESMA, where necessary for the proper performance of a supervisory task, to delegate specific supervisory tasks to a national competent authority. Such specific supervisory tasks may include the power to carry out requests for information or to conduct investigations and on-site inspections. The authorisation of critical benchmarks cannot be delegated by ESMA. When delegating a supervisory task, ESMA should reimburse the competent authority for the costs incurred as a result of carrying out such task.
4. Paragraph 3 of Article 48l requires the Commission, by 1 October 2021, to adopt delegated acts in order to supplement the BMR by specifying, in relation to ESMA new supervisory powers, 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.
5. On 17 June 2020, ESMA received a formal request from the Commission to provide technical advice to assist the Commission in formulating the delegated act of Article

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2175&from=EN>

48l(3) on supervisory fees to be paid by administrators that will be supervised by ESMA under the BMR. The mandate for the technical advice is enclosed in the Annex of this Final Report, and requests ESMA to provide its advice to the Commission by 31 January 2021.

6. On 25 September 2020, ESMA published the Consultation Paper on “ESMA’s technical advice to the Commission on fees for benchmark administrators under BMR”². The Consultation Paper proposed a fees framework for administrators that ESMA will supervise starting on 1 January 2022. This framework is based on the existing rules for the fees that ESMA collect in relation to other types of supervised entities and included 13 questions for the public. The consultation phase ended on the 6 November 2020.

3 General comments by the respondents

7. ESMA received six replies to the Consultation Paper, all published on ESMA’s website³. The respondents were benchmark administrators and one industry association. While the respondents replied to the specific questions included in the Consultation Paper, they also provided some general comments, which can be summarised as follows.
8. Some respondents highlighted the fact that the Consultation Paper was not taking into account the longer transitional period for third country administrators (Article 51(5)) stemming from the BMR Review⁴. It should be noted that the Consultation Paper was published in September 2020, when the only public available text of the BMR Review was the original proposal by the European Commission, dated 24 July 2020⁵. In this original proposal of the BMR Review there was no extension of the transitional period applicable to third country administrators.
9. This Final Report now takes into account the fact that the BMR Review now includes the postponement of the end of the transitional period for third country administrators until 31 December 2023 (new Article 51(5)⁶).
10. In relation to the BMR Review, one respondent expressed concerns regarding the allocation of annual fees to third country administrators. This respondent argued that with a longer transitional period included in the BMR Review, in 2022 there will be less than

² https://www.esma.europa.eu/sites/default/files/library/esma80-187-623_consultation_paper_bmr_advice_fees.pdf

³ <https://www.esma.europa.eu/press-news/consultations/consultation-paper-fees-benchmark-administrators-under-bmr>

⁴ <https://www.consilium.europa.eu/media/47226/st13652-ad01-en20.pdf>

⁵ https://ec.europa.eu/finance/docs/law/200724-benchmarks-review-proposal_en.pdf

⁶ <https://www.consilium.europa.eu/media/47226/st13652-ad01-en20.pdf>

expected third country administrators which are recognised and hence supervised by ESMA. Because of this, the 2022 BMR supervisory budget will be covered by a number of third country administrators which will be lower than expected.

11. As explained in the next section of this Final Report, ESMA prepares the annual budget with the aim of balancing income from fees with its relevant expenditure. If ESMA expects lower expenditure for the BMR supervisory activities in 2022 because of the longer transitional period for third country administrators, it will reduce its 2022 BMR supervisory budget accordingly. This will translate into fair annual fees for the third country administrators subject to the recognition regime.
12. Other respondents argued more generally that the fees proposed for third country administrators were too high, especially if considered that the third country administrators' profits stemming from benchmark provision in the EU is limited.
13. One respondent argued that the one-off application fee and the minimum annual fee for third country administrator could act as a barrier for small firms or for larger firms which do not derive a large portion of their income from EU activity. These firms may conclude that registering under the BMR does not make financial sense. This, in turn, can potentially reduce the benchmarks available in the EU and thus limiting the options available to consumers.
14. These comments regarding the fees to be paid by third country administrators are covered in more detail in the sections 7 and 10 of this Final Report. The original proposals of the Consultation Paper have been amended following the feedback received.
15. Another respondent encouraged ESMA to make transparent the overall cost for supervision as early as possible to enable benchmark administrators to make respective accruals in time. It should be noted that the total amount of the estimated supervisory costs, including in the BMR supervisory budget, 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. So, administrators supervised by ESMA will have already in September of each year an indication of the BMR supervisory budget for the following year.
16. Finally, in one of the replies it was argued that Article 48I of BMR does not contain a legal basis to require administrators to submit audited revenue figures concerning the provision of benchmarks. It should be noted that the legal basis to require administrators to share with ESMA audited revenue figures concerning the provision of benchmarks will

come directly from the delegated act that the European Commission will adopt on the basis of this technical advice, if the European Commission agrees on include reference to audited revenues in the legal text.

17. To be noted that this is the approach followed in relation to fees to be paid by CCPs to ESMA. Commission Delegated Regulation (EU) 2020/1302⁷, Article 4, introduced the definition of turnover as “*worldwide revenues accrued from provision of clearing services*” and required “*Tier 2 CCPs to provide ESMA, on an annual basis, with audited figures confirming their worldwide revenues accrued from the provision of the clearing services*”. For BMR fees, ESMA is proposing a similar approach in order to ensure consistency.

4 ESMA’s budgeting model and management of EC advancement

18. As required by Article 48l(2) of BMR, each year ESMA should charge the administrators of critical benchmarks and third country administrator, under the BMR recognition regime, fees which are proportionate to the turnover of the administrator concerned and which should fully cover all yearly costs incurred by ESMA for its activities in relation to the BMR supervision.
19. These fees should also cover the reimbursement of any costs that national competent authorities may incur as a result of any delegation of tasks by ESMA pursuant to Article 48m of the BMR. Therefore, to ensure an efficient use of ESMA’s budget and, at the same time, alleviate the financial burden for Member States and the Union, it is necessary to ensure that benchmark administrators subject to ESMA oversight pay for all of ESMA’s necessary expenditures related to their authorisation (for critical benchmark administrators) or recognition (for third country administrators) and to their ongoing supervision.
20. ESMA’s budget is managed in accordance with an activity-based management method: financial and staff resources are allocated per activity, rather than per functional cost or per internal management hierarchy. This method is used both for budget planning, i.e. for calculating ESMA’s estimated costs generated per activity (including the relevant overheads), and for budget costing, i.e. calculating ESMA’s actual costs per activity.

