



European Securities and  
Markets Authority

# Final Report

**TA on procedural rules for penalties imposed on DRSPs**





ESMA REGULAR USE

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ESMA43-370-282

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## Executive Summary

### Reasons for publication

On 17 June 2020, ESMA received a request from the European Commission (the “Commission”) to provide technical advice to assist the Commission in formulating procedural rules for penalties imposed on Data Reporting Services Providers (“DRSPs”) under ESMA’s direct supervision (Annex I).

On 23 December 2020<sup>1</sup>, ESMA published a consultation paper to seek stakeholders’ input on ESMA’s proposals relating to penalties for DRSPs under its direct supervision.

This final report presents ESMA’s technical advice to the Commission on the rules of procedure to impose penalties on these supervised entities following the assessment by ESMA of the feedback received on the proposals included in the consultation paper and having regard to the requirements in the Level 1.

### Contents

This final report is comprised of four sections and one annex.

Section 1 presents the background. Section 2 concerns the scope of the proposed rules. Section 3 briefly summarises the feedback received to the consultation paper and responds to the more general points raised by respondents. Section 4 presents the different proposals on the content of the rules of procedure to impose penalties on benchmark administrators under the direct supervision of ESMA. Section 4 also includes ESMA’s assessment of the feedback received on the specific proposals that were consulted and the way forward following the assessment of this feedback.

Annex I contains the mandate received from the Commission.

### Next Steps

ESMA will submit its advice to the Commission and will publish it on ESMA’s website.

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<sup>1</sup> <https://www.esma.europa.eu/press-news/esma-news/esma-consults-fines-and-penalties-data-reporting-services-providers>

# 1 Background

1. On 20 September 2017, the Commission adopted a package of proposals to strengthen the European System of Financial Supervision ('ESFS'). The proposals aim to improve the mandates, governance and funding of the three European Supervisory Authorities ('ESAs') and the functioning of the European Systemic Risk Board ('ESRB') to ensure stronger and more integrated financial supervision across the EU.
2. On 21 March 2019, the European Parliament and Member States agreed on the core elements of reforming the European supervision in the areas of EU financial markets. On 18 April 2019, the European Parliament endorsed the legislation setting the building blocks of a capital markets union, including the review of the ESFS. On 18 December 2019, the European Parliament and the Council signed Regulation (EU) 2019/2175<sup>2</sup>, which reviews the powers, governance and funding of the ESAs thus amending Regulation (EU) No 600/2014 (MiFIR)<sup>3</sup> and Regulation (EU) 1095/2010 (ESMAR)<sup>4</sup>. This set of amendments are referred hereinafter as the 'ESAs Review'.
3. The ESAs Review amended MiFIR in order to, among other purposes, grant ESMA direct supervisory powers over Approved Publication Arrangements (APAs), Authorised Reporting Mechanisms (ARMs) and Consolidated Tape Providers (CTPs). Pursuant to Article 7 of Regulation (EU) 2019/2175, the amendments introduced in MiFIR by this Regulation shall apply from 1 January 2022. In this consultation paper, MiFIR as last amended by Regulation (EU) 2019/2175 is referred to as "MiFIR as amended".
4. Pursuant to Article 54a(1) of MiFIR as amended, ESMA will take up its new direct supervisory powers, including the power to impose fines or periodic penalty payments, on 1 January 2022.
5. Article 38k(10) of MiFIR as amended provides that:

“ The Commission shall adopt delegated acts in accordance with Article 50 by 1 October 2021 to further specify the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments.”

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<sup>2</sup> Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds, *OJ L 334*, 27.12.2019, p. 1.

<sup>3</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, *OJ L 173*, 12.6.2014, p. 84.

<sup>4</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJ L 331*, 15.12.2010, p. 84.

