



European Securities and
Markets Authority

Final Report

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



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I. Executive Summary

Reasons for publication

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

In order to deliver its advice to the Commission, ESMA consulted market participants regarding the proposed fee structures for registration, supervision and recognition of TRs. Respondents to this consultation were encouraged to provide the relevant data to support their arguments or proposals.

Given the time period established for providing this advice, ESMA was compelled to require responses to the consultation within a short timeframe.

In total, ESMA received 8 responses to the consultation. Non-confidential responses can be found on ESMA's website. ESMA would like to thank respondents for providing input given the short period ESMA was able to consult for.

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This document sets out a summary of the responses received by ESMA regarding the fee structure for registration, supervision and recognition of TRs in the EU and includes ESMA's final technical advice to the Commission on the future Regulation on fees for TRs which will be adopted by the Commission in the form of a delegated act.

It is worth noting that all major ESMA proposals were supported by respondents and where comments were received ESMA has considered how best to adjust the original proposals.

Next steps

ESMA will follow-up on this work with the Commission as they work on the adoption of the Commission delegated regulation on fees for TRs.

II. Introduction

1. On 14 January 2013 the European Securities and Markets Authority (ESMA) received a formal request from the European Commission (Commission) to provide technical advice to assist the Commission in formulating an EU Regulation on fees for Trade Repositories (TRs) by delegated act. The advice is to be delivered to the Commission by 31 March 2013.
2. According to Article 72 of Regulation (EU) No 648/2012 of the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories (EMIR), ESMA shall charge fees that shall fully cover all ESMA necessary expenditure relating to the registration and supervision of trade repositories and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to EMIR and, in particular, as a result of any delegated tasks.
3. ESMA already provided a precise analysis of the activities and resources needed in the Report to the European Parliament, the Council and the Commission on the budgetary implications of EMIR, on staffing and resources¹ (report on staffing and resources).
4. Furthermore, ESMA took into account the Commission Delegated Regulation (EU) No 272/2012² (Regulation on CRA Fees), with regard to fees charged to credit rating agencies (CRAs) and the previous technical advice provided by ESMA to the Commission in that respect.
5. Given the time period established for providing its advice, ESMA consulted stakeholders from 20 February 2013 to 6 March 2013. A total of 8 submissions were received by ESMA (a list of respondents which submitted non-confidential opinions is set out at Annex I and their responses have been published on the ESMA website³). Responses were received from market infrastructures (5), a trade association, an asset management company and a service provider.
6. This final report contains a summary of the responses received by ESMA and the rationale for retaining or amending the text of its advice to the Commission following the consultation process.

III. Analysis of the responses to the consultation

7. All the respondents broadly agreed with the proposed fee structure and supported ESMA's effort to provide the Commission with sound advice on the fee structure applicable to TRs.
8. The criteria used to estimate the level of expected turnover of a TR for the purposes of determination of registration fees were among the most widely discussed proposals. Several comments and remarks for the removal of some of the criteria or the inclusion of new ones were received. Nevertheless, all the proposals for alternative criteria, such as complexity of IT infrastructure, number of employees, etc., were already considered internally before the publication of the consultation and they are included in the paper as qualitative characteristics of a TR, but they were finally discarded on the basis of the difficulty to quantify or calibrate them appropriately.

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

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

³ <http://www.esma.europa.eu/consultation/Consultation-ESMA%E2%80%99s-Technical-Advice-Commission-Fees-Trade-Repositories#responses>

9. The treatment of the provision of ancillary services was subject to contradictory opinions among the participants in the consultation. One respondent was totally against the use of ancillary services for the calculation of both registration and supervision fees, because it considered that their use as a criterion would distort the market in ancillary services between trade repositories and other providers. Two respondents wanted to limit ancillary services to those related to derivatives repository activity under EMIR. Two other respondents were against the use of revenues from ancillary services for the calculation of turnover, but considered the provision of ancillary services as a criterion that should be taken into account while classifying TRs between the proposed categories and thus, implicitly, consider it as a descriptor of expected turnover. ESMA has amended accordingly the delimitation of revenues for the purposes of calculation of applicable turnover and has clarified how the offering of ancillary services should be assessed during the registration process.
10. One of the respondents expressed concerns about the timing of the consultation on fees since it took place after TRs' fees structures are already determined and the business model is defined, leaving them with little room for manoeuvre. Furthermore the same participant raised concerns regarding the amounts of the fees, although the concerns were based on assumptions which may or may not be fulfilled. Finally, that participant indicated that it would need to revise its own fee structure.
11. Although the argument on timing is worth considering, it is important to highlight that ESMA published the consultation paper on fees only a month after the receipt of the mandate from the Commission.
12. Finally, one respondent asked ESMA to conduct a further consultation in case the advice to the Commission changes on the basis of the feedback to the consultation. Given that the proposed changes take into account and broadly reflect the opinions of the respondents, an additional consultation is deemed unnecessary.

Expected Costs for ESMA

13. One of the participants in the consultation suggested that trade repositories are consulted on the portion of future operational budgets of ESMA that relate to the supervision of trade repositories, to help ensure that supervisory operations are being conducted in an efficient manner. Given the existence of direct conflicts of interest, ESMA does not consider that such practice should be put in place and considers that its budget process is sufficiently transparent and ESMA is fully accountable. ESMA's budget for the following year(s) is approved in advance and published on ESMA's website and ultimately agreed by the European budget authorities (European Parliament and Council). This should reassure and provide clarity for registered TRs as far as ESMA's expenses regarding TR supervision. In the consultation paper, ESMA not only presented a summary of the report on staffing and resources, but also included a link to it. ESMA will annex this report to its final advice to the Commission.

Turnover

14. Turnover is a key variable for TRs and for ESMA, since EMIR provides that fees charged to a TR shall be proportionate to its turnover. While elaborating the consultation paper, ESMA took into account the Regulation on CRA fees. Given the TR industry structure, ESMA believes it is appropriate to use an enhanced metric for turnover, which does not rely only on revenues as in the case of CRAs.
15. The need for such a metric was already considered when the Commission invited ESMA to provide its technical advice on an appropriate method for considering the turnover of the TR in fee calculations. ESMA was invited to provide its technical advice on the appropriate method for considering the turnover of the TR in fee calculations, including the use of activity indicators when revenues figures are

not yet existent, are not reliable or are not an adequate measure of the trade repository activity. Accordingly, ESMA proposed the use of the following activity indicators that complement financial revenue, from both core and ancillary services, in turnover calculations: (i) number of trades reported to a given trade repository for a certain period (i.e. one year) and (ii) number of recorded outstanding trades at the end of each period.

16. ESMA proposed in the consultation paper the use of the following formula regarding the determination of the proportion of turnover of a particular TR to the total turnover of all supervised TRs:

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

17. The inclusion of the revenues from ancillary services raised major concerns among the participants in the consultation. The majority of them asked for the removal of revenues from ancillary services from the turnover calculation and thus from the determination of fees, although two of them asked only for the removal of revenues from non-repository ancillary services. ESMA believes that it is important to highlight that the only ancillary services to which the consultation paper on fees refers are EMIR-like ancillary services, i.e. such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services. Having said this and as further explained in paragraph 25, ESMA understands the rationale behind the opinions expressed and will amend its technical advice accordingly. The turnover calculation will be limited to the revenues from core services and will exclude the revenues from all ancillary services. Accordingly, the TR should maintain on an on-going basis clear operational separation of core and ancillary services and produce clear financial and accounting records of both types of services.

18. No comments were received with regard to ESMA's proposal for extrapolating the relevant data for the whole financial year, where a TR did not operate during the full year.

19. The calculation of a TR's turnover, besides the composition of revenues, raised a lot of proposals for its calibration. One of the respondents proposed the use of profit instead of revenues. ESMA believes that the use of profit will introduce an unlevelled playing field for TRs, since different cost structures may exist and, furthermore ESMA would not like to penalise more efficient organisations, which *ceteris paribus* may have greater profit than less efficient ones and thus would have to pay higher fees.

20. One respondent proposed turnover indicators from recognised TRs to be included in the calculation of total turnover, since in its opinion, there would be a very real risk that the majority of supervisory costs for EMIR will be carried by firms that have relatively little market share. Based on ESMA's experience with certified CRAs, the idiosyncrasy of the recognition process and the contacts maintained with potential applicants, ESMA believes that such a situation is very unlikely. Furthermore, the applicable amount of annual supervisory fees will be reduced by the recognition fees received. In case the development of the trade repository market indicates a potential imbalance and unlevelled playing field, ESMA will accordingly advise the Commission.

21. As a result of the comments received, ESMA amends the formula for calculation of turnover as follows:

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

22. In order to allow TRs accurately to forecast their regulatory fees, one respondent proposed for ESMA to publish on a regular basis (monthly or quarterly) aggregate data on each of the indicators. In this

respect, ESMA is already exploring the channels of making available the aggregated data on repository activity.

23. ESMA proposed to prepare a report for the European Commission by 2016, regarding the possibility of simplifying the approach for the determination of the applicable turnover and, if certain conditions are met, to propose to the Commission the application of a similar method to the one provided in Article 3 of the Regulation on CRA Fees. The respondents to the consultation did not express any opinion with respect to this proposal.

Trade Repositories Fees Framework

24. In order to establish a homogeneous and sound framework for TRs supervisory fees, consistent with the Commission Regulation on fees for CRAs, ESMA proposed that only ESMA shall charge fees for the registration, recognition and supervision of trade repositories operating under EMIR. ESMA stated that national competent authorities shall not charge fees to trade repositories, including (i) cases where those authorities carry out tasks on behalf of ESMA, according to Article 74 of EMIR⁴, or (ii) in cases of previous registrations under national regimes or (iii) where TRs carry out ancillary services, unless registration or authorisation for the provision of such services is required by EU or national law.

25. One market infrastructure and a trade association raised concerns regarding the possibility that both ESMA and the national competent authority are charging TRs fees for ancillary services or non-repository services for which TRs were registered or authorised in their home country, because, according to both respondents, ESMA has not challenged the powers of the local authority to charge fees for the supervision of ancillary or non-repository services. As previously said, the only ancillary services to which the consultation paper on fees refers are EMIR-like ancillary services, i.e. trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services, among others. Based on the feedback received, ESMA has decided to exclude the revenues from ancillary services from turnover (and thus, annual supervisory fees) calculations and assess the offering of ancillary services only with respect to the registration process.

26. Another entity asked for confirmation that NCAs will not look to recover costs from a particular TR, in case they carried out tasks delegated by ESMA. ESMA considers that this situation was already addressed in the consultation paper and it will be incorporated into the final proposal.

27. Among the three basic methods of levying fees, i.e. general flat fee, specific administrative actions fee and a mixed system, ESMA proposed the use of a mixed system. As a consequence ESMA considers levying specific administrative actions fees for the registration process, since it is initiated by the TRs and an annual fee proportionate to the level of turnover of the TRs for on-going supervision.

28. This approach was broadly agreed. A participant in the consultation further suggested that ESMA should reserve the right to levy additional fees against TRs that consume a disproportionate amount of supervisory time relative to their turnover because of operational reasons such as poor quality control of trades reported to it, problems with systems and controls etc. Although ESMA agrees with such proposal, it deems it to be extremely difficult to apply special supervisory fees for “excessive supervision”. Notwithstanding this, if there are indications that the mentioned situations may

⁴ Please refer to section 0. [Reimbursement of costs to national competent authorities](#) for a detailed explanation

constitute one or more of the infringements listed in Annex I of EMIR, this may give rise to the imposition of fines or penalties as those provided in Articles 65 and 66 of EMIR.

