



European Securities and  
Markets Authority

# Delegation Agreement



## Delegation Agreement

(“The Agreement”)

The European Securities and Markets Authority, represented by Verena Ross;

(“ESMA”)

of the one part,

And

[Name of NCA1] with its Head office at [address], represented by [];

(“NCA”)

of the other part,

(Individually a "Party" and collectively the "Parties"),

taking into account the following considerations:

- (1) In accordance with Article 28(1) of Regulation (EU) No 1095/2010 (“ESMA Regulation”) the NCA may delegate tasks to ESMA;
- (2) A delegation of tasks may in certain cases be a useful instrument in the network of supervisors forming part of the European System of Financial Supervision in order to reduce the duplication of supervisory tasks, to foster cooperation and to reduce the burden imposed on financial market participants;
- (3) A delegation of tasks to ESMA means that tasks are carried out by ESMA in lieu of the NCA responsible for such tasks under the acts referred to in Article 1(2) of the ESMA Regulation, while the responsibility for supervisory decisions remains with the delegating NCA;
- (4) In accordance with Article 22(1) of Regulation (EU) No 600/2014 (“MiFIR”), the NCA is responsible for requiring information from trading venues, APAs and CTPs in order to carry out calculations for determining the requirements for the pretrade and post-trade transparency and the trading obligation regimes imposed by MiFIR and for determining whether an investment firm is a systematic internaliser;
- (5) In accordance with Article 27(1) MiFIR the NCA is responsible for receiving from trading venues and systematic internalisers identifying reference data for the purposes of transaction reporting under Article 26 MiFIR and for transmitting such information without delay to ESMA;

- (6) In accordance with Article 4(1) of Regulation (EU) No 596/2014 (“MAR”), in its capacity of competent authority of a trading venue, the NCA is responsible for receiving from market operators of regulated markets and investment firms and market operators operating an MTF or an OTF notification of (i) any financial instrument for which a request for admission to trading on their trading venue is made, which is admitted to trading, or which is traded for the first time and of (ii) when a financial instrument ceases to be traded or to be admitted to trading, unless the date on which the financial instrument ceases to be traded or to be admitted to trading is known and was referred to in the notification made under (i).
- (7) In accordance with Article 81(3) of Regulation (EU) No 648/2012 (“EMIR”) the NCA is responsible for exercising the access it is granted to information collected and maintained by trade repositories to the extent that such information is necessary to enable the NCA to fulfil its respective responsibilities and mandates;
- (8) The items described above under considerations (4) to (7) constitute execution and material tasks of an implementing nature of the powers of the NCA. As a consequence, the delegation to ESMA established by virtue of the Agreement will not result in a reallocation of competences or of responsibilities as laid down in Article 1(2) of the ESMA Regulation and in the acts referred to in such Article.
- (9) It is the Parties intention to have the NCA delegate to ESMA the above mentioned material tasks for which they are responsible in accordance with Article 22(1), and 27(1) MiFIR, Article 4(1) MAR as well as Article 81(3) EMIR. Corresponding agreements are concluded by ESMA with other national competent authorities to the extent to which these latter authorities have also decided to delegate the above mentioned material tasks to ESMA. A centralization of the carrying out of such tasks with ESMA is expected to simplify the required IT set-up and entail economies as well as a reduction of the burden imposed on the relevant financial market participants.
- (10) In practice, once implemented, this delegation of tasks will imply that the relevant information (information required under Article 22(1) MiFIR, financial instruments reference data provided under Article 27(1) MiFIR, notifications made under Article 4(1) MAR and information to be made available under Article 81(3) EMIR) is to be transmitted by the relevant financial market participants to ESMA which will then make it available to the NCA. Consequently, the delegation of tasks provided for under the Agreement will also imply that ESMA will provide to competent national authorities information on the applicable transparency thresholds under MiFIR.
- (11) The Agreement is intended to apply to the extent that the NCA has agreed to delegate the relevant tasks relating to a given Project as defined in Article 2 of the Agreement. Accordingly, if the NCA participates only in one of the Projects, only the provisions of the Agreement and its annexes relevant for this Project will in practice be applicable.

have agreed as follows:

## **Article 1: Purpose**

1.1 The purpose of this Agreement is to define the mission entrusted to ESMA in the framework of the Delegation. The relevant delegated tasks and related services and

activities are described in more detail in Annex 1 (Description of Tasks) and Annex 2 (Project Presentation Documents). The purpose of this Agreement is furthermore to lay down the rules for the Implementation of the Delegation and the Execution of the Tasks and to set out the relations between ESMA and the NCA in this respect.

1.2 ESMA is entrusted with the activities related to the Implementation of the Delegation and the Execution of the Tasks under the terms and conditions set out in this Agreement and its annexes.