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R1302&from=EN>

21. ESMA applies a universal budgeting approach, which means that income from fees is treated as general revenue⁸. This is in line with the standard practice of other partially funded EU agencies, as recommended by DG Budget of the Commission.
22. ESMA prepares its annual budget aiming at balancing income from fees with its relevant expenditure, on the understanding that deficits or surpluses are to be balanced by the rest of ESMA's income sources. In case of deficits (ESMA collecting less than incurred), ESMA does not recover the deficit from the supervised entities. If the deficit is significant and recurrent, ESMA analyses the reasons why it happened, drawing up lessons for the next budgeting period. For surpluses (ESMA collecting more than incurred) the same reasoning is followed. As a result, no excess of fees is paid back to supervised entities. This mechanism is already in place at ESMA for Credit Rating Agencies (CRAs), for Trade Repositories (TRs) under EMIR and under SFTR and for Securitisation Repositories.
23. Through the existing mechanisms (EU budgetary procedure, annual reporting, single programming document), ESMA's Management Board and Board of Supervisors (of both of which the Commission is a permanent member) remain fully informed of ESMA's fee collection and expenditure levels. ESMA's supervisory costs are presented in its annual work programme and yearly fee income is included in ESMA's budget (which is duly published on its website and in the Official Journal of the European Union).
24. 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.
25. On a yearly basis, the European Court of Auditors evaluates the correct implementation of ESMA's budget, including its fee-funded budget, versus the applicable EU Regulations. The final audit report is communicated to the European Parliament and to the European Council.
26. In addition, in 2018 ESMA has been requested by the Internal Audit Service of the Commission to further simplify and harmonise, to the extent feasible, its fee models. Therefore, in this Final Report, ESMA reflects the guidance by Internal Audit Service of the Commission of a simple and harmonised BMR fees framework.

⁸ See Annex III: Budget of ESMA 2020 Annual Work Programme:
https://www.esma.europa.eu/sites/default/files/library/esma20-95-1132_2020_annual_work_programme_revised.pdf

27. Finally, ESMA aims also at collecting fees by 31 March each 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.
28. To facilitate the set-up of ESMA's new tasks with regards to benchmark administrators, in 2020 and 2021 the Commission has foreseen an advancement of ESMA's fee in order to cover ESMA's overall cost related to the preparatory work. Following the latest ESMA's budget revision, the amounts currently stand at around EUR 0.2 million in 2020 and EUR 0.3 million in 2021.
29. Any amount advanced by the Commission in 2020 and 2021 to cover ESMA's yearly costs in relation to the oversight of administrators will need to be recovered across the years 2022, 2023 and 2024. This is a one-off situation that is different 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 BMR as general revenue as follows:

- a. In case of deficits (ESMA collects less than incurred), ESMA does not recover the deficit from third country recognised administrators or administrators of a critical benchmark.
- b. In case of surpluses (ESMA collects more than incurred), ESMA does not pay back the surplus to third country recognised administrators or administrators of a critical benchmark.
- c. Fees are to be paid at the beginning of the calendar year (i.e. before 31 March of each 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 administrators of benchmarks 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 is given to ESMA, in 2022-2024 ESMA will collect from third country recognised administrators and from administrators of a critical benchmark 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 third country recognised administrators and to administrators of a critical benchmark.

5 ESMA's excepted total costs

30. In the Legislative Financial Statement accompanying the ESAs Review Regulation, the Commission estimated that 7 additional full-time equivalent staff members (FTEs) should be hired in relation to the BMR new supervisory powers: 5 for EU critical benchmarks and 2 for third country benchmarks. Under this assumption, the BMR supervision maximum budget in the steady state is EUR 1 – 1, 5 million.
31. In light of the amendments that the BMR Review will bring to the BMR framework, particularly the extension of the transitional period applicable to third country administrators until 2023, in 2022 ESMA expects to supervise a number of recognised third country administrators that is lower to the one estimated before the extension of the transitional period. This is likely to translate into a lower BMR supervisory budget for 2022, as less supervisory officers will be needed to carry out ESMA's supervisory responsibilities under BMR.
32. The supervisory officers in charge of benchmark administrators will be responsible for the registration phase and the ongoing supervisions of all administrators for which ESMA will be the competent authority. However, as explained before, 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 TRs⁹ under EMIR, under SFTR and under the Securitisation Regulation, as well as for CRAs.

6 ESMA's supervisory activities under BMR

33. In terms of supervisory activities that ESMA will need to perform vis-à-vis administrators of a critical benchmark and third country administrators under the recognition regime, the following tasks are included in the BMR as amended by the ESAs Review Regulation:

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:279:0004:0009:EN:PDF>

- Assessing the application of third country administrators that apply to be recognised in the EU in accordance with Article 32(5) of BMR, including the establishment of cooperation arrangements with third country National Competent Authorities (NCAs) when required by point (a) of Article 32(5) (*third country administrators already recognised in the EU by NCAs before 1 January 2022 will not need to apply again for recognition to ESMA, the recognition decisions will remain valid after the transfer of competences to ESMA*);
- On-going supervision of third country administrators recognised in the EU, including third country administrators recognised by national competent authorities between 1 January 2018 and 31 December 2021;
- Update the ESMA BMR register¹⁰ with the identity of the new recognised third country administrators and their benchmarks;
- Assess the application for authorisation of administrators of a critical benchmark, as referred to in points (a) and (c) of Article 20(1) (*administrators of a critical benchmark already authorised by national competent authorities before 1 January 2022 will not need to apply again for authorisation to ESMA, the authorisation decisions will remain valid after the transfer of competences to ESMA*);
- Establish and chair the college of supervisors for each critical benchmark referred to in points (a) and (c) of Article 20(1) (with the exception of benchmarks where the majority of contributors are non-supervised entities);
- On-going supervision of administrators of a critical benchmark, as referred to in points (a) and (c) of Article 20(1), including administrators of a critical benchmark authorised by national competent authorities between 1 January 2018 and 31 December 2021;
- Update the ESMA BMR register with the identity of the new authorised administrators of critical benchmarks.