29. Furthermore, and in order to cover ESMA's fixed costs relating to supervision, ESMA proposed the establishment of a minimum annual supervisory fee. No adverse opinions were received on this proposal.

Registration Fees

30. Regarding the registration fees, ESMA initially highlighted that the most reliable and easy to be quantified characteristics to determine TR's expected level of total turnover and thus ESMA supervisory effort during the registration process would be (i) types and classes of derivatives, (ii) type of venue of execution and (iii) types and number of ancillary services. ESMA proposed the following criteria:

- a) A TR receives reports for derivatives traded over the counter;
- b) A TR covers at least three derivative classes⁵; and
- c) A TR offers ancillary services.

31. As previously explained, the provision of ancillary services has raised concerns among respondents. Some were against its use and one respondent expressed its concerns that it would distort the market in ancillary services between trade repositories and other providers. Some others consider it as a useful criterion for the determination of the expected level of turnover. Moreover, one of the respondents proposed to use not only the provision of ancillary services as a dummy variable, but also to differentiate among types of ancillary services, although it did not provide any further guidance in this respect. ESMA strongly believes that the offering of ancillary services by a TR increases the supervisory effort during the registration process since ESMA will have to check a number of aspects specifically in relation to the interaction of the TR with the ancillary services that are based or dependent on the TR data. In particular, the following aspects should be assessed and examined accordingly, specifically for the case where ancillary services are provided: (i) operational reliability, (ii) availability and proportionality of resources of repository activity, (iii) access to data by regulators, (iv) access to data by reporting parties and service providers, (v) cost allocation and determination of fees to reporting parties, and (vi) IT systems architecture, confidentiality of data and use of data for commercial purposes.

32. Against this background, ESMA proposes that the offer of ancillary services remains as a qualitative variable for the determination of a registration category. Furthermore, ESMA explains that the offer of ancillary services includes (i) direct provision by the TR legal entity, (ii) indirect provision by an entity in the same holding group as the TR and (iii) provision by a third entity with which the TR has a material agreement in the context of the trading or post-trading chain or business line to cooperate in the provision of services. ESMA considers that any of the three forms of provision of ancillary services requires an additional supervisory effort by ESMA and accordingly must be taken into account.

33. Several participants in the consultation agreed that exchange-traded derivatives, although accounting for greater number of transactions, present several features which make their reception by the TR far easier than OTC derivatives, such as: (i) they are matched, (ii) usually they are cleared and (iii) they are

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

not subject to compression. Furthermore, the message flow to a TR is more stream-lined than for OTC derivatives and the cost for capturing information are lower.

34. On the matter of the possible acceptance of a subset of transactions, which is related to the adoption of the type of execution as one of the proposed criteria for the determination of registration fees, there are several elements to consider. On the one hand, ESMA wanted to highlight that EMIR, contrary to the US Dodd-Frank Act: (i) does not impose explicitly on a trade repository, once registered to collect transactions in one asset class, to collect all the contracts that can be concluded in such asset class and (ii) requires the reporting of exchange traded derivatives. On the other hand, Article 78(7) EMIR provides that TRs shall have non-discriminatory requirements for access by reporting parties. This provision against discriminatory access and the triggering effect for the reporting obligation (which is related to registration of a TR in a particular class and has effects on the obligation to report contracts in the whole class) would be hard to reconcile with the case of a TR accepting only a small type or subset of derivative transactions (ETD or OTC only). Overall, considering all the above elements, ESMA considers that TRs should remain available to receive reported trades in the class they are registered for irrespective of their venue of execution and therefore ESMA proposes to exclude the criterion of venue of execution from registration fee determination.
35. Some of the participants proposed the deletion of venue of execution and ancillary services as criteria for the determination of the registration fee and accordingly they asked for further calibration of the number of derivatives which trigger a classification between the categories, if staying as a sole criterion. ESMA strongly believes that using only one criterion to classify a TR will be counterproductive and will not capture the difficulty to assess and examine an application for registration. ESMA would like to clarify that the offering of ancillary services would include cases where the TR provides them directly, cases where another company in the group of the TR provides them and cases where a third party provides them under an agreement with the TR. The final advice has been clarified in that respect.
36. Accordingly the proposed criteria for determination of registration fee are as follows:
- a) A TR covers at least three derivative classes; and
 - b) A TR offers ancillary services.
37. Taking into consideration the responses to the consultation, ESMA has decided to modify its proposal on criteria for the classification of TRs, by excluding the criterion on venue of execution and accordingly ESMA has amended the classification in each of the three categories. If a particular TR meets both criteria, it would be deemed to be a high expected total turnover (HET). In case a TR fulfils only one of the above criteria it should be considered medium expected total turnover (MET). In case a TR does not fulfil any of the above criteria, it would be deemed low expected turnover (LET).
38. Although ESMA considered the application of a flat registration fee, for its advice to the Commission, ESMA will finally propose the registration fees based on the level of expected turnover and which takes into consideration all of ESMA's expenditure, as stated in EMIR. For the purposes of setting the registration fee band, ESMA believes that they should reflect the expected turnover of the applicant on the basis of the criteria described above. None of the participants in the consultation was in favour of a flat registration fee.
39. Using the estimated workload, which is expressed in a detailed manner in the report on staffing and resources and the expected level turnover of applicant TRs, ESMA proposed the following three bands of registration fees: low expected turnover, medium expected turnover and high expected turnover.

40. In the opinion of one respondent, the fees between different categories of repositories (LET, MET and HET) should remain at the same level and a diversity of fees would be justified only if TRs from one category have significantly higher turnover than repositories from other categories. Another respondent raised doubts regarding the difference in supervisory effort and thus registration fees between LET and HET. Based on the CRAs experience, ESMA has estimated its costs for the assessment and the examination of each one of the classes of TR applicants and accordingly has considered that a HET application may require twice more effort than a LET application.
41. With respect to a doubt on how the fees are going to be specified in the regulation on fees for TRs, i.e. as a concrete amounts or as a band, ESMA points out that in its final advice ESMA will provide the Commission with the exact amounts of fees to be charged for registration.
42. As previously referred in paragraph 10, there was only one entity - which provided a confidential reply to the consultation – that expressed some concerns with respect to the total amount of fees it was supposed to pay, but its estimations were based on assumptions which may or may not be fulfilled. None of the rest of respondents raised any concern or opposed the amounts of registration fees as proposed by ESMA.

Annual Supervisory Fees

43. ESMA proposed that the relevant amount for the calculation of the annual supervisory fee charged to a registered TR for a given year, as in the case of CRAs, should be based on the estimate of expenditure relating to the supervision of TRs as included in ESMA’s budget for that year set out and approved in accordance with Article 63 of Regulation (EU) No 1095/2010, decreased by (i) recognition fees charged to third country TRs, (ii) registration fees and annual supervisory fees paid by new TRs, or by already registered TRs, in case a material change to their registration takes place and (iii) surplus of annual supervisory fees from the previous year, and increased by the deficit of annual supervisory fees from the previous year. The method for determination of the relevant amount of annual supervisory fees was not commented on. Only one participant requested that trade repositories are consulted on the portion of future operational budgets for ESMA that relate to the supervision of trade repositories, to help ensure that supervisory operations are being conducted in an efficient manner. The rationale for not accepting such a proposal is explained in paragraph 13 of this final report.
44. Given that there are some fixed administrative costs regarding post-authorization supervision of TRs, ESMA proposed the introduction of a minimum fee of between 20,000 and 40,000 euro. No comments were received on this proposal.
45. Furthermore, ESMA proposed a specific supervisory fee regime for newly registered TRs, which may be described by the following formula:

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

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

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

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

46. One respondent proposed to base the annual supervisory fee for the first year of operations of a TR on its turnover at the end of the year as opposite to the approach set out in the consultation paper to calculate the supervisory fees for the first year of operations of TRs on their registration fee and further

adjust it by a coefficient. This approach is practical but has two main drawbacks: firstly, ESMA shall dispose of the necessary resources for supervision of TRs in advance, to utilise them during the year and charging a fee only at the end of the year will run contrary to this expenditure pattern; secondly, it would mean that ESMA is going to use the same data for the calculation of annual fees in two exercises (first year and second year) and this is not an ideal approach.

47. Another respondent proposed the use of a flat supervisory fee for TRs for the first 6 months of reporting in a given class, given there are no activity statistics; then – on the basis of the preceding six-month period - calculate the supervisory fees for the following 6 months and finally level out the fees (charge or rebate) paid by each TR. ESMA believes that using for the calculation of fees periods that are different from the entire exercise, for example 6 months, will make the calculations more complex, will expose TRs to additional uncertainty, and finally, charging an equal price in 2013 for supervisory fees will not be EMIR-compliant. As ESMA has explained in its proposal, 2014 supervisory fees are going to be based on the level of activity in 2013 and to that extent TRs are going to be charged on a 'real' basis.
48. It is worth noting that ESMA proposes that any surplus or deficit arising as a consequence of annual supervisory fees shall be taken into account for the purposes of determination of the relevant amount of supervisory fees for the following year.

Recognition of third country TR

49. As described in the report on staffing and resources, ESMA estimates that the cost of equivalence assessment for a complex jurisdiction would be around 50,000 euro (this would include the overall assessment of rules on OTC derivatives, reporting to TRs, TRs and CCPs requirements). Of those, 15,000 euro can be considered to be the cost for assessing the equivalence of trade repositories rules. Some additional costs, such as several rounds of negotiations and travelling are also considered as necessary for the establishment of a cooperation agreement with a third country authority.
50. ESMA considers that the final cost of the process (equivalence, recognition process and establishment of the cooperation agreement) should be around 55,000 euros and to that extent, fees charged for recognition should fully recover it.
51. ESMA proposed two different ways of charging fees to recognised TRs. On the one hand, ESMA proposed to charge to the first TR which applies for recognition a higher fee - 35,000 euros - than to the second applicant, which ESMA initially proposed to be charged only 20,000 euro, due to the fact that the equivalence assessment and the MoU with the foreign supervisor will have already been completed before the first recognition process and should not be double counted in the second and subsequent ones. An alternative approach ESMA considered was to recalculate the fees charged to all recognised entities and to level them out by reimbursing the already recognised entities. Two respondents were in favour of the second approach, i.e. to level the fees for recognised TRs from the same jurisdiction. Furthermore, ESMA has noticed that in its initial proposal one of the components (the one related to the assessment of the recognition application) was not incorporated in the total amount and has amended accordingly the final text to include it. To that extent, ESMA finally proposes to charge to the first entity from a jurisdiction a fee which covers all fixed and variable costs related to the recognition. The first entity to apply is going to be charged 55,000 euros and, in case of subsequent applications for recognition, the already recognised entities are going to be reimbursed the proportionate cost of the equivalence assessment and of the establishment of a cooperation agreement.
52. ESMA proposed a reduced annual supervisory fee for recognised TRs that some respondents considered symbolic. Two of the respondents expressed their opinion that there should be a level playing field for supervisory fees charged to TRs offering services under EMIR and to that extent they

considered that recognised TRs should be subject to the same fee structure as registered TRs. ESMA disagrees with such a proposal, since this will not properly reflect ESMA supervisory effort.