## **Article 2: Definitions and Interpretation**

**Delegated Projects' Board:** a committee composed of ESMA's staff and representatives from ESMA's Board of Supervisors designated by all national competent authorities having entered into agreements corresponding to this Agreement to be set up as part of the Governance Framework as described in Annex 6.

**Delegation:** the delegation of tasks as described in Annex 1.

**Economy:** the principle of economy requires that the resources used in the pursuit of the Implementation of the Delegation and the Execution of the Tasks shall be made available in due time, in appropriate quantity and quality and at the best price.

**Effectiveness:** the principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results.

**Efficiency:** the principle of efficiency concerns the best relationship between resources employed and results achieved.

**Execution (of the Tasks):** the carrying out of the Tasks in relation to maintenance and support once the set-up phase of the relevant Project has been completed, as described for each Project.

**Final Report:** a complete account of all aspects of the Implementation of the Delegation to be issued after completing the Implementation of the Delegation. The report shall describe the Implementation of the Delegation. The report shall be laid out in such a way as to allow comparison of the objective(s), the means envisaged or employed, the results expected and obtained and the budget details for the Implementation of the Delegation. A model of the Final Report is attached as Annex 8.

**Force Majeure:** any situation or event beyond the Parties' control which is inexorable and inevitable to the point of making impossible for the Party concerned to comply with any of its obligations under the Agreement, which may not be attributed to error or negligence on either part (or the part of their agents or staff), and which could not have been avoided by the exercise of due diligence. Defects in equipment or material or delays in making them available, labour disputes, strikes or financial problems cannot be invoked as *force majeure* by the defaulting Party.

**Implementation (of the Delegation):** the carrying out of the Tasks in relation to the set-up phase of the relevant Project, as described for each Project.

**Infringement:** any infringement of a provision of the Agreement resulting from an act or an omission by either Party which causes or might cause a loss to the other Party.

**Irregularities:** any improper Execution of the Tasks.

**Project:** each of the projects further described in Annex 2.

**Progress Report:** complete account of all aspects of the Implementation of the Delegation and the Execution of the Tasks for a certain period of time as provided for under this Agreement. The Progress Report shall describe the Implementation of the Delegation and the Execution of the Tasks. The Progress Report shall be laid out in such a way as to allow comparison of the objective(s), the means envisaged or employed, the results expected and obtained and the budget details for the Delegation. A model of a Progress Report is attached as Annex 7.

**Sound Financial Management:** principle overarching the Implementation of the Delegation and the Execution of the Tasks, namely Economy, Effectiveness and Efficiency.

**Tasks:** tasks delegated by virtue of this Agreement, as well as the services and activities ancillary to the delegated tasks, and more particularly: (i) the tasks described in Annex 1, (ii) the activities to be carried out by ESMA under the Project Presentation Documents described in Annex 2.

### **Article 3: General obligations**

#### **Implementation of the Delegation and Execution of the Tasks**

3.1 ESMA will carry out the activities assigned to it under the Agreement and relating to the (i) Implementation of the Delegation in accordance with the work plan set out in Annex 5 and (ii) the Execution of the Tasks in accordance with the service levels as prescribed in Annex 3.

3.2 In carrying out the activities assigned to it under the Agreement, ESMA shall not affect or modify the agreed features of the Delegation. In carrying out the activities assigned to it under the Agreement, ESMA will act and be organised in accordance with the provisions of the ESMA Regulation and other applicable EU legislation in such a manner as to avoid conflict of interests and to ensure that information obtained from carrying out the activities assigned to it under the Agreement is not used unfairly or to prevent competition. In carrying out the activities assigned to it under the Agreement, ESMA will be subject to Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union, and notably its Title V on procurement, and Commission Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012, and notably its Title V on procurement. ESMA may not sub-delegate any of the tasks delegated by virtue of this Agreement.

3.3 ESMA shall carry out the activities assigned to it under the Agreement in accordance with the principle of Sound Financial Management, transparency and non-discrimination.

## **Responsibility**

### 3.4 Responsibility of ESMA

- a) ESMA shall be fully responsible towards the NCA for the activities assigned to it under the Agreement for the Implementation of the Delegation and the Execution of the Tasks and for ensuring compliance with the provisions of the Agreement.
- b) ESMA shall without undue delay take all appropriate measures to resolve problems encountered during the Implementation of the Delegation and the Execution of the Tasks.
- c) ESMA shall without undue delay prevent any Irregularities when executing the activities assigned to it under the Agreement, and if not possible, it will without undue delay correct any detected Irregularity.