34. With reference to the recognition regime, there are five recognised administrators in the EU included in the ESMA BMR register¹¹. According to Article 48n(2), the application for

¹⁰ <https://www.esma.europa.eu/databases-library/registers-and-data>

¹¹ https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_bench_entities

recognition received by national competent authorities after 1 October 2021 can be transferred from the national competent authorities to ESMA.

35. Following the amendments of Article 51(5) of BMR and the extension of the transitional period for third country administrators until 31 December 2023, the number of recognised third country administrators is not expected to increase substantially in 2021.
36. With reference to critical benchmarks, only the administrator of EURIBOR, EMMI, is expected to be supervised by ESMA starting in January 2022. EMMI has been already authorised by the Belgian FSMA for the provision of EURIBOR in July 2019, and therefore a new authorisation for this benchmark is not needed.

7 Recognition fee: assessment of feedback and final proposal

37. Starting in January 2022, ESMA will directly receive any application for recognition by third country administrators. Additionally, Article 48m(2) of BMR states that the applications for recognition submitted to national competent authorities between 1 October 2021 and the end of 2021 can be transferred from national competent authorities to ESMA. ESMA will be able to formally take a decision to grant or refuse recognition only in January 2022.
38. Article 32(5) states that ESMA should assess any application for recognition within 90 working days, corresponding to 18 weeks, i.e. roughly a period of four months. NCAs currently have the same time to assess the applications for recognition they receive, and their experience indicates that the full period of four months is needed to develop a thorough assessment of the recognition application and take the final decision to grant or refuse a recognition.
39. The assessment of a recognition application includes the following activities:
 - A check that the information provided by the third country administrator are sufficient to assess whether the third country administrator complies with the relevant BMR provisions or the corresponding IOSCO principles for financial benchmarks or IOSCO principles for Price Reporting Agencies;
 - The assessment that the third country administrator complies with the relevant BMR provisions or the corresponding IOSCO principles. To fulfil this task,

besides the analysis of the internal organisation of the administrator, ESMA will have to consider the nature of the benchmarks provided by the third country administrators (including the degree of their use in the EU), the requirements applicable to them and the potential request for exemptions (included in Articles 25 and 26 of BMR) by the third country administrators;

- Make sure that the two conditions included in Article 32(5) are fulfilled: 1) where an administrator located in a third country is subject to supervision, an appropriate cooperation arrangement is in place between ESMA and the competent authority of the third country where the administrator is located; and 2) the effective exercise by ESMA of its supervisory functions is neither prevented by the laws, regulations or administrative provisions of the third country where the administrator is located, nor, where applicable, by limitations in the supervisory and investigatory powers of that third country's competent authority.

40. ESMA received mixed feedback to the proposal included in the Consultation Paper of a one-off fee of EUR 65,000. The general approach for determining the recognition fees was considered logical by most of the respondents, however, stated in their reply that the proposed one-off fee was too high.
41. One respondent noted that third country administrators range from small, specialist firms to large multi-national entities. The proposed EUR 65,000 fee may prove simply too significant for a number of providers, exceeding any profit or revenue resulting from the commercialisation of their benchmarks in the EU. Similarly, another respondent stated that the proposed one-off fee can create high barriers to entry in the EU market for some small benchmark administrators.
42. Also, in one of the replies received by ESMA it was highlighted the fact that, while the elapse time from initial submission to approval or rejection could reasonably be four months in duration, this would appear to be an over-estimate in terms of the actual work effort (in terms of working hours spent) required to process an application.
43. After having analysed the arguments and the data provided as part of the feedback received, ESMA proposes the following approach.
44. The recognition fee should be a simple lump-sum recognition fee identical for all third country administrators. This is coherent with what was proposed in the Consultation Paper. Such approach is supported by the fact that the experience of national competent

authorities in relation to recognition applications indicates that the assessments of applications submitted by large and small administrators are equally resource intensive. All assessments are based on the same procedure and timeframe and the estimated workload for each recognition application is approximately the same.

45. The approach of a single, flat recognition fee is also in line with other registration fees charged with ESMA, and therefore with the principles of simplicity and harmonisation of the different fee frameworks.
46. The assessment of a recognition application lasts four months, i.e. a third of the yearly work of a single Full-Time Equivalent (FTE) at ESMA. ESMA internal analysis indicates a yearly average cost of EUR 195,000 for each FTE (including indirect costs).
47. However, as mentioned by one respondent, the application assessment will not represent a full-time task lasting four months. The recognition fee should cover the full cost of assessing the recognition application, as requested by the mandate for technical advice. Following the comments received by market participants ESMA acknowledges that, while the procedure will last four months, the assessment of a single recognition application will not represent a full-time activity.
48. Accordingly, ESMA estimates the actual resources used to assess a recognition application during the four months will be less than one FTE working full time on the procedure. A more appropriate estimate is represented by one FTE working more than 50% of its time on the application assessment. This new estimate considers also the possible efficiency gains that should materialise thanks to the cooperation of the officers in charge of the recognition of third country administrators with the officers in charge of ongoing supervision. Against this background, the cost of assessing a recognition application should be EUR 40,000, to be fully covered by the one-off recognition fee.
49. This is a lower level of recognition fee if compared with the proposal in the Consultation Paper. The recognition fee is payable at the time of the submission of the application, in line with ESMA approach towards the registration of entities it supervises.
50. In the case of the applications received by the NCAs after 1 October 2021 and transferred to ESMA, the recognition fees will be paid in the beginning of 2022 and as soon as the Commission's fee management delegated act will enter into force.

For third country administrators applying for recognition under BMR ESMA proposes a one-off fee of EUR 40,000.

The one-off recognition fee should be paid at the time of the submission of the application, upon receipt of ESMA's debit note.