Managing surpluses/deficits

53. ESMA explained the reasons to include a sound mechanism to deal with any imbalance between ESMA's costs and ESMA's fees revenues. In case that in year (n) they were charged fees which exceeded ESMA's total expenditure, ESMA will reduce in year (n+1) the amount of their total fees. If in year (n) a deficit took place, TRs would be charged an additional amount in year (n+1) in order to restore the equilibrium of TRs supervision. Further ESMA proposed that any correction to fees coming from previous years is applied only to the TRs that were already registered in the year in which the deficit or the surplus arose and that are still registered with ESMA on the date when the reduction or increase takes place. ESMA method for management of surpluses and deficits was agreed and as such will be included in the final advice.

Modalities of Payment

54. ESMA highlighted the reasons for proposing an upfront payment of registration fees and two instalments for annual fees. The amount of the second instalment shall be the annual supervisory fee reduced by the amount of the first instalment. Any adjustments due to previous year's deficits or surpluses will be applied in the second instalment.

55. ESMA's proposal on modalities of payments was broadly agreed and did not raise adverse opinions, although one respondent proposed a calendar of monthly payments for annual supervisory fees similar to the way TRs would collect their fees from clients. Such proposal will increase ESMA's internal costs of TR fees management and will be contrary to the Commission requirement stated to ESMA in the mandate to provide technical advice to dispose always of the necessary resources to finance its activities related to TRs.

Supervisory Fees in 2013. Transitional provisions

56. ESMA recognised the difficulties regarding 2013 fees. They stem from (i) the procedural issues regarding the adoption of a delegated act, (ii) the lack of repository activity track record and (iii) the practical issues regarding the establishment of a fee model with different parameters related to activity. Notwithstanding any potential delays in the adoption of a delegated act, ESMA shall fully cover its expenditure related to registration and supervision of TRs in 2013.

57. For 2013 ESMA proposed registration fees, determined in accordance to the model outlined in the section on *Registration Fees*, to be payable in full at the time the TR applies for registration and the payment to be received by ESMA no later than the adoption of the decision on registration or refusal of registration. The method of calculation of the annual supervisory fee in 2013 was advised to be the same as the one used in paragraph 45 to determine first year supervisory fees. Furthermore, ESMA considers that such a method would provide registered TRs enough certainty regarding the total supervisory fees they should pay to ESMA in their first year of operations.

58. The proposal made by one respondent already included in paragraph 47, to ask all TRs for an equal fee in 2013 and further level them out should not be taken on board since this approach does not take into account the EMIR provision that TR fees should be proportionate to their turnover.

59. With respect to 2013 fees another respondent raised concerns on why ESMA asks for full supervisory fee, if in 2013 there are only two asset classes which may be subject to reporting obligation, depending

on the dates of registration of TRs for that asset classes. ESMA considers that it is necessary to highlight that the relevant amount used to calculate the supervisory fees for each year is based on the expenditure included in the budget for that year.

60. The same respondent proposed both the registration fee and the annual supervisory fee for 2013 to be paid in the 2014 instalment, because TRs are not going to receive revenue until the first trades are reported by the entities and since the reporting start date will take place 90 days after the registration of the first TR for that asset class, and this may delay the receipt of any income. Although ESMA acknowledges such reasoning, it is important to highlight that ESMA lacks a special budget provision for EMIR implementation regarding TRs and this is the main reason behind the introduction of fees for the registration and supervision of TRs.
61. Since there is not enough certainty on when the Commission delegated act is going to be adopted, ESMA advises the Commission to include a special provision in the Delegated Act regarding 2013 registration and supervision fees that ensures that ESMA can charge its on-going supervisory fee for the relevant period and the registration fee for any applications it received, even after the applications were received, so that it recovers fully the costs incurred as required by EMIR. Both fees should be payable within a reasonable time after the entering into force of the TRs fees regulation. In case after receiving 2013 fees, a deficit or a surplus takes place, ESMA will address it according to the procedure for [Managing surpluses/deficits](#) outlined in paragraph 53.

Reimbursement of TRs withdrawing from the registration process

62. ESMA proposed not to reimburse fees to TR to discourage the submission of spurious applications and to concentrate its resources on the applications which carry a true intention of registration.
63. There was one respondent who proposed a reimbursement to TRs withdrawing from the registration process for two reasons: (i) uncertainty around the initial implementation of EMIR and the appropriate financial model for this business and (ii) restrictions on the flexibility of pricing available to TRs. Although ESMA agrees with the analysis provided, ESMA strongly believes that a policy of non-reimbursement of registration fees will be the only way for ESMA to efficiently use its resources and will discourage the submission of application from companies which are unlikely to fulfil EMIR requirements.

Reimbursement of costs to national competent authorities

64. ESMA established a model to deal with reimbursements to NCAs in case a delegation of tasks takes place. Any delegation of tasks to the relevant competent authority will be subject to previous agreement on the scope and complexity of the task, the timetable for its performance and the transmission of necessary information to ESMA. Furthermore ESMA specified that the cost should be calculated in accordance with the method used to determine ESMA's total administrative costs regarding TRs, should be proportionate to the turnover of the relevant TR, and should not be greater than the total amount of supervisory fees paid by the relevant TR.
65. One of the respondents asked for confirmation that any costs incurred by national competent authorities while carrying out supervisory tasks delegated by ESMA will be covered by ESMA supervisory fees and the NCA will not look to recover these costs directly from the TR. ESMA confirms this position and strongly believes that TRs shall be subject to a homogeneous and sound framework of supervisory fees.

ANNEX I – List of non-confidential respondents to ESMA’s Consultation Paper on Fees to Trade Repositories

Full Name	Short Name	Type
London Metal Exchange	LME	Market Infrastructure
Dekabank Deutsche Girozentrale	Dekabank	Asset Management
Abide Financial Limited	Abide	Service Provider
Polish Bank Association	PBA	Trade Association
Krajowy Depozyt Papierow Wartosciowych SA	KDPW	Market Infrastructure
Depository Trust and Clearing Corporation	DTCC	Market Infrastructure



ANNEX II –ESMA’s Final Technical Advice to the Commission on Fees for Trade Repositories



ESMA's Final Technical Advice on Fees to Trade Repositories



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I. Background

1. On 14 January 2013 ESMA received a formal request from the European Commission (the Commission) to provide technical advice to assist the Commission in formulating an EU Regulation on ESMA's fees for Trade Repositories (TRs) by delegated act. The advice is to be delivered to the Commission by 31 March 2013. Given the time period established for providing its advice, ESMA consulted stakeholders from 20 February 2013 to 6 March 2013.
2. ESMA already provided a precise analysis of the activities and resources needed in the Report to the European Parliament, the Council and the Commission on the budgetary implications of EMIR, on staffing and resources⁶ (report on staffing and resources).
3. To ensure an efficient use of ESMA's budget and, at the same time, alleviate the financial burden for Member States and the Union, it is necessary to ensure that trade repositories pay for all the costs related to their registration and supervision.
4. While elaborating its fee structure for TRs, ESMA took into account the Commission Delegated Regulation (EU) No 272/2012⁷ (Regulation on CRA Fees), with regard to fees charged to credit rating agencies (CRAs) and the previous technical advice provided by ESMA to the Commission in that respect.

II. Expected costs for ESMA

5. In the report on staffing and resources, which is annexed to this final advice, ESMA has estimated in a detailed manner all costs related to the implementation of EMIR, including registration, supervision and recognition of trade repositories. The expected level of expenditure for ESMA regarding the registration, supervision and recognition of trade repositories is as follows: 1.1 million euros in 2013, 1.5 million euros in 2014 and 1.4 million euros in 2015. Furthermore, ESMA's budget is approved well in advance and it is published on ESMA's webpage, so that TRs can be able to project their supervisory fees. At this stage and until 2015, ESMA has not considered the need of any additional resources from those included in the report on resources and incorporated in ESMA's budget.
6. In accordance with Article 72 of EMIR, ESMA shall charge fees that cover all the necessary administrative expenditure relating to TR registration and supervision and these fees shall be proportionate to the turnover of the TR concerned.
7. Based on its initial research and on several subsequent rounds of contacts maintained with market participants, ESMA has already identified a relevant proportion of the companies that are likely to apply for registration as trade repositories under EMIR. According to a preliminary internal classification⁸ carried out to determine the level of workload and supervisory effort, on the basis of

⁶ <http://www.esma.europa.eu/content/Report-European-Parliament-Council-and-Commission-budgetary-implications-Regulation-EU-No-64>

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ.L:2012:090:0006:0010:en:PDF>

⁸ Please refer to the section "o. **Registration Fees**" for a detailed explanation of the method of internal classification

TRs estimated turnover, ESMA expects that between 2 and 4 high expected turnover TRs, and the same number of medium expected turnover TRs and of low expected turnover TRs would apply for registration in 2013 and 2 more low expected turnover TRs would apply in 2014. According to our report on staffing and resources, 2.6 full-time equivalent officers (FTE) are expected to process the applications for registration in 2013 and 0.4 FTE in 2014 and 2.6 additional FTE will be involved in the on-going supervision of TRs, which will start from the moment the first ESMA's decisions on registration are adopted.

III. Turnover

8. Turnover is a key variable for TRs and for ESMA, since EMIR provides that fees charged to a TR shall be proportionate to its turnover. For its advice to the Commission on trade repository fees, ESMA has considered the approach for determining the applicable turnover of TRs and if it should be similar or not to the one already in place for CRAs. Article 3 of the Regulation on CRA Fees provides that applicable turnover for a given financial year (n) shall be the revenues of a CRA as published in its audited accounts of the previous year (n-1) generated from rating activities and ancillary services and where the CRA did not operate during the full year (n-1), the applicable revenue shall be estimated by extrapolating that amount for the whole financial year.
9. At this stage ESMA considers that there are structural differences between the two industries. On the one hand, credit rating has existed for more than a century and its market structure is well-established and consolidated. There are three global CRAs and a wide variety of local CRAs. On the other hand, the trade repository industry is still in a very early stage of its existence. The TR industry may be characterized by the following aspects:
 - a. It is formed on the basis of a new service, which arises partly as a consequence of regulatory development;
 - b. There is an emergence of new suppliers and new customers, appearance of different business models and variety of additional/ancillary products and services;
 - c. There is an uncertainty regarding the demand for the TR's product and the growth potential;
 - d. There is a limited track record and market conditions of the companies and the industry itself are still largely unknown;
 - e. Different commercial and business practices may arise; and
 - f. Cross sector spill-overs could take place, since TRs may use already existing technology and know-how from other market infrastructures, such as CSDs or IT solutions providers.
10. In that context, it would not be unlikely that Trade Repositories:
 - a. Face different cost structures and, therefore, apply pricing policies that vary significantly between them, causing significant revenue variability;
 - b. Lack previous financial track records or these are based on very short periods; and

- c. Produce financial estimates and business plans that are either over-conservative or over-ambitious.
11. The above circumstances make it advisable to complement revenues with additional variables in order to establish a more accurate and unbiased indicator of turnover. This was already considered when the Commission invited ESMA to provide its technical advice on an appropriate method for considering the turnover of the TR in fee calculations, since it included the use of activity indicators when revenue figures are not yet existent, are not reliable or are not an adequate measure of the trade repository activity. In this vein, ESMA is accordingly considering and proposes to the Commission as appropriate indicators for turnover that complement financial revenue from core function the following: (i) number of trades reported to a given trade repository for a certain period (i.e. one year) and (ii) number of recorded outstanding trades at the end of each period.