### 3.5 Responsibility of the NCA

- a) The NCA shall provide ESMA with the required financial contribution as further specified in Article 4, the assistance stipulated for the relevant Project in this Agreement and in Annex 3, and the cooperation required in the context of the Governance Framework set out in Annex 6 so as to enable ESMA to comply with the work plan set out in Annex 5.
- b) The NCA shall be fully responsible towards ESMA for providing ESMA with the support it is materially and legally able to provide for the Implementation of the Delegation and Execution of the Tasks described in Annex 1 where the relevant activity would be outside ESMA's remit under this Agreement and within the remit of the NCA. To this end, the NCA shall provide ESMA with all support to be reasonably expected and to the extent that it is able to do so under national law, always provided that national law complies with EU law. Notably, insofar as relevant, the NCA shall take all possible measures to enable financial market participants for which it is the national competent authority under the relevant sectoral legislation to transmit relevant information to ESMA.

## **Other obligations**

3.6 ESMA shall notify the Delegated Projects' Board without undue delay of any substantial change in the rules, procedures and systems applied in the Implementation of the Delegation and Execution of the Tasks. This obligation concerns in particular any circumstance likely to affect the Implementation of the Delegation and Execution of the Tasks or delay or event that might jeopardise the performance of the Agreement. If as a consequence of such a change an amendment to the Agreement, including its annexes, becomes necessary, the provisions of Article 12 apply.

3.7 In so far as relevant, in order to ensure a proper and efficient Implementation of the Delegation and Execution of the Tasks, the NCA shall promptly inform all interested third

parties and stakeholders, such as financial market participants, of the Delegation and, as the case may be, instruct them accordingly, so as to enable them to comply with their reporting and other obligations under the applicable legislation. The Parties shall agree on the measures to be taken for those purposes, without prejudice to any additional communication with stakeholders that the NCA deems appropriate.

3.8 The Parties shall ensure proper communication with the European Commission and, if necessary, other EU Institutions and Bodies, in relation to the Delegation, the Implementation of the Delegation and the Execution of the Tasks, in order to ensure proper execution of the applicable legislation.

#### **Article 4: Financing the Delegation**

4.1 The NCA undertakes to provide for each relevant Project a financial contribution following the approach set out in Annex 4 (Financial Contribution and Approved Budget).

4.2 ESMA shall call the financial contribution in accordance with Article 18.

#### **Article 5: Obligations regarding information and reporting**

##### **General issues**

5.1 ESMA shall provide the Delegated Projects' Board with full information on the Implementation of the Delegation and the Execution of the Tasks in accordance with the Governance Framework as described in Annex 6. To that end, ESMA has included in Annex 5 a work plan for the Implementation of the Delegation. ESMA shall submit to the Delegated Projects' Board Progress Report(s) on all aspects of the Implementation of the Delegation and the Execution of the Tasks for each Project for the period covered in accordance with the provisions below and a Final Report concerning the Implementation of the Delegation for each Project. These reports shall consist of a narrative part and a financial part (including a budget implementation report). In any case, ESMA shall notify the Delegated Projects' Board without undue delay of any identified delay in the Implementation of the Delegation which is deemed to have a substantial impact on the financial contribution referred to in Article 4.

5.2 The Delegated Projects' Board or the NCA may request additional information at any time from ESMA, providing the reasons for that request. Such information shall be supplied within 30 calendar days of receipt of the request.

5.3 ESMA and the NCA shall promote close collaboration and exchange of information on the state of progress of the Delegation.

5.4 The Progress Reports and the Final Report are submitted by ESMA to the Delegated Projects' Board for acceptance of their content within 30 calendar days from submission to the Delegated Projects' Board. The content of a Progress Report or a Final Report shall be deemed to have been accepted if it is not refused by the Delegated Projects' Board within 30 calendar days from its submission. By accepting the content of the

relevant report the Delegated Projects' Board confirms for each Project that the Implementation of the Delegation and, if relevant, the Execution of the Tasks as described by the content of the relevant report complies with the agreed deliverables as set out in the work plan contained in Annex 5 and corresponds to the expected requirements and service levels as prescribed in Annex 3.

### **Content of the reports**

5.5 The Progress Report(s) shall at least include the information in the model attached as Annex 7.

5.6 The Final Report shall at least include the information in the model attached as Annex 8.

5.7 ESMA shall submit a Progress Report for every three-month period as from the commencement until the completion of the Implementation of the Delegation for each relevant Project. As from the completion of the Implementation of the Delegation for the relevant Project, ESMA shall for each Project submit a Progress Report for every one-year period in relation to the Execution of the Tasks. Reporting, narrative as well as financial, notably as regards the costs incurred in relation to the Delegation during the relevant period, shall cover each Project individually. Progress Reports shall be submitted within 30 calendar days after the period covered by such report and the Final Report at the latest three months after the end of the Implementation of the Delegation for the relevant Project.