In the case of the applications received by the NCAs after 1 October 2021 and transferred to ESMA, the recognition fees will be paid at the beginning of 2022 and as soon as the Commission's fee management delegated act will enter into force.

8 Authorisation fee: assessment of feedback and final proposal

51. ESMA will become the competent authorities of administrators providing a critical benchmark, as defined in points (a) or (c) of Article 20(1). These two definitions of critical benchmark are based, inter-alia, on quantitative criteria that a benchmark should meet in order to be classified as critical benchmark. The benchmark should be used (directly or indirectly within a combination of benchmarks) as a reference for financial instruments, contracts or for measuring the performance of investment funds, having a total value of at least EUR 500 billion (point (a) of Article 20(1)) or of at least EUR 400 billion (point (c) of Article 20(1)).
52. Also, critical benchmarks can be classified as such only when they are provided by administrators located within the EU. Considering the BMR transitional period applicable to EU administrators ended on 31 December 2019, it is likely that any new critical benchmark (and its European administrator) is already either authorised or registered by the relevant national competent authority.
53. Where a critical benchmark administrator is already authorised by a national competent authority, the authorisation decision will remain valid after the transfer of competences to ESMA on 1 January 2022. This is the case for EURIBOR, that was authorised by the FSMA in July 2019 and for which a new BMR authorisation by ESMA is not needed.
54. Where instead the administrator of the critical benchmark is already registered by a national competent authority, or is neither authorised nor registered, ESMA will have to carry out an authorisation process, as defined in Article 34 of the BMR.

55. The authorisation process starts with a completeness phase, during which ESMA will have 15 working days from the receipt of the application to assess whether the application is complete. If the application is incomplete, the applicant should submit the additional information required by the relevant competent authority. The time limit of 15 working days apply from the date on which such additional information is provided by the applicant.
56. The completeness phase is followed by the compliance phase, in which ESMA should examine the application for authorisation and adopt a decision to authorise or refuse to authorise the applicant within four months of receipt of a complete application. The requirements applicable to critical benchmarks are the most stringent, and the assessment of compliance with them is more complex, if compared with authorisation processes regarding administrators of non-critical benchmarks.
57. As the application will concern a critical benchmark, ESMA may need to carry out additional tasks. If the critical benchmark is based on contribution, with the exception of critical benchmarks where the majority of contributors are non-supervised entities, ESMA will have to establish and chair a college of supervisors, as indicated in Article 46 of BMR¹².
58. Articles 21 and 23 of BMR describe special powers that ESMA will have in relation to critical benchmarks. While these tasks belong to the ongoing supervisory activity of the critical benchmark, when a critical benchmark is undergoing an authorisation assessment, ESMA will have to start preparing the internal procedures defining how it intends to use the powers under Article 21 when the ongoing supervision will start. This will imply, inter alia, a detailed analysis of the underlying market that the critical benchmark seeks to measure, including data sources that ESMA can use to fulfil its tasks.
59. The authorisation process of an administrator of a critical benchmark will also include one or more on-site inspections in the premises of the administrator, to ensure that all the organisational arrangements needed for compliance with the BMR are in place.

¹² The college should comprise the competent authorities of the supervised contributors, and additional authorities applying in accordance with Article 46(3). The college should be established within 30 working days from the inclusion by the Commission of a benchmark in the list of critical benchmarks. The college must be consulted by ESMA on the decision of granting authorisation to the administrator of the critical benchmarks (and other important decisions too, such as the application of mandatory contribution as per Article 23 of BMR). The details of the process of consulting the college for the authorisation decision should be defined by ESMA in the written arrangements for the college, which define in detail the functioning of the college chaired by ESMA.

60. The authorisation process for critical benchmarks is therefore the most articulated registration activity under the BMR. It includes a completeness and compliance phase (lasting at least five months), but also it requires ESMA to establish a college of supervisors (if the benchmark is based on contribution provided by a majority of supervised entities) as well as to define dedicated internal procedures to deal with the specific powers applicable to critical benchmarks.
61. ESMA estimates that the fulfilment of the tasks needed for the authorisation of an administrator of a critical benchmark will require the involvement of several staff members. The authorisation fee should cover the full cost of assessing the application of a critical benchmark administrator.
62. The authorisation fee should therefore be higher than one FTE because, during a period of at least five months (and likely to be longer), several staff members will work on this process simultaneously. Against this background, in the Consultation Paper was proposed that the authorisation fee for critical benchmarks corresponds to about 1.3 FTEs, i.e. EUR 250,000.
63. ESMA received only supportive comments in relation to the proposal of the Consultation Paper regarding the authorisation fee for critical benchmark administrators. The proposal of the Consultation Paper is therefore confirmed in this Final Report
64. The authorisation fee is payable at the time of the submission of the application, in line with ESMA approach towards the registration of entities it supervises.

For critical benchmark administrators applying to ESMA for authorisation under the BMR ESMA proposes a one-off fee of EUR 250,000.

The one-off authorisation fees should be paid at the time of the submission of the application, upon receipt of ESMA's debit note.

9 First-year supervisory fees: assessment of feedback and final proposal

65. With reference to third country administrators, it is unlikely that a recognition decision takes 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, such administrative decisions take place

during the calendar year. This requires that the supervisory costs until the end of the year in which a third country administrator is recognised are covered by fees which are not the recognition fees. The same applies for critical benchmark administrators that are authorised by ESMA.