Based on the feedback of the consultation, ESMA proposes the proportion of turnover of a particular TR to the total turnover of all registered and supervised TRs to be calculated using an equal proportion of (i) number of trades reported to a TR for a certain period (i.e. one year), (ii) number of recorded outstanding trades at the end of the period and (iii) revenues from core repository function, as defined in Article 78-5 EMIR. The resulting formula is:

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

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

$$\text{Indicator } TR_i = \frac{\text{Value of indicator for period } y \text{ } TR_i \times 12}{(12-y)}$$

y = number of months of operations after registration

ESMA will make available, on a periodical basis, the aggregate values of the two activity indicators, in order to allow TRs estimate their percentage of the industry turnover.

12. It is important to highlight that although ancillary services are excluded from the calculation of applicable turnover and thus would have no impact on the supervisory fees charged to a TR, ESMA will supervise closely all the areas where potential conflicts of interest between the provision of core and ancillary services may arise: (i) operational reliability, (ii) availability and proportionality of resources of repository activity, (iii) access to data by regulators, (iv) access to data by reporting parties and service providers, (v) cost allocation and determination of fees to reporting parties, and (vi) IT systems architecture, confidentiality of data and use of data for commercial purposes.
13. ESMA stands ready to prepare a report for the European Commission by 2016, if needed, regarding the possibility of simplifying the approach for the determination of the applicable turnover in case certain conditions, such as similarity in cost structures among TRs and appearance of well-established market practices, are met.

IV. Trade Repositories Fees Framework

14. According to EMIR, there are two main supervisory actions regarding trade repositories: (i) authorisation for registration and (ii) on-going supervision. Both actions should be conducted by ESMA. The assessment of completeness of an application and the examination of compliance of that application with EMIR and relevant implementing regulations are the two main stages of the registration process. As detailed in the report on staffing and resources, ESMA has estimated that 2.6 FTE will be needed to process the applications for registration. Furthermore, immediately after the registration decision is adopted, two main activities should be deployed by ESMA: (i) desk-based supervision and (ii) on-site inspections of registered TRs.

In order to establish a homogeneous and sound framework for TRs supervisory fees, consistent with Commission Regulation on fees for CRAs, ESMA proposes that only ESMA shall charge fees for the registration, recognition and supervision of trade repositories operating under EMIR. National competent authorities shall not charge fees to trade repositories (i) in case those authorities carry out tasks on behalf of ESMA, according to Article 74 of EMIR⁹, or (ii) in case of previous registrations under national regimes, or (iii) in case TRs carry out ancillary services that do not require registration. National competent authorities may charge fees to TRs only in case registration or authorisation for the provision of ancillary or non-repository services is required under EU or national law.

15. In order to prepare this consultation on fees, ESMA has considered three basic methods of levying fees:
- A general flat fee,
 - A specific administrative actions fee, and
 - A mixed system.

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

16. A general flat fee stays for a single (i.e. annual) fee charged to entities that are registered under EMIR and its aim is to cover ESMA's annual overall budget. This fee does not take into consideration the number or type of actions (application for registration, desk-based supervision or on-site inspections, among others) between TRs and ESMA, but only takes into account the fact that there is a supervisory interaction. For the determination of a general flat fee applicable to TRs, ESMA may take into account the relevant turnover of a TR according to certain thresholds or levels of turnover.
17. The specific administrative actions fee method is envisaged to recover the cost of each action (application for registration, desk-based supervision or on-site inspections, among others) that takes place between TRs and ESMA. While applying this method, ESMA may also establish different fees for each administrative action based on the turnover of TRs.
18. A mixed system method proposes a fee structure that brings together specific administrative actions fees, such as those charged for each supervisory action performed by ESMA and general annual fees, related to the on-going supervision.

⁹ Please refer to section XII. [Reimbursement of costs to national competent authorities](#) for a detailed explanation

19. The benefits of general flat fees are that they are simpler to calculate and implement than specific administrative action ones. They create greater budgetary certainty both for ESMA and for TRs than the specific ones and they allow ESMA to perform all the pertinent actions without specific budgetary constraints. However, with general flat fees TRs that require or initiate fewer actions would probably be overcharged and the ones requiring more interaction with ESMA would likely be undercharged. General flat fees might also be less effective in reflecting the real supervisory effort dedicated to a particular entity.
20. The advantages of having activity specific fees for each type of action are that they better represent and align supervisory fees with the workload and supervisory effort conducted with respect to each TR, they allow for quick reclamation of fees relating to tasks and could reduce risk of under- or overcharging fees. Nevertheless, this approach may reduce the ability of TRs to plan the total supervisory fees they should pay and increases the complexity of fees calculations. This method is deemed highly recommended for actions initiated by the TRs.
21. ESMA considers that the optimal solution is to establish a mixed system, where some fees are applicable to specific administrative actions and some others are charged on a periodical basis. Such methodology should allow ESMA to allocate fees on the processes it performs according to their nature (once or on-going), taking into account the supervisory effort and FTE dedicated to any specific phase of the authorisation and supervision process.
22. Fees related to specific actions are ideal for processes that are initiated at the request of the Trade Repository, like registration or modification of registration conditions. The registration process takes place only once and requires a thorough analysis of the application, because initial compliance with the conditions set in EMIR and the technical standards needs to be determined. ESMA doesn't consider charging fees annually for the initial authorisation to be the correct approach, but believes that the registration fee should be established as a specific action fee. In such a way it would be better aligned with the duties to be performed by ESMA staff during this phase.
23. However it should be noted that supervision is a continuous process aimed at ensuring the on-going compliance by TRs with the conditions for registration or the fulfillment of any commitments made during the registration process. It is possible that additional measures need to be taken to ensure TR compliance with EMIR and the technical standards. Furthermore, ESMA believes that post-registration supervisory fees shall take into account the spectrum of all supervisory tasks to be carried out, for example on-site inspections or desk-based supervision, as a whole and not as separate supervisory actions, since they all abide a common goal which is the assurance of the proper functioning of the TR and it is for ESMA to decide on the mix of actions to be conducted.
24. For its advice on types of supervisory fees, ESMA favours the option of a mixed system of TR supervisory fees for the registration and the supervision.

For the registration process, ESMA proposes to levy specific administrative actions fees, since they better represent and align the supervisory fees with the workload and supervisory effort conducted with respect to each TR, they allow for quick reclamation of fees relating to tasks and could reduce risk of under- or overcharging fees. This method is highly recommended for actions initiated by the TRs.

For on-going supervision, ESMA proposes to charge a periodic annual fee proportionate to the level of turnover of the TRs. In order to cover ESMA's fixed costs relating to supervision, ESMA proposes to the

Commission the establishment of a minimum annual supervisory fee. The methods for the determination and payment of the applicable fees are described in the following chapters.

V. Registration Fees

25. During the registration process, ESMA staff should perform two main supervisory tasks: assessment of the completeness of an application and examination of its compliance with EMIR. Both are of utmost relevance for ESMA and for the objectives of EMIR, since the relevant decision on registration or refusal of registration of an applicant trade repository would be adopted based on the actions carried out while performing such tasks.
26. ESMA considers that the level of the administrative costs incurred during the assessment and examination of an application for TR registration would depend, among others, on the following characteristics:
- a. Types and classes of derivatives covered;
 - b. Type and number of ancillary services provided;
 - c. Number of transactions processed and recorded;
 - d. Number of reporting parties (effective or expected);
 - e. Number of clients (effective or expected);
 - f. Complexity of IT infrastructure; and
 - g. Number of employees.
27. When an application for registration is submitted it is highly probable that accounting and financial data does not exist and even if existing, it may not be a clear indicator for their expected total turnover once registration is granted. The result of the above characteristics of an application for registration may also constitute an indicator of both the complexity or difficulty (and thus the supervisory cost) of the registration assessment and of the expected total turnover level. It would be unlikely for a TR that registers under EMIR for one asset class and offers no ancillary services to its clients to obtain higher total turnover in comparison to its peers. A TR which covers different asset classes and offers different value-added ancillary services may potentially build a strong business model and obtain important total turnover.
28. ESMA strongly believes that for the determination of registration fees, the offer of ancillary services should be maintained as a qualitative criterion, since using only one criterion to classify a TR would be counterproductive and would not capture the supervisory effort to assess and examine an application for registration.

For its advice to the Commission regarding the registration fees, ESMA proposes the use of the following two characteristics that take into account the difficulty to assess the TR application, are not subject to different interpretations and finally, may be considered as an appropriate approximation to TR's expected total turnover:

- a) A TR covers at least three derivative classes; and
- b) A TR offers ancillary services.

For the purpose of determination of registration fees, the offer of ancillary services by a TR should be considered any of the following: (i) direct provision by the TR, (ii) indirect provision by a company within the TR's group or (iii) provision by a third entity with which the TR has a material agreement in the context of the trading or post-trading chain or business line to cooperate in the provision of services.

According to EMIR, ancillary to TR are services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services. ESMA believes that any additional services which may be ancillary to the core function of a TR and are not subject to registration or authorisation under a national regime may fulfil this category.

Furthermore, ESMA proposes the following classification of TRs: (i) if a particular TR meets both criteria, it would be deemed to be a high expected total turnover, (ii) in case a TR fulfils only one of the above criteria it should be considered medium expected total turnover and finally, (iii) in case a TR does not fulfil any of the above criteria, it would be deemed low expected total turnover.

Using the estimated workload, which is already expressed in detailed manner in the report on staffing and resources annexed to this final advice, and the expected total turnover of applicant TRs determined according to the criteria for classification outlined in the preceding paragraph, ESMA proposes the following three registration fees:

- Low expected total turnover TRs shall pay a registration fee of 45,000 Euros
- Medium expected total turnover TRs shall pay a registration fee of 65,000 Euros
- High expected total turnover shall pay a registration fee of 100,000 Euros

The fees charged for TR registration, determined in accordance with the above criteria to classify TR applicants, shall be payable in accordance with the modalities of payment outlined in sections "IX. Modalities of Payment" and "X. Supervisory Fees in 2013. Transitional provisions of this advice".

In case a material change to the conditions of registration of a particular TR takes place and it affects any of the two criteria used to estimate the level of turnover of that TR, i.e a TR includes more classes of derivatives or starts offering ancillary services, an appropriate adjustment to the registration fees should be done, according to the above-mentioned classification on the basis of expected turnover. This will further align ESMA necessary expenditure regarding a registered TR with its expected turnover.

VI. Annual Supervisory Fees

29. Once a TR is registered, annual supervisory fees shall be levied. They should fully cover all necessary ESMA expenditure and they also need to be proportionate to TR turnover.
30. While preparing its advice, ESMA has taken into consideration the Commission regulation on CRA fees. Furthermore, ESMA has taken into account all EMIR provisions regarding fees to TRs: (i) they shall cover all administrative costs incurred by ESMA and (ii) they shall be proportionate to TR's turnover. Furthermore, ESMA considers that surplus (or deficit) from the previous year, if any, should be subtracted from (added to) the relevant amount used to calculate the present year annual supervisory fees.