### **Failure to comply with reporting obligations**

5.8 If ESMA fails to present a Progress or the Final Report and the accompanying documents for a Project by the end of the deadline set out in Article 5.7, ESMA shall within 15 calendar days inform the Delegated Projects' Board in writing of the reasons why it is unable to do so, and shall provide a summary of the state of progress of the Delegation.

## **Article 6: Liability**

### **Liability towards third parties**

6.1 Liability of the NCA towards third parties shall not be affected by this Agreement, including liability for damage or injury of any kind sustained by third parties in respect of or arising out of the Implementation of the Delegation and the Execution of the Tasks. The NCA shall not be liable towards contractors ESMA has entered into agreements with in respect of the Delegation and ESMA shall thus discharge the NCA of liability associated with any claim or action brought against an NCA by such contractors up to an amount equivalent to the financial contribution provided by the NCA for the relevant Project(s) in accordance with Article 4.1.

6.2 ESMA shall discharge the NCA of liability associated with any claim or action brought as a result of an infringement of rules and regulations applicable to the Implementation of

the Delegation and the Execution of the Tasks committed by ESMA or ESMA's staff up to an amount equivalent to the financial contribution provided by the NCA for the relevant Project(s) in accordance with Article 4.1.

6.3 Should a third party bring liability actions against the NCA based on the Execution of the Tasks, the NCA will immediately inform ESMA about the scope of the actions and the goal pursued by the third party. Should this occur, ESMA commits to intervene in support of the NCA concerned.

6.4 ESMA shall without undue delay and as soon as the total amount of the costs borne by the NCA can be determined compensate the NCA for costs caused by a claim or an action brought against the NCA that should have been discharged according to Articles 6.1 or 6.2 where this did not effectively prevent the claim or action. The overall amount to be claimed by the NCA under Articles 6.1, 6.2 and the present provision may however under no circumstance exceed an amount equivalent to the financial contribution provided by the NCA for the relevant Project(s) in accordance with Article 4.1.

#### **Liability between the Parties**

6.5 The Parties shall be liable towards one another for a breach of their respective obligations under this Agreement which is due to negligence or intent on their part and compensate the other Party for any loss up to an amount equivalent to the financial contribution to be provided by the NCA for the relevant Project(s) in accordance with Article 4.1.

#### **Article 7: Confidentiality**

7.1 The NCA and ESMA shall, subject to national rules regarding access to information applicable to the NCA and in compliance with EU law, preserve the confidentiality of any document, information or other material directly related to the Implementation of the Delegation and the Execution of the Tasks in accordance with the provisions of Article 70 of ESMA Regulation and the provisions of EU law on professional secrecy applicable to the NCA. The Delegated Projects' Board, as the case may be upon request by the NCA, shall have access to all relevant documents, information or other material upon request.

7.2 Without prejudice to the provisions of Article 3.7 and the confidentiality requirements referred to in Article 7.1, the Parties shall obtain each other's prior written consent before disclosing any information related to the Agreement, the Implementation of the Delegation and the Execution of Tasks to a third party or the public, unless the disclosure of such information is required by EU law or national law, always provided that such national law complies with EU law.

## **Article 8: Data Protection**

8.1 ESMA ensures the protection of personal data through its own rules and procedures in accordance with the provisions of Regulation (EC) No 45/2001<sup>1</sup> and Article 8 of the Charter of Fundamental Rights of the European Union.

## **Article 9: Outside communication**

9.1 Without prejudice to the provisions of Article 7.2, ESMA shall ensure that reports and press releases relevant to the Delegation are communicated to the Delegated Projects' Board 7 calendar days before they are issued. According to Article 28(4) ESMA Regulation, this Agreement must also be published.

## **Article 10: Ownership and use of results, ownership of data**

10.1 All IT materials, including software, programs, source code and object code, comments to the source or object code, specifications, documents, abstracts and summaries thereof developed by ESMA in connection with the Implementation of the Delegation for each Project shall be owned jointly by ESMA and the NCA as well as all other national competent authorities having concluded an agreement corresponding to the Agreement for the relevant Project(s).

10.2 All other results of the Delegation for each Project and the reports and other documents relating to it shall be owned jointly by ESMA and the NCA as well as all other national competent authorities having concluded an agreement corresponding to the Agreement for the relevant Project, as the case may be together with third parties or as otherwise agreed.