66. ESMA received only one comment related to this section of the Consultation Paper. The respondent argued that ESMA should be actively supporting and encouraging applications from third country administrators, while the imposition of significant recognition and first year supervisory fees will drastically reduce the number of third country administrators seeking recognition.
67. It should be considered that, with a reduced one-off recognition fee of EUR 40,000, also the first-year supervisory fee will result as lower. The reduction of the one-off recognition fee will have an important effect in terms of lowering the fees that third country administrators will have to pay in their first year (recognition fee plus first year supervisory fee). Additionally, it should be considered that the payment of the recognition fee, when the application is submitted to ESMA, and the payment of the first year supervisory fee, once the administrator is recognised by ESMA, will take place in two separate moments, because the application assessment is expected to last four months on average. This time gap between the two payments should allow the third country administrators to manage the payment cycle of the first year smoothly.
68. ESMA therefore is not changing its approach to the first-year supervisory fees that was included in the Consultation Paper. This approach is consistent with the ESMA's advices under EMIR and SFTR on this matter.
69. ESMA proposes that the supervisory activities in the first year after registration are linked to the registration process and includes a formula for calculating the first-year fee as a percentage of the applicable registration fee. ESMA's experience with the registration and supervision of supervised entities has shown that its supervisory efforts in the first months after registration are similar to its supervisory efforts during registration. The percentage should be related to the period of time during which the third country administrator is supervised in its first year of operations under the BMR.
70. ESMA therefore proposes that third country administrators which are (regardless of the year) in their first calendar year of recognition (i.e. have been recognised earlier in the same year) would pay a first-year supervisory fee equal to the recognition fee adjusted by a coefficient. Similarly, ESMA proposes that administrators of critical benchmarks which are (regardless of the year) in their first calendar year of authorisation (i.e. have

been authorised earlier in the same year) would pay a first-year supervisory fee equal to the authorisation fee adjusted by the same coefficient.

71. The coefficient reflects the share of remaining days until the end of the year from the date the recognition or authorisation is granted, as follows:

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

72. 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.

73. With reference to both recognised third country administrators and critical benchmark administrators, the first-year supervisory fees should be payable after the firm has been notified by ESMA that its application has been successful and within 30 days from the date of issuance of ESMA's relevant debit note.

74. Finally, in case a critical benchmark administrator is authorised during the month of December or a third country administrator is recognised in the month of December, ESMA proposes that it should not pay a first-year supervisory fee, as the administrative cost linked to such fee is not proportionate to the fee itself

For recognised third country administrators, with reference to the year in which they have been recognised, ESMA proposes the following first-year supervisory fee:

- The recognition fee adjusted by the coefficient.

For authorised critical benchmark administrators, with reference to the year in which they have been authorised, ESMA proposes the following first-year supervisory fee:

- The authorisation fee applicable to critical benchmark administrators, adjusted by the coefficient.

The coefficient to be used in both cases should be the following:

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

The first-year supervisory fees should be payable after the administrator has been notified by ESMA that its application has been successful and within 30 days from the date of issuance of ESMA's relevant debit note.

By way of derogation, where a critical benchmark administrator is authorised during the month of December or a third country administrator is recognised in the month of December, it shall not pay first-year supervisory fee.

10 Annual supervisory fees: assessment of feedback

75. In the Consultation Paper, ESMA proposed that its BMR annual supervisory fees are determined in accordance with its budgeting procedure, which takes into account all the activities that would result in supervisory efforts related to the BMR.
76. According to the proposal in the Consultation Paper, once the relevant total amount of supervisory costs for BMR is determined for the year (*the BMR supervisory budget*), these costs are allocated to each administrator it supervises. This general approach is in line with ESMA's previous technical advices for the calculation of fees.
77. In the Consultation Paper, the proposal for critical benchmark administrators was an annual supervisory fee covering the cost of direct supervision of a critical benchmark administrator. ESMA believes that these supervisory costs related to critical benchmarks will be basically fix for each critical benchmark administrator, as their supervision will need constant work and will not be affected by the level of their turnover.
78. In relation to the proposal of annual supervisory fees for critical benchmark administrators, ESMA received only supportive comments and a request for clarification. One respondent asked ESMA to clarify whether, in case one administrator provides two critical benchmarks, such administrator would have to pay a single annual supervisory fee or a double one.
79. ESMA wishes to clarify that in the case that one administrator provides more than one critical benchmark, it will have to pay a single supervisory fee. This is the case because the overall organisational and governance structure, risk governance (including conflicts of interest), internal control structure, oversight and accountability framework put in place to comply with the BMR applies to the different critical benchmarks provided by the same

administrator. Therefore, the supervisory effort required for the oversight of each critical benchmark does not result in the multiplication of the cost involved.

80. In line with this approach, BMR foresees that if one administrator provides multiple critical benchmarks, the competent authority should establish a single college of supervisor covering all the critical benchmarks provided by the same administrator¹³.
81. The wording of the final advice has been slightly amended to reflect this clarification concerning administrators of multiple critical benchmarks (see next section of this Final Report).
82. For third country administrators, the Consultation Paper proposed that they should participate with an annual supervisory fee according to the ratio of the third country administrator's specific turnover versus the total turnover of all recognised third country administrators.
83. The Consultation Paper proposed a definition of turnover as the worldwide revenues accrued from provision of benchmarks during the third country administrator's last financial year.
84. The proposal of the Consultation Paper regarding third country administrator annual supervisory fees received mixed feedback. While one respondent fully supported the proposal, the others made the following comments.
85. One respondent argued that the separation of ESMA's supervisory fees into a fixed amount for critical benchmark administrators and a variable amount for third country administrators means that third country administrators would be liable for all variations in ESMA's costs, which might lead to unduly high costs relative to the risks posed by the activity being supervised.
86. As explained in section 4 of this Final Report, the fact that ESMA defines each year its BMR supervisory budget for the following year means that such budget will take into account the number of recognised third country administrators expected for the following year. This will ensure that each year the right budget for the supervision of recognised third country administrators is defined in a way that cannot produce unduly high costs to be charged to third country administrators.

¹³ See second sub-paragraph of Article 46(5) of BMR.