31. To this extent, ESMA considers that the annual supervisory fees paid by each TR shall be calculated as the proportion of the relevant expenditure amount which corresponds to the ratio of the TR turnover to the turnover of all registered TRs.
32. The approach for the determination of the annual supervisory fees described as follows has the following advantages: (i) it will ensure that the exact costs sustained by ESMA will be covered by fee, (ii) it will limit the existence of surplus or deficits to be reimbursed or levied; (iii) it is an already existing practice for CRAs supervisory fees. Furthermore, TRs may assess the estimated annual supervisory fees that ESMA will charge them by referring to the aggregate data on activity indicators ESMA will make publicly available on a periodical basis.

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

Given that there are some fixed administrative costs regarding post-authorization supervision of TRs, ESMA considers necessary the introduction of a minimum fee of 30,000 euros.

33. Since a newly registered TR will lack (i) the financial information regarding revenues from core services and activity-related measures such as (ii) number of transaction reported during the year and (iii) number of transactions recorded at the end of the year, the supervisory fees for the first year of operation of a TR need to be determined in an alternative way to the general approach. ESMA has explored the possibility to use the financial information and/or the business plan provided by the applicants during the process of assessment and examination of a registration. Such information may give ESMA some reference guidance on the expected turnover of a TR and furthermore, may prevent TRs from submitting unrealistic business plans. Notwithstanding this, neither the financial information, nor the estimation of future level of activity included in the business plans, may be deemed appropriate tools to evaluate TR turnover.
34. Taking into consideration the overall supervisory effort during the registration process, ESMA believes that supervisory fees in the first year could be based on the registration fees determined according to the expected level of turnover and further adjusted by a coefficient. The coefficient should be the ratio between the working days until the end of the year from the date the registration is granted, and ESMA's deadlines for assessment and examination of an application, which as stated in Articles 56 and 58 of EMIR are a total of 60 working days¹⁰ (20 for assessment and 40 for examination). ESMA considers the total registration period of 60 working days, because it is the only reference in terms of

¹⁰ ESMA working days for 2013 are defined in http://www.esma.europa.eu/system/files/esma_closing_dates_2013.pdf

supervisory effort for a newly registered TR. The maximum amount due for annual supervisory fee by a TR in its first year of operation shall be equal to the amount of the relevant registration fee.

ESMA proposes specific supervisory fee regime for the first year of registration of a TR described by the following formula:

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

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

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

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

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

VII. Recognition of third country TR

35. As described in the report on staffing and resources, ESMA estimates that the cost of equivalence assessment for a complex jurisdiction would be around 50,000 euro (this would include the overall assessment of rules on OTC derivatives, reporting to TRs, TRs and CCPs requirements). Of those, 15,000 euro can be considered to be the cost for assessing the equivalence of trade repositories rules. It is worth noting that ESMA's fees for recognition are determined on the basis of the supervisory effort towards the TRs which apply for recognition.

36. In addition to the cost of the third country equivalence assessment, ESMA expects that the burden of processing the application for recognition will be significantly lower than the cost for processing an application for registration, given that such TR will already be registered with a third country competent authority and subject to its supervision. However such a process would need to include the establishment of a cooperation agreement with a third country authority, which will imply negotiations and possibly travel costs. According to the estimates included under the section on the recognition of trade repositories of the Report on staffing and resources, the cost in terms of dedicated human resources for processing an application for recognition would be around 20,000 euro, plus additional 20,000 euro for establishing and negotiating the cooperation agreement. ESMA considers that it would not be appropriate to distinguish the fees on whether a TR comes from a more or less complex jurisdiction. The cost of the first application per jurisdiction is equal to 55,000 euro, from which 35,000 correspond to the cost of equivalence assessment and to the establishment of cooperation arrangement with that jurisdiction and 20,000 correspond to the cost of processing the application.

37. It is likely that only a limited number of foreign trade repositories will apply for recognition. ESMA does not expect two or more trade repositories applying from the same jurisdiction. In case there are two or more TRs per jurisdiction, ESMA proposes to charge them fees which total the cost per jurisdiction and then reimburse the already recognised entities. This is due to the fact that the equivalence assessment and the MoU with the foreign supervisor will have already been completed before the first recognition process and should not be double counted in the second and subsequent ones.

ESMA considers that the recognition fee for third country trade repositories should be equal to 55,000 euro per jurisdiction's first application. Such amount is the sum of the cost for processing the application for recognition, estimated at 20,000 euro, and the costs for equivalence assessment and cooperation arrangement, estimated at 35,000 euro.

ESMA proposes that the amount to be paid by a TR applying for recognition will be the sum of two components:

- a) The cost for processing the application (estimated at 20,000 €)
- b) The amount resulting from dividing the costs for equivalence assessment and cooperation arrangement, estimated at 35,000 euro, by the total number of TRs that are either recognised or applying for recognition from that jurisdiction, including the concerned applicant.

After collecting these fees, ESMA shall reimburse and distribute equally among the previous applicants from the same jurisdiction the amount received by the last applicant under point b) above.

The reimbursement should be instrumented either through direct payment or through reduction of subsequent year fees. ESMA has no preference between the two methods.

ESMA advises the Commission that, if the reimbursement mechanism proposed here was not to be followed, it would be necessary to foresee an equivalent system to avoid that the first TR to be recognized from a jurisdiction absorbs the full cost of the equivalence assessment, to the benefit of possible subsequent TRs to be recognized from the same jurisdiction.

38. Given that the supervision will be carried out by the third country competent authority and ESMA will only need to ensure that the provisions of the co-operation agreement works properly and data are rightly received by all the relevant authorities.

ESMA proposes an annual supervisory fee of 5,000 euro for recognised TRs, similar to the annual supervisory fee for a certified CRA, which is 6,000 euro.

VIII. Managing surpluses/deficits

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

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

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

Furthermore, ESMA proposes that any correction to fees coming from previous years is to be applied only to the TRs that were already registered in the year in which the deficit or the surplus arose and that are still registered with ESMA on the date when the reduction or increase takes place.

IX. Modalities of Payment

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

ESMA proposes the registration fees to be payable in full at the time the TR applies for registration.

42. Regarding annual supervisory fees ESMA explored several alternatives. The option of one payment reduces invoice handling costs both for ESMA and for the TRs. Nevertheless, it may be unlikely for ESMA to have all the information regarding the relevant amounts of turnover of TRs at the beginning of the year. Having semiannual or quarterly payments increase the handling cost for invoices, but bring greater flexibility for ESMA to adjust the amounts of fees paid by TRs, reduces the burden to TRs of a sole installment and allows ESMA to easily reduce the deviations between fees due and fees paid.

Regarding annual supervisory fees, ESMA proposes the establishment of calendar of two payments, in February and in August, similar to that of CRAs. The first installment shall be due by the end of February of each year and shall amount to two thirds of the estimated annual supervisory fee. If the applicable turnover is not yet available at that time, ESMA shall base the calculation on the last turnover available. The second installment shall be due by the end of August. The amount of the second installment shall be the annual supervisory fee reduced by the amount of the first installment. Any adjustments due to previous year's deficits or surpluses will be applied in the second installment.

X. Supervisory Fees in 2013. Transitional provisions

43. ESMA recognises the difficulties around 2013 fees. They stem from (i) the procedural issues regarding the adoption of a delegated act, (ii) the lack of repository activity track record and (iii) the practical issues regarding the establishment of a fee model with different parameters related to activity. Notwithstanding any potential delays in the adoption of a delegated act, ESMA shall fully cover its expenditure related to registration and supervision of TRs in 2013.

For 2013 ESMA proposes that registration fees are determined in accordance with the model outlined in chapter V. **Registration Fees** and annual supervisory fees are determined in accordance to the model

for first year supervisory fees. This approach provides applicant TRs with enough clarity regarding the total annual supervisory fees they should pay to ESMA in their first year of operations.

ESMA advises the Commission to include a special provision in the delegated act regarding 2013 registration and supervision fees that ensures that ESMA can charge its on-going supervisory fee for the relevant period and the registration fee for any applications it received, even after the applications were received, so that it recovers fully the costs incurred, as required by EMIR. Both fees, determined in accordance with the above-mentioned approach should be payable within a reasonable time after the entering into force of the Commission Regulation on Fees to TRs. In case a deficit or surplus takes place, ESMA will address it according to the procedure for o. **Managing surpluses/deficits**".

44. ESMA believes that the approach described in Commission Regulation on CRA fees for 2011 fees is not applicable to the Regulation on fees to trade repositories, since the position of ESMA in both situations is completely different. With respect to CRAs in 2011, the NCAs registered the entities and ESMA had to ensure the smooth transition of supervisory powers from the NCA to ESMA. With respect to TRs, ESMA will be the only authority responsible for their registration and supervision.

XI. Reimbursement of TRs withdrawing from the registration process

45. The Commission Regulation on CRA fees, provides that, in case a CRA withdraws its application, ESMA shall reimburse the relevant CRA a certain amount of the upfront registration fee. At present, CRAs which withdraw during the assessment phase are reimbursed $\frac{3}{4}$ of the registration fee and in case they withdraw during the examination phase, they are reimbursed $\frac{1}{4}$ of such fee.
46. ESMA believes that the situation in the trade repositories industry is quite different from CRAs and that the reimbursement of registration fees in the case of trade repositories should not be foreseen. In the first place, the fact that reporting to TRs is a legal obligation creates a market in itself, there may be a number of undertakings willing to access that market. Lowering the expected cost of an incomplete process (by reimbursing a part of the fee) could allow for spurious applications, from companies aiming at establishing a TR without fulfilling a minimum set of requirements. Furthermore, the fact that ESMA does not have all the resources that it would need for the full activity of registration and supervision (because of the absence of a special budget attached to EMIR, as shown in the above-mentioned report on staffing and resources) requires ESMA to concentrate the limited resources available on the applications that carry a true intention of becoming a trade repository and to discourage the submission of spurious applications. The possibility of reimbursement runs contrary to that goal and the applications that end up withdrawing would reduce the available resources for those that do not, compromising the proper review of the latter.

ESMA proposes not to reimburse registration fees to TRs that withdraw from the registration process.

XII. Reimbursement of costs to national competent authorities

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

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

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

XIII. CCP recognition fees

47. According to Article 72 of EMIR, ESMA shall recover all administrative costs incurred by ESMA for its registration and supervision activities. This important principle is included only in Title VI of EMIR on registration and supervision of trade repositories, notably in an Article on supervisory fees for trade repositories.

48. It should be noted, however, that ESMA will face significant administrative costs also for activities related to the recognition of CCPs. These costs were analysed and estimated in details in the report on staffing and resources and amounted to 55,000 euro per jurisdiction and 30,000 euro per third country CCP, plus an on-going cost for monitoring the activity of the recognised CCPs equal to 20,000 euro per CCP.

49. Given the absence of an explicit provision in EMIR that allows ESMA to recover the administrative costs sustained for the recognition of third country CCPs, this activity will need to be financed with public money, rather than money from the applicant third country CCPs.

50. ESMA considers that the lack of this provision in EMIR, i.e. the absence of the possibility to charge fees to third country CCPs, gives rise to the following issues:

- a. The important principle according to which all administrative costs sustained by ESMA for registration and supervision activities will not be respected;
- b. Inconsistency with the treatment of third country TRs, for which ESMA faces a similar activity, but whose costs would be allowed to be recovered;
- c. The provision of services in the EU by third country CCPs is not a public good for which public resources (taxpayers' money) should be used;
- d. Fees dis-incentivise unsubstantiated applications, i.e. incomplete, inaccurate, or spurious applications;
- e. European CCPs generally pay fees to their supervisors to offer services in the EU and they generally pay fees to offer services in third countries. The same treatment would not be envisaged for third country CCPs offering services in the EU;

- f. National competent authorities currently require fees (application and annual fees) from recognised foreign CCPs to offer their services in the different Member States. Following the recognition of these CCPs under EMIR, they will no longer be subject to those fees to provide their services in all the EU.