10.3 Subject to Articles 7 and 15.7, upon termination or non-renewal of the Agreement, the NCA (as well as all other national competent authorities having concluded an agreement corresponding to the Agreement) shall have the right to use free of charge all results of the Delegation, whatever their form, the right to modify them as might be necessary for the proper performance of the obligations of the NCA, without any limitation of duration. Accordingly, ESMA shall notably provide the NCA upon request with the IT materials referred to in Article 10.1. The NCA shall also have the right to use under the same conditions any pre-existing industrial and intellectual property rights owned by ESMA, which have been included in the results of the Delegation. ESMA shall also make any reasonable effort so as to enable the NCA to use any relevant industrial and intellectual property rights which are not owned by ESMA. ESMA shall provide the NCA with such information and grant the right to use it free of charge and to modify it even before the termination or non-renewal of the Agreement, upon a reasoned request of the NCA.

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<sup>1</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

10.4 ESMA acting under a delegation of tasks in accordance with the provisions of the ESMA Regulation, the data to be transmitted by the relevant financial market participants to ESMA acting under the Delegation belong exclusively to the NCA, which shall decide on the use of, and access to, any such data.

#### **Article 11: Monitoring and evaluation of the Delegation**

11.1 The Delegated Projects' Board shall carry out the monitoring and evaluation relating to the Implementation of the Delegation and Execution of the Tasks, with a view to continuously improving the service levels.

11.2 ESMA shall implement the measures arising from the monitoring and evaluation referred to in Article 11.1 and report back the results to the Delegated Projects' Board in accordance with the Governance Framework as described in Annex 6.

#### **Article 12: Amendment to the Agreement**

12.1 Any amendment to this Agreement, including its annexes, shall be set out in writing in a document signed by both Parties.

12.2 The requesting Party shall submit in writing to the Delegated Projects' Board any request for amendment to this Agreement, including its annexes, for information. The Parties endeavour to limit to the minimum required for complying with applicable national law, always provided that such national law complies with EU law, any amendments that cannot also be made in parallel to the delegation agreements concluded by ESMA with other national competent authorities for one or more Projects due to the relevant national law applicable to such latter authorities, always provided that such latter national law complies with EU law.

12.3 The requesting Party shall request any amendment to the extent possible at least 30 calendar days before the amendment is intended to enter into force. The Delegated Projects' Board will be informed of any amendment that actually enters into force.

12.4 ESMA will monitor the EU law relevant for the legal provisions referred to under this Agreement and, in so far as necessary, propose amendments to this Agreement, including its annexes.

#### **Article 13: Extension of time limit for Implementation, Suspension, Force Majeure**

13.1 In exceptional and duly substantiated cases, either Party may request to extend the time limit for Implementation of the Delegation in full or for one of the Projects, whatever relevant, subject to the provisions provided for in Article 12.

13.2 Either Party may suspend the Implementation of the Delegation or the Execution of Tasks in full or for one of the Projects, whatever relevant, in case of Force Majeure. In such case, it shall inform the Delegated Projects' Board immediately, and to the extent

possible in advance, and provide all the necessary details and the foreseeable effect and date of resumption.

13.3 Neither of the Parties shall be held liable for an Infringement if it is prevented from fulfilling its obligations under the Agreement by Force Majeure or by the other Party, provided it takes all possible measures to minimise possible damage.

13.4 If the NCA provides the Delegated Projects' Board with any evidence that ESMA has committed substantial Infringements or Irregularities, such as a repeated failure to comply with reporting obligations as referred to in Article 5.8, in the Implementation of the Delegation and the Execution of the Tasks, or if the Delegated Projects' Board does not accept the content of a Progress Report or of the Final Report for the relevant Project, the Delegated Projects' Board shall give ESMA a reasonable period to remedy this situation, such period not to be less than 30 calendar days. The Delegated Projects' Board may request ESMA to immediately suspend the Implementation of the Delegation or Execution of the Tasks in full or for one of the Projects, whatever relevant, if the situation is not remedied within the above-mentioned period.

13.5 The Parties shall each make their best efforts, within their own respective remit under this Agreement, to minimise the duration of the suspension and ESMA shall, unless the Agreement is terminated, resume the Implementation of the Delegation or the Execution of the Tasks once the Delegated Projects' Board acknowledges that the conditions allow doing so. The time limit for Implementation is automatically extended by an amount of time equivalent to the duration of a suspension of the Implementation of the Delegation. This is without prejudice to any amendments to the Agreement which may be necessary to adapt the Delegation to new conditions for Implementation or to a termination in accordance with Article 15.

#### **Article 14: Suspension of payments**

14.1 If there is a suspension of the Implementation of the Delegation or the Execution of Tasks in full or for one of the Projects, whatever relevant, in case of Force Majeure in accordance with Article 13.2, the NCA may in turn suspend the payment of the following financial contribution to be called in accordance with Article 4.2, in full or for one of the Projects, whatever relevant, for the duration of the suspension of the Implementation of the Delegation or Execution of the Tasks.