87. Most of the respondents stated that the minimum fee of EUR 30,000 proposed in the Consultation Paper is too high, particularly for small administrators. Following the feedback received and the analysis of the data provided by the respondents, ESMA has lowered the minimum annual fee for third country administrator, as explained in section 10.2 of this Final Report.
88. With reference to the definition of turnover, one respondent fully supported the proposal in the Consultation Paper. The others provided the following suggestions.
89. The majority of respondents suggested to consider only revenues from licensing of benchmarks within the EU, and not worldwide revenues. ESMA originally proposed to refer to worldwide revenues because it thought the definition of this figure would require less administrative burden if compared with revenues stemming from benchmarks provision in the EU only. However, in light of the comments received, the definition of turnover has been revised and now makes reference to revenues in the EU and not to worldwide revenues.
90. A group of respondents argued that the external audit requirements proposed in the Consultation Paper to certify the turnover of each third country administrator would represent an additional and not justified cost.
91. It should be noted that imposing an external audit for the turnover figures is needed to ensure that the information provided by the third country administrators can be formally verified. With audited turnover figures, the fair treatment of all recognised third country administrators is ensured. If, instead, the turnover of each third country administrator would be provided by the administrator itself without any form of auditing, this turnover would be considered as not reliable, endangering the soundness of ESMA budget.
92. To be noted also that, with reference to CCPs, the requirement to provide audited revenues is included in the Commission Delegated Regulation (EU) 2020/1302¹⁴. So, the reference to audited revenues ensures consistency between the fees applied by ESMA to different supervised entities.
93. Other respondents proposed a complete definition of turnover based on the number of benchmarks provided by the third country administrators, with a potential distinction between significant and non-significant benchmarks provided by the administrators.

¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R1302&from=EN>

94. While Article 48l(2) of BMR requires the individual fees to be proportionate to the turnover of administrators, the word “turnover” of administrators is present also in other Articles of BMR. Turnover is a term that is used in Article 42 of BMR, on administrative sanctions and other administrative measures, Article 43 of BMR, on exercise of supervisory powers and imposition of sanctions, Article 48e of BMR, on supervisory measures by ESMA, Article 48f of BMR, on fines, and Article 48g of BMR, on periodic penalty payments. In these five Articles of BMR the meaning of turnover is always a monetary value.
95. The definition of turnover as revenues therefore ensures consistency with other provisions within the BMR and also with other fees framework applied by ESMA vis-à-vis different supervised entities.
96. ESMA believes that revenues accrued from the provision of benchmarks in the EU represent the best measure of the third country administrators’ activities. For these reasons, the definition of turnover included in section 10.3 of this Final Report still refers to revenues stemming from the provision of benchmarks, with the only amendment being that reference is made to revenues in the EU and not to worldwide revenues.

10.1 Annual supervisory fees critical benchmark administrators: final proposal

97. According to BMR, the failure of critical benchmarks can impact market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the EU. The supervision of a critical benchmark is therefore a crucial responsibility for which ESMA will dedicate appropriate resources.
98. The classification of a benchmark as critical benchmark under points (a) and (c) of Article 20(1) does not take into account the turnover of the administrator. It does instead consider quantitative and qualitative criteria (e.g. its extensive use in financial instruments, contracts and investment funds in the EU). These criteria indicate that the existence and accuracy of the critical benchmark are relevant for market integrity, financial stability or consumer protection in the EU.
99. As explained in the Consultation Paper, the size of the turnover of an administrator of a critical benchmark does not really impact the amount of resources that a competent authority has to dedicate for the supervision of a critical benchmark. It is instead the important role that it plays in the EU financial system that determines the amount of resources needed for its proper supervision.

100. Irrespective of the turnover of the administrator of a critical benchmark then, ESMA will have to bear important costs for the supervision of each critical benchmark administrator.
101. In line with the approach for the authorisation of a critical benchmark administrator, one additional factor to be considered is whether the supervision of the critical benchmark includes the creation of a college of supervisors that should be established and consulted by ESMA in accordance with Article 46 of BMR.
102. A college of supervisors should be established when a critical benchmark under either point (a) or (c) of Article 20(1) is based on input data provided by contributors the majority of which are supervised entities (as defined in point 17 of Article 3(1)).
103. Against this background, ESMA proposes in its final advice that the annual supervisory fee to be paid by the administrator of one or more critical benchmarks supervised by ESMA should not be proportionate to the turnover of the administrator but rather reflect the expected supervisory effort required for the oversight of the critical benchmark. In this respect, the annual supervisory fee should be higher when ESMA chairs a college of supervisors dedicated to the supervision of the critical benchmark(s).
104. The experience of national competent authority dealing with critical benchmarks under points (a) or (c) of Article 20(1) indicates that the critical benchmark administrators requires continuous actions by the relevant supervisory officers. During a year, the work of the supervisory officers in relation to a critical benchmark will be constant and not limited to a certain number of months.
105. For this reason, in line with the Consultation Paper, ESMA proposes a basic annual supervisory fee equivalent to about 0.8 FTE, i.e. EUR 155,000. In cases where ESMA has to chair a college of supervisors dedicated to the oversight of the critical benchmarks, the annual supervisory fee is proposed to be equivalent to one FTE, i.e. EUR 195,000.

For each administrator of one or more critical benchmarks supervised by ESMA, ESMA proposes the following annual supervisory fees:

- An annual supervisory fee of EUR 195,000, in cases where ESMA has to chair a college of supervisors;
- An annual supervisory fee of EUR 155,000, in cases where ESMA does not have to chair a college of supervisors.

10.2 Annual supervisory fees for third country administrators: final proposal

106. The approach proposed to compute the annual supervisory fees payable by third country recognised administrators is based on the notion of turnover, which is defined in the next section of this Final Report.
107. To calculate the annual supervisory fee to be paid by recognised third country administrators, ESMA confirms the approach proposed in the Consultation Paper. The starting point is the BMR supervisory budget for the year N, defined by ESMA in the year N-1. The annual supervisory fees to be paid by administrators of critical benchmarks supervised by ESMA for the year N should be deducted from the BMR supervisory budget for the year N. The remaining BMR supervisory budget for the year N should then be covered by the annual supervisory fees to be paid by the recognised third country administrators.
108. These costs should be allocated to each third country administrator (in the form of an annual supervisory fee) according to the ratio of the third country administrator's turnover to the total turnover of all recognised third country administrators supervised by ESMA. Additionally, the minimum annual supervisory fee for a third country administrator should be defined for the following reason.
109. ESMA adopts a risk-based approach to supervision and, as set out in its supervision work programme, prioritises the supervisory actions that it will take each year in accordance with its objectives of promoting financial stability, orderly markets and enhancing investor protection. ESMA's risk-based approach will be extended to the supervision of third country administrators under the recognition regime.
110. However, although specific supervisory actions may vary per third country administrators, ESMA will systematically undertake a minimum level of supervisory activities in order to be able to perform its tasks, i.e. ESMA bears fixed costs in relation to each recognised third country administrator. Therefore, ESMA believes that a minimum annual supervisory fee is warranted.
111. Following the comments received by the respondent, ESMA considers that the minimum annual fee to be paid by a recognised third country administrators should be EUR 20,000 and not EUR 30,000. This reduction follows the analysis of the figures and calculations provided in the replies to the Consultation Paper. Also, the new minimal annual fee takes into account the efficiency gains that should emerge from the

supervision of multiple third country administrators at the same time. This minimum amount is proposed to be also applicable in cases where the turnover of the third country administrator is equal to zero.