Against this background, ESMA invites the Commission to consider an amendment of EMIR which would allow for the introduction of fees to be charged to recognised third country CCPs.



ANNEX III –ESMA’s Report to the European Parliament, the Council and the Commission on the budgetary implications of EMIR, on staffing and resources



Report on staffing and resources

Report to the European Parliament, the Council and the Commission on the budgetary implications of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)

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Annex I: Tables of resources needed



Acronyms used

EMIR	Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories
OTC	Over-the-Counter
NCA	National Competent Authority
FTE	Full Time Equivalent

I. Executive Summary

Reasons for publication

Article 90 of Regulation (EU) No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR) requires ESMA to assess the staffing and resource needs arising from the assumption of its powers and duties under EMIR and submit a report to the European Parliament, the Council and the Commission of these needs.

Contents

This paper highlights the tasks that ESMA will need to carry out in view of its responsibilities under EMIR. For each task the report analyses the implications in terms of processes and activities to be carried out. It estimates the different processes that are expected to be followed and completed and it determines the resource implications that these will have.

Next steps

The European Parliament, the Council and the Commission are asked to assign the relevant resources from the EU budget in order to allow ESMA to perform its tasks under EMIR.

IV. Introduction

51. Article 90 of Regulation (EU) No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR) requires ESMA to assess the staffing and resources needs arising from the assumption of its powers and duties under EMIR and submit a report to the European Parliament, the Council and the Commission of these needs.
52. This report lists the additional tasks assigned to ESMA under EMIR and for every task it analyses the activity that it involves and resources needed, both in terms of human resources and IT developments.

V. ESMA tasks under EMIR

53. In addition to the already accomplished regulatory tasks of developing the technical standards and guidelines prescribed under EMIR (40 set of draft technical standards and one set of guidelines) for which no dedicated budget was envisaged, ESMA will have the following direct responsibilities under EMIR from 2013:

A. Trade Repositories

- Registration of trade repositories established in the EU
- Supervision of European trade repositories and enforcement actions
- Recognition of third country trade repositories
- Direct reporting to ESMA of derivatives transactions that cannot be reported to trade repositories

B. Central counterparties

- Participation in all the colleges of European CCPs
- Recognition of third country CCPs
- Validation of the CCPs risk models and parameters

C. OTC Derivatives

- Determination of the OTC derivatives subject to the clearing obligation:
 - i. Bottom-up approach;
 - ii. Top-down approach.
- Monitoring the activity on OTC derivatives for the following purposes:
 - i. To identify systemic risk and prevent regulatory arbitrage between cleared and non-cleared transactions;
 - ii. To ensure the proper functioning of the exemptions:
 1. Periodic review of the thresholds for non-financial counterparties;
 2. Management and controls of the notifications from NCAs on intragroup transactions;
 - iii. To assist the Commission in preparing reports to the European Parliament and the Council on the international application of the clearing and reporting obligations, the

exemptions to non-financial counterparties and the risk mitigation techniques for the contracts not cleared by CCP, in particular with regard to potential duplicative or conflicting requirements;

D. Public registers

Set-up and maintenance of the following registers:

- Register for the clearing obligation;
- Register for authorised and recognised trade repositories;
- Register for authorised and recognised CCPs;
- Register on the penalties imposed for breaches of clearing, reporting and risk mitigation obligations, of provisions on access to CCP and trading venues, of obligations imposed on non-financial counterparties;
- Register on the penalties imposed for breaches of CCP requirements and provisions on interoperability arrangements;
- Register on fines and periodic penalty payments imposed to trade repositories;
- Register on the types of pension scheme entities and arrangements which have been granted an exemption;
- Register on the list of the competent authorities responsible for the authorisation and supervision of CCPs

E. Opinions

- Issuing opinions on exemptions for pension scheme arrangements;
- Issuing opinions in case of denial of access of interoperability arrangements.

F. Reports

- On the application of the clearing obligation;
- On the application of the identification procedure under the top-down approach;
- On the application of segregation requirements for CCPs;
- On the extension of the interoperability requirements to non-cash financial instruments;
- On the access of CCPs to trading venues, the effect on competitiveness of certain practices and the impact on liquidity fragmentation;
- On the impact of the application by Member States of additional requirements to CCPs, including a banking licence;
- On the penalties imposed by competent authorities, including supervisory measures, fines, periodic penalty payments.
- Assist the Commission in preparing the 2015 report on: i) systemic relevance of transactions by non-financial counterparties; ii) efficiency of the margining requirements; iii) the evolution of CCPs' policies on collateral margining.

G. Regulatory work for consistent implementation of EMIR

- Guidelines, Q&A, processes and procedures for: i) consistent application of exemptions; ii) harmonising the templates for notification; iii) facilitating the establishment and functioning of the colleges; iv) ensuring consistent risk assessments for CCPs; v) ensuring consistent reporting to trade repositories.

VI. Trade repositories

Registration of trade repositories

54. According to the procedure outlined in Article 56 of EMIR, ESMA has 20 working days following the receipt of an application for registration by a trade repository (TR) to assess whether the application is complete.
55. Following a complete application, ESMA has 40 working days to analyse it and assess the compliance of the applicant trade repository with the requirements in EMIR and relevant technical standards. After completing the analysis, ESMA will need to take a full reasoned decision to register or refusing registration of the applicant trade repository.
56. The technical standards drafted by ESMA under Article 56 of EMIR, specify a number of documents and information that applicant trade repositories will need to submit to ESMA to prove their compliance with EMIR. This assessment includes:
 - a. the services trade repositories intend to provide;
 - b. ownership and governance structure, including internal controls and reporting lines;
 - c. the fitness and properness of board members and staff;
 - d. the adequacy of the TR's resources from a financial, IT and staff perspective, including an accurate description of their IT systems and the remuneration policies for the staff;
 - e. the adequacy of the procedures for the management of conflicts of interests and for ensuring confidentiality of the information maintained by the TR;
 - f. outsourcing arrangements and the provision of ancillary services, to detect any potential risk arising from them;
 - g. the access rules, including the relevant policy, procedures, conditions and fees to access the trade repositories;
 - h. any potential source of operational risk, including the business continuity and disaster recovery policies;
 - i. the record keeping policy and systems;

- j. the resources, systems, methods and channels for making the information available to the public and to the relevant authorities.
57. It is estimated that an application might range from 200 to 1000 pages, depending on the complexity of the trade repository, the services it provides and the asset classes it covers.
58. It is also estimated that in 2013 ESMA will receive applications from both more complex, multi asset trade repositories and from less complex single asset/single product trade repositories. In particular, from the analysis of the trade repositories currently operated and the projects currently being developed, the following applications may be envisaged:
- a. 3 applications from complex trade repositories in 2013;
 - b. 8 applications from less complex trade repositories in 2013 and 2 applications in 2014.
59. In this respect, it should be noted that EMIR (contrary to the US Dodd-Frank Act): a) does not impose to a trade repository once authorised to collect transaction in one asset class, to collect all the contracts that can be concluded in such asset class; b) requires the reporting of exchange traded derivatives. These differences are expected to have a significant effect on the number of possible applicant trade repositories. In particular, it is expected that: a) some regulated markets will establish their own trade repositories for the reporting of the derivatives traded on their exchanges; b) some information providers will also apply, to expand the services they offer.
60. Although it is uncertain whether all these applications will actually result in effective registrations of trade repositories, if received, they will need to be analysed and a reasoned decision will need to be taken. In addition, it is expected that they will all arrive roughly at the same time. ESMA will therefore need to have all the resources available when the applications will be received.
61. Although several officers will intervene in the assessment of the applications (IT, fitness and properness, corporate governance) ESMA estimates that, in total, the equivalent of 75 days of one full time equivalent of a supervision officer will be needed for the assessment of a complex TR and around 45 days for a less complex one. These estimates are based on ESMA's experience in processing CRAs applications. In particular, ESMA needed 50 days FTE, plus 1 day on-site visit to process the application of a small CRA.
62. Against this background, ESMA estimates that for processing the applications for registration of trade repositories it will need the following resources:
- a. 2013: 1 full time equivalent (FTE) for the expected 3 complex TRs and 1.6 FTE for the 8 less complex TRs.
 - b. 2014: 0.4 FTE for the expected 2 less complex TRs.

Supervision of European trade repositories and enforcement actions

63. The supervision of TRs implies an on-going assessment of the compliance of TRs with EMIR and technical standards. This will be done through on-site inspections and off-site work to assess: a) the compliance of the rules and procedures and adequacy of their systems and controls; b) the quality of the data maintained by TRs. Following these assessments and on the basis of the

evidence produced by the relevant people in charge of supervision, remedial/enforcing actions might be taken by ESMA.

64. The supervisory activity will start following the registration of the trade repositories. Therefore, the officers counted for the application process, should not be double counted for supervision, as they will naturally move to supervision following the conclusion of the application process. The process will need to ensure some rotation of officers from the authorisation to the supervision phase, in order to ensure some variety in the assessments of the same trade repository.
65. Starting from the consideration above, according to which ESMA is expected to receive 11 applications, applying a reasonable discounted factor and considering that some application may come from entities not specialised in trade repository or related business, we estimate that only 7 of those 11 applications will actually be registered in 2013.
66. It is estimated that 3 officers can supervise on average 4 TRs of average complexity (e.g. 1 complex and 3 less complex). Considering that supervision is expected to start from the second half of 2013, and that the officers employed in authorisation will move to supervision, of the more than 5 officers needed to supervise the expected 7 TRs, ESMA will need to allocate 2.6 officers for supervision of TRs in 2013.
67. For 2014 no new complex TRs are expected to apply, but possibly 2 additional TRs could be registered. Thus raising to 9 the number of TRs to be supervised and to 6.7 the number of officers involved in the supervision of trade repositories. Such number is expected to remain stable in 2015.

Recognition of third country trade repositories

68. For the recognition of trade repositories, the following steps are envisaged: 1) the Commission should determine the equivalence of the relevant third country jurisdiction; 2) the third country jurisdiction should enter into an international agreement with the EU; 3) ESMA should conclude a co-operation agreement with the relevant third country authority.
69. For the determination of equivalence, the European Commission requested a technical advice to ESMA for 9 jurisdictions to be completed by mid-2013. The technical advice will cover equivalence for the purpose of: 1) requirements for CCPs; 2) requirements for TRs; 3) requirements for OTC derivatives. On average it is expected that to deliver such advice ESMA will need to allocate 20 days of work per jurisdiction (some jurisdictions will have more complex frameworks to assess, some less). Therefore, overall ESMA estimates that to deliver its advice to the Commission on equivalence it would need 1 FTE for the three areas and the 9 jurisdictions.
70. For the additional tasks to complete a recognition process, i.e. the establishment of co-operation agreements and the processing of the application, ESMA expects 20 days of 1 FTE to process each application. ESMA also estimates to receive 3 applications for recognition, which would require 0.3 FTE in 2013, an equal number in 2014 and less in 2015 (2 applications, 0.2 FTE). In addition, ESMA estimates 5 days FTE for the on-going activity related to registered trade repositories which would amount to 0.1 FTE in 2014 and 0.2 FTE in 2015.