14.2 If the Delegated Projects' Board requests ESMA to suspend the Implementation of the Delegation or Execution of the Tasks in accordance with Article 13.4, the NCA may in turn suspend the payment of the following financial contribution to be called in accordance with Article 4.2, in full or for one of the Projects, whatever relevant, for the duration of the suspension of the Implementation of the Delegation or Execution of the Tasks.

## **Article 15: Termination of the Agreement**

15.1 If, at any time, either Party believes that the purposes of the Agreement can no longer be effectively or appropriately carried out due to Force Majeure or substantial changes affecting the Implementation of the Delegation or the Execution of Tasks it shall consult the Delegated Projects' Board. Failing agreement on a solution between the Parties and discussed in the Delegated Projects' Board within a period of 60 calendar days, either Party may terminate the Agreement in relation to the Delegation in full or for one of the Projects, whatever relevant, by serving 30 calendar days written notice. In case Force Majeure or substantial changes affecting the Implementation of the Delegation are relied upon by the NCA before the completion of the Implementation of the Delegation for the relevant Project(s) and the corresponding delegation agreements concluded by ESMA with other national competent authorities are maintained for the relevant Project(s), ESMA shall nevertheless be entitled to payment of the entire financial contribution due for the Implementation of the Delegation for the relevant Project(s). In all other cases ESMA shall be entitled to the payment of the financial contribution corresponding to the costs incurred up until the termination takes effect.

15.2 Without prejudice to any other provision of this Agreement, the NCA may terminate the Agreement in relation to the Delegation in full or for one of the Projects, whatever relevant:

- a) If ESMA undergoes legal, financial, technical or organisational changes likely to substantially affect in a negative way the Implementation of the Delegation and the Execution of the Tasks;
- b) If ESMA has intentionally or by negligence committed a substantial Infringement or Irregularity in performing the Agreement;
- c) If the duration of a suspension of the Implementation of the Delegation or Execution of the Tasks in accordance with Articles 13.2 and 13.4 exceeds 6 months.

In such case, ESMA shall be entitled to payment of the financial contribution due for the Implementation of the Delegation and the Execution of the Tasks for the relevant Project(s) up until the termination takes effect, subject to the provisions of Article 20.

15.3 Without prejudice to any other provision of this Agreement, the NCA may furthermore for other reasons terminate the Agreement in relation to the Delegation in full or for one of the Projects, whatever relevant, before the end of the implementation time limit referred to in Article 23.3, subject to the provisions of Article 15.6.

15.4 Without prejudice to any other provision of this Agreement, ESMA may terminate the Agreement in relation to the Delegation in full or for one of the Projects, whatever relevant:

a) If the NCA undergoes legal, financial, technical or organisational changes likely to substantially affect in a negative way the Implementation of the Delegation and the Execution of the Tasks;

b) If the NCA has intentionally or by negligence committed a substantial Infringement in performing the Agreement.

15.5 In the circumstances mentioned in Articles 15.2, 15.3 and 15.4, the Parties shall consult the Delegated Projects' Board and enter into discussions with each other. Failing agreement on a solution between the Parties and discussed in the Delegated Projects' Board within a period of 60 calendar days, the relevant Party may terminate the Agreement by serving 30 calendar days written notice.

15.6 In the case of a termination under the circumstances mentioned in Articles 15.3 and 15.4, ESMA shall be entitled to payment of the entire financial contribution due for the Implementation of the Delegation for the relevant Project(s) and to the payment of the financial contribution corresponding to the costs incurred for the Execution of the Tasks for the relevant Project(s) up until the termination takes effect.

15.7 In the event of termination of this Agreement, regardless for what reason it occurred, Parties shall take all necessary measures allowing the NCA to directly execute the Tasks with respect to third parties (if necessary), in order to fully perform its duties under the applicable legislation.

## **Article 16: Applicable law and settlement of disputes**

16.1 This Agreement is governed by EU law and the general principles common to the legal systems of the Member States, complemented, where necessary, by the national substantive law of France.

16.2 The Parties shall endeavour to consult the Delegated Projects' Board and settle amicably any dispute or complaint relating to the interpretation, application or fulfilment of the Agreement, including its existence, validity or termination.

16.3 In case of dispute relating to the interpretation, application or fulfilment of the Agreement, any Party shall start an amicable settlement procedure by sending a written 'invitation to negotiate' to the other Party. Such procedure shall consist in the Parties' attempt to resolve the dispute in good faith through agreed mediation supported by the Delegated Projects' Board.

16.4 In default of successful amicable settlement, within 90 calendar days -either by failure of the Parties to settle or by failure of the requested Party to agree to initiate the amicable settlement procedure- any Party may refer the matter to the General Court of the EU and,

in the event of appeal, to the Court of Justice of the EU, in accordance with Article 272 TFEU.