For recognised third country administrators, ESMA proposes annual supervisory fees defined as follows:

- The annual supervisory fee of a recognised third country administrator for a given year (n) should be the total annual fee for recognised third country administrators adjusted by the turnover coefficient.
- The total annual fee for recognised third country administrators for a given year (n) should be equal to the BMR supervisory budget for the year (n) minus the annual supervisory fees to be paid to ESMA by critical benchmark administrators for the year (n).
- For each third country administrator, the turnover coefficient should be its share of the applicable turnover in the aggregate turnover generated by all recognised third country administrators.

$$\text{Turnover Coefficient "administrator i"} = \frac{\text{applicable turnover of administrator i}}{\sum \text{applicable turnover of all third country administrators}}$$

- The minimum annual supervisory fee for recognised third country administrators should be EUR 20,000, including when the applicable turnover of the recognised third country administrator is equal to zero.

10.3 Definition of applicable turnover: final proposal

112. In line with the technical advice under SFTR, EMIR and Securitisation Regulation, ESMA proposes that the term ‘turnover’, for the purposes of implementing Article 48I(2) of BMR, should be based on revenue figures. This is the approach proposed by ESMA in the Consultation Paper and confirmed in this Final Report for the reasons included in section 10 of this Final Report.

113. Also, as explained in Section 10 of this Final Report on “Annual supervisory fees: assessment of feedback”, the turnover should consider only the revenues stemming from

the activities of benchmarks provisions in the EU, as recommended by the majority of respondents, and not worldwide revenues, as first suggested in the Consultation Paper.

114. The final proposal is therefore to use third country administrators' revenues from benchmarks provision in the EU as an appropriate proxy for reflecting their turnover. On the basis of this, the annual fees to be paid by third-country administrators will be defined.
115. To enable the identification of European revenues stemming from the provisions of benchmarks to be performed smoothly and accurately, ESMA proposes that recognised third country administrators would regularly prepare and share with ESMA the audited figures of the revenues generated by the provision of benchmarks in the EU.
116. European revenues of third country administrators stemming from benchmark provision may be reported in currencies different from the EUR. ESMA should convert them into EUR using the average EUR foreign exchange rate applicable to the period during which the revenues were recorded. For that purpose, the euro foreign exchange reference rate published by the European Central Bank should be used.
117. ESMA is aware that the business year for the third country administrators may differ. However, ESMA proposes to compare administrators' European revenues from benchmark provision as an appropriate proxy for reflecting turnover in the fees to be paid by third-country administrators.
118. To simplify and reduce the reporting burden, ESMA proposes to look at revenues in the administrator's last reporting year, despite the fact that reporting years and accounting standards may differ between administrators. The relevant information should be readily available to administrators and, in some cases, it may be a public figure included in annual reports.
119. The relevant turnover of administrators supervised by ESMA should therefore be their European revenues accrued from provision of benchmarks during the administrators' most recent financial year.
120. These revenues, as motivated in section 10 of this Final Report, should be audited. The audited figures should be submitted to ESMA no later than 30 September each year. The documents containing audited figures should be provided in a language custom to the financial services.
121. With reference to third country administrators recognised by NCAs before the end of 2021, they should provide ESMA with the relevant turnover of 2021 by 31 January 2022,

so that ESMA can calculate the relevant annual supervisory fee for the year 2022 by 31 March 2022.

The relevant turnover of a recognised third country administrator should be its revenues accrued from provision of benchmarks in the EU during the administrator's last financial year.

A recognised third country administrator should provide ESMA, on an annual basis, with audited figures confirming its revenues accrued from the provision of benchmarks in the EU. The figures should be certified by an external audit and should be submitted to ESMA by electronic means no later than 30 September each year. If a third country administrator was recognised after 30 September, it should provide the figures immediately upon recognition and by end of the year of recognition. The documents containing audited figures should be provided in a language custom to the financial services.

If the revenues reported are expressed in a currency that is not the EUR, ESMA should convert them into EUR using the average EUR foreign exchange rate applicable to the period during which the revenues were recorded. For that purpose, the EUR foreign exchange reference rate published by the European Central Bank should be used.

Third country administrators recognised before 1 January 2022 should provide ESMA with their turnover of 2021 by 31 January 2022.

11 Supervisory fees related to the preparatory work: assessment of feedback and final proposal

122. As mentioned in section 4 of this Final Report, for the years 2020 and 2021 ESMA will receive by the European Commission a total amount of around EUR 500,000 to cover the expenditures related to the preparatory work needed for the fulfilment of ESMA supervisory tasks under BMR. This preparatory work covers duties related to both third country administrators and administrators of a critical benchmark. ESMA will have to reimburse the Commission in a three-year period: from 2022 to 2024.

123. During the years 2022, 2023 and 2024 ESMA therefore has to collect extra-fees for a total amount of EUR 500,000, i.e. roughly EUR 167,000 per year.

124. In order to recover this amount of money by administrators it supervises in the three relevant years, the Consultation Paper proposed that each administrator supervised by ESMA contributes with an yearly extra-fee (in 2022, 2023 and 2024) proportionally to the amount paid by each administrator as its annual supervisory fees over the total BMR supervisory budget for that year.