Direct reporting to ESMA of derivatives transactions that cannot be reported to trade repositories

71. In accordance with Article 9(3) of EMIR, if a trade repository is not able to collect the details of certain derivatives transactions, these details should be sent to ESMA, who should then make them available to the relevant competent authorities.
72. According to the preliminary analysis made by ESMA, some applicant TRs will be able to collect the details of any derivatives transactions, even the most complex ones. ESMA, therefore, considers that at this stage it is not worth spending taxpayers' money on building a very complex system that might never be used.
73. Against this background, ESMA established a calendar for reporting according to which, if by 1 July 2015 there will not be TRs able to collect the reports of certain derivatives transactions, these reports should be sent to ESMA. This timeline will give ESMA sufficient time to assess whether the assumption according to which authorised TRs will be able to collect also tailor made derivatives is correct and if not, it will give ESMA the time to develop the fall-back solution for direct reporting.
74. Building the systems for direct reporting to ESMA is a fall-back option in the Regulation. However, that would be similar to building a Trade Repository, since ESMA would have to interact with potentially thousands of firms and counterparties, do the appropriate checks on the reports received, reconcile them when needed and classify the reports in such a way that competent authorities have access to them. Such 'in-house' Trade Repository in ESMA, would only be used while no other solution is available and potentially for a very limited period of time.
75. It should be noted that developing a quasi-TR in ESMA is a very complex IT project that would require extraordinary resources. Therefore, if such project has to be developed by ESMA, a dedicated budget would be needed. Besides, it would have to be paid for by public resources, since there are no provisions for ESMA to apply fees to recover that cost.
76. For the reasons explained above, no detailed analysis has been made of the different tasks, tools and resources that such a project would imply. However, from a rough estimate, it is expected that to build a direct reporting system and a repository in ESMA and to make it accessible to the relevant authorities according to their mandate, the IT development costs will exceed 10 million euros, which would need to be added to the 2015 budget, for the subsequent years the running cost would be equal to 2.5 million euro per year of running costs. These amounts have not been included in the final summary of resources, for the reasons explained above.

Supervisory fees

77. In accordance with Article 72 of EMIR, ESMA shall charge fees to trade repositories. These fees will be defined through a delegated act by the Commission that will specify: the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.
78. It is therefore expected that all the cost outlined above for the registration, recognition and supervision of trade repositories will be fully covered by supervisory fees. ESMA stands ready to advise at the earliest convenience the Commission on the calculation and level of these fees, in order to ensure that the fees mechanism are in place by the time the applications by trade

repositories will start being received by ESMA, i.e. immediately after the entry into force of the technical standards on trade repositories.

VII. Central counterparties

79. As mentioned above, ESMA will have two direct competencies with reference to CCPs: 1) the participation in the colleges; 2) the recognition of third country CCPs.
80. As for the ESMA role in the colleges, ESMA will need to:
 - a. Participate in all the colleges of CCPs;
 - b. Have a coordination role between competent authorities and across colleges.
 - c. Ensure the consistent application of EMIR and relevant technical standards;
 - d. Facilitate the adoption of joint opinions;
 - e. Resolve disputes between competent authorities;
 - f. Take decisions on the authorisation of a CCP when the matter is referred to it;
 - g. Conduct an annual peer review;
 - h. Conduct Union wide stress tests.
81. In addition, under Article 49 of EMIR, NCAs and ESMA need to validate the risk models and parameters of CCPs, following significant changes of those and after having received: 1) an independent validation obtained by the CCP; 2) the results of the stress and back tests carried out by the CCP.
82. For the performance of all the tasks above, ESMA estimates that one officer can follow 5 colleges (1 large CCP and 4 smaller CCPs). The activity of model validation can be considered an additional task to be performed under ESMA's role in the colleges, so no dedicated resources are expected for such activity. 23 European CCPs are currently authorised to provide services and another 2 CCPs are expected to be authorised in 2013. ESMA, therefore, estimates its resource needs to fulfil its duties in terms of colleges to be equal to 5 FTE from 2013 onward.
83. For the recognition of third country CCPs the process is similar to the one described for trade repositories, i.e. equivalence, cooperation agreement and recognition. No international agreement is though required for the recognition of third country CCPs.
84. Although the process for the recognition of a CCP is similar to the one of a trade repositories and although recognised third country CCPs are already subject to equivalent legislation, ESMA believes that given the risks CCPs are exposed to and the impact they might have on financial stability, the process for the recognition of a CCP will be more detailed and granular than the one to recognise a trade repository. Against this background, ESMA estimates that to handle a recognition application 30 days FTE will be necessary.

85. Considering 4 applications for recognition in 2013, 3 applications in 2014 and zero in 2015, ESMA resource needs for the recognition of third country CCP is equal to 0.6 FTE in 2013 and 0.4 FTE in 2014. In addition, ESMA estimates an on-going cost related to recognised CCPs equal to 20 days FTE, which would amount to 0.2 FTE in 2013, 0.6 FTE in 2014 and 2015.

Fees for recognition third country CCPs

86. Although EMIR does not explicitly refer to fees for the recognition of third country CCPs, ESMA believes that the Commission Delegated Regulation on fees should include fees for third country CCPs for the following reasons:
- a. Processing the application of third country CCPs will have a cost and an impact on ESMA's budget;
 - b. European taxpayers (i.e. the contributors to ESMA budget) should not pay for allowing third country CCPs to freely offer their services within the EU;
 - c. European CCPs will pay fees to their supervisors to offer services in the EU and generally pay fees to offer services in third countries;
 - d. Fees dis-incentivise unsubstantiated applications, i.e. incomplete, inaccurate, or spurious applications;
 - e. National competent authorities currently require application and annual fees from recognised foreign CCPs, be they European or third country CCPs. In certain cases those fees are equal to around 90,000 euro for recognition and 100,000 euro annual fee.
87. As highlighted above under the supervisory fees for trade repositories, ESMA stands ready to advice the Commission at the earliest convenience on the computation and level of these fees.

VIII. OTC Derivatives

Clearing obligation

88. The determination of the classes of derivatives subject to the clearing obligation envisages two processes:
- 1) A bottom-up approach, under which following the authorisation of a CCP to clear a class of OTC derivatives, such class is notified to ESMA and this would trigger the ESMA assessment;
 - 2) A top-down approach according to which ESMA will need to identify the OTC derivatives that pose significant risks and that may be mitigated through the use of a CCP.
89. Under the bottom-up approach, following the notification of the competent authority, ESMA has 6 months to:

- a. Assess whether the relevant class of OTC derivatives meets the eligibility criteria;
- b. Develop and draft the technical standards to determine: i) the class of OTC derivatives subject to the clearing obligation; ii) the date of application of the clearing obligation, including any phasing-in per category of counterparty; iii) the minimum remaining maturity for frontloaded contracts to be cleared;
- c. Publicly consult;
- d. Finalise the draft technical standards to be sent to the European Commission for endorsement.

This is a complex and delicate task since it involves an assessment of market conditions and practices and ends up with a proposed obligation to clear that affects multiple parties.

90. ESMA estimates that 1 FTE can process two dossiers (i.e. group or categories of products for which the clearing obligation is proposed) per year. In fact, it will be 3-4 officers part time involved in each of those processes that will amount to 1 full FTE. Although ESMA is expected to receive a number of notifications in 2013, which will need to be processed, our estimates are based on the notifications expected to result in draft technical standards. ESMA, therefore, expects to issue the draft technical standards in the following cases, which would require the relevant reported resources:

- a. 6 dossiers in 2013, which would require 3 FTE;
- b. 5 dossiers in 2014, which would require 2.5 FTE;
- c. 2 dossiers in 2015, which would require 1 FTE.

91. With reference to the top-down approach, ESMA expects that to be covered under the general monitoring described below. It, therefore, does not consider to split that activity to determine the exact resources dedicated to the top-down process. In addition, it should be noted that following a top-down decision by ESMA (i.e. calling for the development of CCP solutions for clearing certain classes of OTC derivatives), for the obligation to start applying, a bottom-up approach will need to be followed and the resources for the analytical job of assessing the relevant classes of derivatives to be subject to the clearing obligation should not be double-counted in estimating the cost of the two approaches.

Monitoring

92. As mentioned under Section III, ESMA will need to carry out monitoring activity on OTC derivatives for the following purposes:

- 1) To identify systemic risk and prevent regulatory arbitrage between cleared and non-cleared transactions;
- 2) To ensure the proper functioning of the exemptions:
 - a. Periodic review of the thresholds for non-financial counterparties;
 - b. Management and controls of the notifications from NCAs on intragroup transactions;
- 3) To assist the Commission in preparing reports to the European Parliament and the Council on the international application of the clearing and reporting obligations, the exemptions to

non-financial counterparties and the risk mitigation techniques for the contracts not cleared by CCP, in particular with regard to potential duplicative or conflicting requirements.

93. In addition, ESMA considers that the activity involved in the determination of the clearing obligation under the top-down process is basically an on-going monitoring activity of the OTC derivatives market and of specific asset classes.
94. It should be noted that in view of the amount of notifications expected to be received for intragroup transactions, this will have an impact both in terms of IT and human resources. In particular, in terms of IT, ESMA will need to develop tools to: 1) receive the notifications from NCAs; 2) store such information; 3) process and analyse it.
95. ESMA is expecting to receive tens of thousands of intra-group notifications in the first wave (shortly after the entry into force of the technical standards on EMIR, expected for end Q1). It is difficult to estimate the amount of updates and new notifications which ESMA will receive on an on-going basis, but this number is unlikely to be more than 10% of the initial number of notifications, on a yearly basis.
96. Against this background, ESMA estimates that to carry out such monitoring activity, it would need to dedicate the equivalent of 2 officers working 2 days per week on the above tasks, thus amounting to 0.87 FTE per year.
97. With reference to the IT developments only the drafting of business requirements, system specifications and feasibility studies in order to determine the required technologies are foreseen for 2013. ESMA expects that those tasks will require 230 days of work, divided in 180 of an external consultancy and 50 days internal resources. The external consultancy cost would amount to €117,000, plus 30,000 euro per year for the maintenance. The internal resources will add up to the total overhead that EMIR implies.

IX. Public registers

98. As mentioned in Section III, ESMA will need to set up and maintain a number of registers. Some are more complex as they require continuous updates or links with national registers. Others are simpler and will take the form of a web page that would not require significant updates.

Register for the clearing obligation

99. The register for the clearing obligation will have two sections: 1) the classes of derivatives notified to ESMA, that might be eligible for the clearing obligation, but that are not yet declared subject to the clearing obligation; 2) the classes of derivatives subject to the clearing obligation.
100. The first part of the register will be relevant for the purpose of the frontloading and will contain a significant amount of information, given the number of OTC derivatives that are currently traded OTC and that can be cleared by various CCPs. The second part will be updated following the adoption of technical standards determining the classes of derivatives subject to the clearing obligation, so it is expected to be updated less frequently.

101. The complexity of this register will depend on the definition of the class of derivatives. As mentioned in ESMA technical standards, the classes should not be defined too narrowly to allow an easy circumvention of the obligation and not too broadly to include contracts that either do not meet the conditions for subjecting them to the clearing obligation, or that cannot be cleared by an authorised or recognised CCP.
102. The complexity of this register will impact its IT development and depending on the level of automation of the notifications and resulting decisions on the clearing obligation, it might require more or less manual work. ESMA is considering developing a relatively automated system, to have a smaller impact on resources.