## **Article 17: Eligible costs**

### **Conditions for the eligibility of costs**

17.1 Eligible costs incurred by ESMA, to be covered by the financial contribution in accordance with Article 4.1, shall meet the following criteria:

- a) They are necessary for carrying out the activities assigned to ESMA under the Agreement linked to the Implementation of the Delegation or the Execution of the Tasks;
- b) They are actual, i.e. they represent real costs definitely and genuinely borne by ESMA in relation to the Implementation of the Delegation or the Execution of the Tasks;
- c) They are reasonable, justified and comply with the principle of Sound Financial Management, in particular regarding Economy and Efficiency;
- d) They are incurred during the Implementation of the Delegation or the Execution of the Tasks;
- e) They are identifiable, in particular being recorded in the accounting records of ESMA and are in accordance with ESMA's budget. They are backed by effective supporting evidence (originals, as the case may be in electronic form) and are verifiable.

### **Categories of eligible costs**

17.2 The following categories of costs are eligible costs, provided that they satisfy the conditions of eligibility set out in Article 17.1 as well as the following conditions:

- a) The costs of ESMA's own staff, which shall correspond to salaries and related employer's contributions (pension etc.) of the staff assigned to the Implementation of the Delegation and the Execution of the Tasks and other statutory costs included in the remuneration of the staff. The evidence regarding the actual time worked by the staff shall be through timesheets.
- b) The costs of travel by the staff assigned to the Implementation of the Delegation and the Execution of the Tasks and related subsistence allowances, provided that these costs are in line with ESMA's usual practices on travel;
- c) Purchase costs for equipment (new or used) which are directly attributable to the Implementation of the Delegation and the Execution of the Tasks;
- d) Purchase costs for goods and services (transport, storage and distributing, rent of equipment, etc.) which are directly attributable to the Implementation of the Delegation and the Execution of the Tasks;

e) Costs of consumables and supplies directly attributable to the Implementation of the Delegation and the Execution of the Tasks.

### **Article 18: Payments**

18.1 ESMA shall issue debit notes for the financial contribution of the NCA in accordance with Article 4.1.

18.2 Debit notes shall be issued twice a year, the first time in February, for an amount not to exceed 70 per cent of the agreed annual contribution of the NCA in accordance with Article 4.1 and the second time in September for the balance.

18.3 ESMA shall present budget implementation reports in accordance with the stipulations of Article 5.

18.4 The NCA shall make payments in Euro into the following bank account:

Citibank International Plc  
1-5 rue Paul Cezanne  
75008 Paris (France)

IBAN: FR76 1168 9007 0000 6570 0700 550

BIC: CITIFRPP

18.5 ESMA's financial regulation (ESMA/2014/MB/38) applies to all other aspects related to the management of the NCA's financial contribution.

### **Suspension of the time limit for payment**

18.6 The NCA may suspend the applicable time limit for payment at any time either because the supporting documents referred to in Article 17.1 have not been produced, or because there is doubt about the eligibility of the costs declared. The NCA shall revert to ESMA with a request explaining the reason and specifying the additional information required.

18.7 Suspension shall take effect on the date when the NCA sends the notification stating the reasons for the suspension. The remaining payment period shall start to run again from the date on which the requested information or revised documents are received by the NCA.

### **Late payment interest**

18.8 In case of late payment interest shall be accrued at the rate applied by the European Central Bank for its main refinancing operations in Euros (the reference rate), plus eight points. The reference rate shall be the rate in force on the first day of the month in which the payment period ends, as published in the C series of the Official Journal of the European Union. The interest shall be payable for the period elapsing from the day

following expiry of the time limit for payment up to the day of payment. Any partial payment shall first cover the interest.

#### **Article 19: Final amount**

19.1 This Agreement shall not, in any circumstances, result in a profit for ESMA. Therefore, subject to the provisions of Article 15, any financial contribution paid by the NCA exceeding the actual costs incurred by ESMA under this Agreement shall be paid back to the NCA by ESMA either through a recovery or, preferably, through a reduction of a following financial contribution to be called in accordance with Article 4.2.

#### **Article 20: Recovery, Reduction**

20.1 Where an amount is to be recovered under the terms of the Agreement, ESMA shall repay to the NCA the amount in question in Euro.

20.2 Prior to or in the absence of acceptance by the Delegated Projects' Board of the content of a Progress Report or the Final Report containing such evidence, if the NCA has evidence that:

- a) there has been a poor, partial, late or non-Implementation of the Delegation for the relevant Project(s), or
- b) a poor, partial, late or non-Execution of the Tasks for the relevant Project(s) (at that stage of the Delegation),

the NCA shall consult the Delegated Projects' Board and formally notify ESMA of its intention to recover the amount unduly paid or to reduce its financial contribution in line with the actual Implementation of the Delegation and the Execution of Tasks (at that stage of the Delegation) for the relevant Project(s), specifying the amount due or to be reduced and the reasons for recovery or reduction, inviting ESMA to make any observations within a specified period.