125. For example, if in the year 2022 ESMA BMR supervisory budget is fixed to EUR 1 million, and a recognised third country administrator is asked to pay EUR 50,000 for annual supervisory fee, its contribution to the BMR supervisory budget is equal to 5% of the total BMR supervisory budget. This third country administrator will have therefore to pay, in addition to its annual supervisory fee of EUR 50,000, an extra-amount of EUR 8,350, corresponding to the 5% of the EUR 167,000 that ESMA has to charge in 2022 to repay the advancement to the European Commission.

126. Two respondents argued that, in light of the longer transitional period applicable to third country administrators, the fee structure will incentivise late applications for recognition. While this is likely, ESMA has a contractual obligation to reimburse the European Commission in the years 2022, 2023 and 2024, so the repayment of the advancement by the Commission cannot be postponed to the end of the transitional period, as suggested by the two respondents.

127. So, in this Final Report ESMA confirms the approach included in the Consultation Paper.

In addition to the annual supervisory fee, for the years 2022, 2023 and 2024, ESMA will charge the administrators 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 administrator supervised by ESMA should pay the additional fee proportionally to the ratio of its annual supervisory fee over the total BMR supervision budget.

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.

12 Payment and reimbursement conditions

12.1 Timing of payment of recognition and authorisation fees: assessment of feedback and final proposal

128. In line with the established practices for the payment of fees to ESMA under other Regulations, the Consultation Paper proposed that the fees for recognition of third country administrators and the fees for authorisation of administrators of critical benchmarks are due at the time of application for recognition / authorisation and should be paid by administrators upon the initiation of the recognition / authorisation process. This will result in only one payment made by each administrator.

129. There were no substantial comments provided by respondents to this section of the Consultation Paper, and therefore the original proposal is retained in this Final Report.

ESMA proposes that the recognition fees, to be paid by third country administrators seeking recognition, and the authorisation fees, to be paid by administrators of critical benchmarks, should be paid when administrators submit their applications to ESMA, upon receipt of a debit note from ESMA.

12.2 No reimbursement of fees in case of withdrawal of application by an administrator: assessment of feedback and final proposal

130. In the Consultation Paper, ESMA proposed to not reimburse fees to a third country administrator which decides to withdraw its application before recognition is granted by ESMA. Similarly, ESMA proposed to not reimburse fees to a critical benchmark administrator which decides to withdraw its application before authorisation is granted by ESMA.

131. This is because the handling of applications and the relevant preparatory work are being incurred by ESMA already before the withdrawal. The same approach has been taken with regards to fees for registration and extension of registration under EMIR and SFTR as well as to the application part of the recognition fee under SFTR. The main reasons supporting this proposal are the following:

- Lowering the expected cost of an incomplete process (by reimbursing a part of the fee) could allow for spurious applications;
- 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
- ESMA has to concentrate the limited resources available on the applications that carry a true intention of becoming a third country administrator or administrator of a critical benchmark and to discourage the submission of spurious applications.

132. There were no substantial comments provided by respondents to this section of the Consultation Paper, and therefore the original proposal is retained in this Final Report.

ESMA proposes to not reimburse fees to a third country administrator that decides to withdraw its application for recognition.

ESMA proposes to not reimburse fees to an administrator of a critical benchmark that decides to withdraw its application for authorisation.

12.3 Timing of payment of annual supervisory fees: assessment of feedback and final proposal

133. To fully support its supervisory activities vis-à-vis administrators, the Consultation Paper proposed that ESMA will be receive the annual supervisory fees in the first three months of the calendar year and at the latest on 31 March each year.

134. There were no substantial comments provided by respondents to this section of the Consultation Paper, and therefore the original proposal is retained in this Final Report.

135. This means that ESMA should compute the relevant annual supervisory fees for benchmark administrators it supervises by the end of Q4 of the previous year. In all cases, ESMA should send invoices to all administrators it supervises specifying the amount of the annual supervisory fees at least 30 calendar days before the day when annual fees are to be paid.

136. Given the frequency of performance of ESMA's activities, they will produce administrative effects and potential changes in fees only from one calendar year to another.

137. This approach is aligned with the ESMA's budgeting approach outlined in Section 4 of this Final Report on ESMA's budgeting model.

ESMA proposes that administrators 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.

12.4 Reimbursement of competent authorities: assessment of feedback and final proposal

138. As set out in Article 48m(3) of BMR, any costs incurred by national competent authorities while carrying out supervisory tasks delegated by ESMA will be covered by ESMA's supervisory fees. This implies that, when a delegation of tasks takes place, the national competent authority will not seek to recover these costs directly from the administrator of benchmarks.

139. To be noted that, according to Article 48m(1), the authorisation of critical benchmarks cannot be delegated by ESMA.

140. In the Consultation Paper, ESMA proposed that the costs to be reimbursed to national competent authorities must:

- have been previously agreed between ESMA and the competent authority;
- be calculated in accordance with the method used to determine ESMA's total administrative costs regarding administrators of benchmarks; and
- not be greater than the total amount of supervisory fees paid by the relevant administrators of benchmarks.

141. There were no substantial comments provided by respondents to this section of the Consultation Paper, and therefore the original proposal is retained in this Final Report.

ESMA should solely charge the recognition fee and the annual supervisory fees for third country administrators and administrators of critical benchmarks.

ESMA should reimburse a competent authority for the costs incurred as a result of any delegation of tasks pursuant to Article 48m of BMR, in accordance with Article 48a of BMR, with an amount which is agreed by ESMA and the competent authority before the delegation of tasks take place and which is:

- calculated with the same method used to determine ESMA's total supervisory costs regarding administrators of benchmarks; and
- always lower than the total amount of supervisory fees paid to ESMA by the relevant administrators of benchmarks.

13 Annex

MANDATE Technical Advice ESMA for Regulation (EU) 2019/2175

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) No 600/2014 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

¹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84.

² Communication of 9.12.2009. COM (2009) 673 final.

³ OJ L 304, 20.11.2010, p. 47

limitation periods for the imposition and enforcement of fines and periodic penalty payments (Article 38k(10) of (EU) No Regulation 600/2014);

1. 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:

2. 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);
3. 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.
- 2) 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 II BMR

- 2) 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.

2) 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 481(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.