Registers of CCPs' competent authorities and of authorised and recognised CCPs and trade repositories

103. The registers of CCPs' competent authorities and of authorised and recognised CCPs and trade repositories will be basically five webpages: 1) the list of NCAs responsible for the authorisation and supervision of CCPs; 2) authorised CCPs; 3) recognised CCPs; 4) authorised trade repositories; 5) recognised trade repositories. Although the registers for CCPs will need to include information on the services and activities they are authorised to provide or perform, including the financial instruments covered by the authorisation, ESMA does not expect a significant amount of work for the set-up and maintenance, given the relatively small number of updates per year.

Registers on penalties

104. ESMA will need to set-up the following registers on penalties imposed by national competent authorities for breaches of: 1) clearing obligation, 2) reporting obligation; 3) risk mitigation obligations; 4) provisions on access to CCP and trading venues; 5) obligations imposed on non-financial counterparties; 6) CCP requirements; and 7) interoperability provisions.
105. These registers will need to be linked with the national registers set-up for the same purposes. ESMA considers that initially, i.e. for 2013 the process and the link with the national registers can be managed manually, with exchange of information from NCAs to ESMA on the penalties imposed by the NCAs. Depending on the number of penalties imposed and on the basis of the experience gained following the manual set-up and maintenance of these registers, ESMA will consider whether to automatise the process.

Registers on fines and periodic penalty payments imposed to trade repositories and on types of pension scheme entities

106. These last two registers will be fed by either decisions taken by ESMA or by decisions taken by NCAs following an opinion released by ESMA. Although following the entry into force of the technical standards ESMA is expected to adopt a number of opinions on the type of the exempted pension scheme arrangements, following this initial wave of exemptions, the register is not expected to require a significant number of updates per year.

Resources needed for registers

107. In terms of human resources, ESMA expects that all the activity related to registers will require two days of work per month of an officer, for a total of 0.1 FTE per year from 2013 onward.

108. From an IT perspective the total cost of setting-up these registers is expected to be equal to 150 full time working days (100 days allocated to external consultant and 50 to internal resources) and 60.000 € material resources (software application development costs). Therefore the total project costs are estimated to 125,000 € for 2013 (65,000 € consultancy resources and 60,000 € material resources) and 32,000 € per year for the maintenance of the system. As for the other IT project mentioned above on intragroup notifications, the internal resources will be counted under the total overhead that EMIR implies.

X. Opinions

109. In accordance with Article 89(2) of EMIR, ESMA will need to issue opinions assessing the compliance of the type of entities and arrangements for pension schemes with Article 2(10)(c) or (d) of EMIR and the reasons why an exemption is justified due to the difficulties in meeting the variation margins requirements.

110. The procedure for the NCAs to grant an exemption to these types of pension scheme entities and arrangements foresees the following steps:

- 1) An NCA receives a request for exemption;
- 2) The NCA notifies ESMA and EIOPA of the request to grant an exemption to certain types of entities or arrangements;
- 3) ESMA will need to consult EIOPA;
- 4) ESMA, within 30 days from the notification, will need to issue the above-mentioned opinion.

111. ESMA will also need to issue opinions under Article 54(3) when an NCA wants to deny an interoperability arrangement, in order to assess the validity of the risk considerations on the basis of which the interoperability arrangement is denied. ESMA considers that the guidelines it will need to adopt for the consistent assessment of interoperability arrangements by competent authorities will limit the possibility for competent authorities to come to different conclusions on the fulfilment by the arrangement of the relevant requirements. Therefore, ESMA expects to adopt very few opinions in this respect.

112. With reference to the first type of opinions, ESMA expects the majority of those to be taken in 2013. ESMA is currently analysing together with EIOPA the existing type of entities and arrangements that may require an exemption under Article 2(10)(c) or (d). Therefore, at this stage, ESMA is not in a position to forecast precisely the number of opinions that it will be required to issue. However, from a very preliminary analysis and considering that ESMA intends to group the opinions to facilitate the process, it would be reasonable to assume around 10 procedures for requests of opinions on pension schemes in 2013 and 2 in 2014 and 2015. Given the very short timeframe for consulting and delivering these opinions, ESMA considers that this activity will be very resource intensive. It therefore considers that 10 days of a full time officer will be needed to process each opinion, thus amounting to 0.5 FTE in 2013 and 0.1 in 2014 and 2015.

XI. Reports

113. In accordance with Article 85 of EMIR, ESMA will need to prepare the following reports by September 2014:
- 1) On the application of the clearing obligation;
 - 2) On the application of the identification procedure under the top-down approach;
 - 3) On the application of segregation requirements for CCPs;
 - 4) On the extension of the interoperability requirements to non-cash financial instruments;
 - 5) On the access of CCPs to trading venues, the effect on competitiveness of certain practices and the impact on liquidity fragmentation;
 - 6) On the impact of the application by Member States of additional requirements to CCPs, including a banking licence;
 - 7) On the penalties imposed by competent authorities, including supervisory measures, fines, periodic penalty payments.
114. Part of the job to prepare these reports has been already counted under the monitoring section or under the college participation. However, dedicated time and resources will need to be allocated to the actual drafting of the reports.
115. In addition to these reports, ESMA will need to assist the Commission in preparing by August 2015 the following reports on:
- 1) systemic relevance of transactions by non-financial counterparties;
 - 2) efficiency of the margining requirements;
 - 3) evolution of CCPs' policies on collateral margining.
116. On the basis of previous experience, ESMA expects that the Commission will require technical advices to complete these reports.
117. For completing these tasks and considering that some of the analysis would be done under the monitoring of OTC derivative market or under participation in colleges of CCPs, ESMA expects that each report will require 15 days full time work. This would amount to:
- a. 0.5 FTE for 2014
 - b. 0.2 FTE for 2015

XII. Regulatory work for consistent implementation of EMIR

118. Although EMIR does not prescribe ESMA to prepare guidelines for the implementation of EMIR and relevant technical standards or Q&A for understanding how certain provisions in the standards should be implemented, ESMA expects to develop some of these measures in 2013 and 2014. In addition, different processes, procedures and templates will need to be established to facilitate the communication or notifications from market participants to NCAs and from NCAs to ESMA. These measures will be necessary to allow for:

- 1) the consistent application of exemptions (intragroup and pension schemes);
 - 2) the harmonisation of the communication processes, with uniform templates for notification on:
 - a. Clearing obligation;
 - b. Intragroup exemptions;
 - c. Pension schemes exemptions;
 - 3) The smooth establishment and functioning of the colleges, through:
 - a. A framework written agreement for the establishment and operation of colleges;
 - b. A template for the risk assessment report;
 - 4) Ensuring consistent reporting to trade repositories.
119. On the basis of the past experiences in draft guidelines and Q&As, ESMA estimates that it will need on average 45 days FTE per set of Guidelines or new Q&As and that it will have to work on 5 of these measures in 2013 and on 3 in 2014. This would amount to:
- a. 1 FTE for 2013
 - b. 0.6 FTE in 2014.

XIII. Total resources needed for EMIR

120. On the basis of the analysis described in the previous sections, Annex I summarises the resources needed and the monetary impact of EMIR on ESMA's budget.

121. In summary, ESMA will need in total 17 dedicated resources (FTE) in 2013, 18 dedicated resources in 2014 and 14 dedicated resources in 2015 to fulfil its mandate under EMIR. Each additional resource has an overall impact on the structure in terms of administrative support of 20%. In addition, the tasks required will also have an overall impact on the legal division of ESMA, requiring 1 FTE legal officer. Finally, considering the above-mentioned 100 days FTE of internal resources for IT development in 2013 of the OTC derivatives register and intragroup notifications tools, the overall total overhead (including legal and IT development) will amount to 5 additional

staff in 2013, 5 in 2014 and 4 in 2015. These numbers are not higher than comparable international supervisors with similar responsibilities.

122. In 2012 and in the 2013 budget, ESMA took out some resources planned for other areas to assign them to the ESMA post-trading team in charge of carrying out the activities described in this report. This was due to: 1) the priority to implement EMIR; 2) the absence of a dedicated budget line allocated to EMIR (in view of the competencies assigned to ESMA, for which this report has been requested).
123. As mentioned above, the average cost of an officer (of average grade and including all indirect costs associated to it) is equal to 200,000 euro. In addition, the IT costs are expected to be 242,000 euro in 2013 and 62,000 euro in 2014 and 2015. This means that the total impact of EMIR on ESMA budget is equal to:
- a. 4,695,000 euro for 2013
 - b. 4,586,000 euro for 2014
 - c. 3,684,000 euro in 2015
124. It should be noted that around half of EMIR's total impact on ESMA's budget is expected to be covered by fees. The collection of full cost recovery fees is foreseen in EMIR. Therefore, in the expectation that the Commission delegated act on fees will be adopted before the application date by trade repositories, the 2013 budget of ESMA already incorporates the collection of fees as a source of revenues.

ANNEX I – Tables of total resources

STAFF NEEDS	2013	2014	2015
	<u>FTE</u>	<u>FTE</u>	<u>FTE</u>
TRs			
Authorization of EU complex TRs	1.0	0.0	0.0
Authorization of EU less complex TRs	1.6	0.4	0.0
Recognition of 3rd country TRs	0.3	0.3	0.2
Ongoing supervision of TRs	2.6	6.7	6.7
Ongoing activity on third country TRs	0.0	0.1	0.2
<i>Sub-total TRs</i>	<i>5.5</i>	<i>7.5</i>	<i>7.1</i>
CCPs			
Participation in colleges	5.0	5.0	5.0
Recognition of foreign CCPs	0.6	0.4	0.0
On-going cost for recognised CCPs	0.2	0.6	0.6

<i>Sub-total CCPs</i>	5.6	5.4	5.0
OTC Derivatives and others			
Determination of the clearing obligation	3.0	2.5	1.0
Monitoring	0.9	0.9	0.9
Registers (Clearing , CCPs, TRs, Penalties, exemptions)	0.1	0.1	0.1
Opinions: pension funds and interoperability	0.5	0.1	0.1
Advice to the European Commission on equivalence	0.9	0.5	0.0
EMIR Review Report in 2014 (art 85.3)	0.0	0.5	0.0
EMIR Reports in 2015 (art 85.1 b. d. and e., if required by EU COM))	0.0	0.0	0.2
Guidelines, Q&A	1.0	0.6	0.0
<i>Sub-total OTC and others</i>	6.3	5.1	2.2
Sub-total FTE required for EMIR tasks	17	18	14
Sub-total Overhead, including legal officer and IT development (FTE required)	5	5	4
Total FTE required	22	23	18

MONETARY Value (Euro)	2013	2014	2015
Total TRs	1,105,667	1,507,940	1,417,031
Total CCPs	1,114,286	1,085,714	1,000,000
Total OTC and others	1,245,455	1,008,182	433,636
Sub-total cost for FTE required for EMIR tasks	3,465,408	3,601,836	2,850,667
IT costs for intragroup notifications	117,000	30,000	30,000
IT costs for registers	125,000		

	00	32,000	32,000
Sub-total IT costs	242,000	62,000	62,000
Sub-total Overhead, including legal officer and IT development (Euro equivalent)	988,354	922,549	772,315
Total Budget required	4,695,762	4,586,385	3,684,983