20.3 Following the termination or non-renewal of the Agreement, if the NCA considers that the amount it has already paid exceeds the actual costs incurred by ESMA under this Agreement, it shall consult the Delegated Projects' Board and formally notify ESMA of its intention to recover the amount unduly paid, specifying the amount due and the reasons for recovery, inviting ESMA to make any observations within a specified period.

20.4 If ESMA does not submit any observations in reply to a notification made in accordance with Articles 20.2 or 20.3, or if, despite the observations submitted by ESMA, the NCA decides to pursue the recovery or reduction procedure, the NCA may confirm recovery or reduction by formally notifying to ESMA a debit note or a formal notification, specifying the terms and, in case of recovery, the date for payment.

20.5 If ESMA does not make the payment by the date specified in the debit note, the NCA shall recover the amount due:

- a) By offsetting it against any amounts owed to ESMA by the NCA;
- b) By taking legal action in accordance with Article 16.

20.6 Payments by ESMA shall be deemed to be made on the date on which they are debited from its account. If ESMA fails to repay by the due date, the sum due shall bear interest at the rate applied by the European Central Bank for its main refinancing operations in Euros (the reference rate), plus eight points. The reference rate shall be the rate in force on the first day of the month in which the payment period ends, as published in the C series of the Official Journal of the European Union. The interest shall be payable for the period elapsing from the day following expiry of the time limit for payment up to the day of payment. Any partial payment shall first cover the interest.

20.7 Bank charges incurred from the repayment of amounts due to the NCA shall be borne entirely by ESMA.

#### **Article 21: Accounts and records**

21.1 ESMA shall keep accurate and regular records and accounts of the Implementation of the Delegation and the Execution of the Tasks. The NCA accepts that the accounting regulations and rules of ESMA shall apply.

#### **Article 22: Communication language and contacts**

22.1 All communications between the Parties in connection with the Agreement shall be in English. All IT materials referred to in Article 10.1 shall be in English.

22.2 Any communication relating to the Agreement shall be in writing, shall state the reference number of the Agreement, and shall use the addresses set out in Article 22.3 below.

22.3 Payment requests and attached reports, including requests for changes to bank account arrangements shall be sent to:

For ESMA:

CS 60747  
103 rue de Grenelle  
75345 Paris Cedex 07  
France  
For the attention of Finance Department



For the **[Name of the NCA]**

**[complete details for NCA]**

For the attention of **[Unit/Section, including address]**

22.4 Ordinary mail shall be deemed to have been received by the Parties on the date on which it is officially registered at the address referred to above.

## **Article 23: Entry into force, duration, time limits for Implementation and Execution**

### **Entry into force and duration**

23.1 The Agreement shall enter into force on the date when it has been signed by the Parties and ESMA's Board of Supervisors has adopted the amended budget required for the Delegation to take place.

23.2 The Agreement is concluded for an initial period corresponding for each Project to the Implementation of the Delegation in accordance with Article 23.3 and three years of Execution of the Tasks. It shall be automatically renewed for subsequent periods of one year, unless one of the Parties informs the other by serving a 90 calendar days written notice of its intention not to renew the Agreement in relation to the Delegation in full or for one of the Projects, whatever relevant.

### **Implementation time limit**

23.3 The Implementation of the Delegation shall start when the Agreement enters into force. The Implementation of the Delegation shall end for each Project in accordance with the work plan set out in Annex 5 as acknowledged by the acceptance by the Delegated Projects' Board of the content of the relevant Final Report, unless the Agreement is terminated at an earlier date.

### **Execution time limit**

23.4 The Execution of the Tasks shall start for each Project at completion of the Implementation of the Delegation in accordance with Article 23.3 and end with the non-renewal of the Agreement, unless the Agreement is terminated at an earlier date.



**Article 24: Annexes**

24.1 The following documents are annexed to this Agreement and form an integral part of the Agreement:

Annex 1.1 (Description of Tasks)

Annex 2.1 (Presentation Instrument Reference Data Project)

Annex 3.1 (SLA Instruments)

Annex 4.1 (Financial contributions)

Annex 5.1 (Work plan)

Annex 6 (Governance Framework)

Annex 7 (Progress Report Template)

Annex 8 (Final Report Template)

24.2. In the event of a conflict between this Agreement and any Annex thereto, the provisions of this Agreement shall take precedence.

Done in specify in two originals in the English language, one for the relevant NCA and one for ESMA.

**For the [NCA]**

**For ESMA**

Name

Name

Verena ROSS

Position

Position

Executive Director

Signature

Signature

Date

Date