6. Accordingly, on 17 June 2020, ESMA received a request from the Commission to provide, inter alia, technical advice to assist the latter on the possible content of this delegated act. The relevant parts of the request are enclosed in Annex II to this paper.
7. ESMA notes that Article 2(1)(18) of MiFIR as amended establishes supervisory competences for ESMA regarding DRSPs, with the exception of those APAs and ARMs benefiting from a derogation in accordance with Article 2(3) of MiFIR as amended.
8. ESMA also notes that, pursuant to Article 38g(1) of MiFIR as amended, read in conjunction with Article 38b(1)(a) of MiFIR as amended, ESMA has powers also over investment firms or market operators operating a trading venue to provide the data reporting services of an APA, a CTP or an ARM and the persons that control them or are controlled by them.
9. For the purposes of this final report and the technical advice to the Commission, all the APAs, ARMs and CTPs under the direct supervision of ESMA, the investment firms or market operators operating a trading venue to provide the data reporting services of such APAs, CTPs or ARMs and the persons that control them or are controlled by them, are collectively referred to as “DRSPs”.
10. In order to deliver its advice to the Commission, ESMA took into account the existing Union regulatory framework in areas where European institutions or agencies have the power to impose fines on market participants.
11. In particular, ESMA has considered Regulation (EC) No 1060/2009 on credit rating agencies (the “CRA Regulation”)<sup>5</sup> and the Commission Delegated Regulation (EU) No 946/2012 (the “CRA Commission Delegated Regulation”)<sup>6</sup> as well as Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (“EMIR”)<sup>7</sup> and the Commission Delegated Regulation (EU) No 667/2014 (the “TR Commission Delegated Regulation”)<sup>8</sup>. ESMA has also considered the relevant experience acquired when applying the aforementioned rules of procedure applicable to Credit Rating Agencies (‘CRAs’) and Trade Repositories (‘TRs’) and the recent technical advice on procedural rules to impose penalties on Tier 2 Third Country Central Counterparties (‘TC-CCPs’) provided to the Commission on 31 March 2020<sup>9</sup>.

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<sup>5</sup> Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1.

<sup>6</sup> Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions, OJ L 282, 16.10.2012, p. 23.

<sup>7</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1.

<sup>8</sup> Commission Delegated Regulation (EU) No 667/2014 of 13 March 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority including rules on the right of defence and temporal, OJ L 179, 19.6.2014, p. 31.

<sup>9</sup> Final Report TA on procedural rules for penalties imposed on Third-Country CCPs, TRs and CRAs (ESMA43-370-103).

12. The consultation paper set out ESMA's preferred options for the procedural rules on the imposition of penalties to DRSPs. ESMA carried out a public consultation between 23 December 2020 and 23 January 2021.
13. This final report includes a section that briefly summarises the feedback received to the consultation paper as well as specific sections where particular aspects on which ESMA consulted are being discussed.
14. In this final advice to the Commission ESMA is putting forward proposals for draft procedural rules on the imposition of penalties on DRSPs under the direct supervision of ESMA. The proposals included in this final report aim at ensuring that as far as possible the procedural rule for DRSPs are aligned and are consistent with the procedural rules applicable to CRAs and TRs as well as with the proposals made in March 2020 with regards to TC-CCPs<sup>10</sup>.
15. Finally, ESMA is advising only on the mentioned procedural aspects and is not performing a cost-benefit analysis as ESMA understands that, as part of the approval of MiFIR as amended, impact assessments of the different policy choices have already been performed.

## 2 Scope of the technical advice

16. ESMA was invited by the Commission to provide technical advice to assist it in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or penalty payments to DRSPs, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments.
17. However, before proposing rules of procedure for the imposition of penalties on DRSPs, ESMA would like to highlight the following points.
18. First, ESMA notes that the advice requested is in relation to the requirement at Article 38k(10) of MiFIR as amended for the Commission to adopt rules of procedure for the exercise of the power to impose fines or periodic penalty payments by ESMA. Accordingly, this technical advice does not address matters of procedure in respect of (i) the withdrawal of authorisations under Article 27e of MiFIR as amended or (ii) the assessment of whether an APA or ARM should benefit from the derogation in Article 2(3) of MiFIR as amended.
19. Second, supervisory measures (under Article 38g of MiFIR as amended) which are unconnected with fines or periodic penalty payments could, in theory, be also considered out of scope. However, this exclusion is in practice meaningless because it is only at the end of the enforcement procedure that ESMA decides whether to impose a fine and/or another supervisory measure (such as the issuance of a public notice). Furthermore, the

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<sup>10</sup> ESMA43-370-103.

wording of the TR and CRA Commission Delegated Regulations refer to supervisory measures even though the scope of the empowerment under Article 64(7) of EMIR and Article 23e(7) of the CRA Regulation is identical to the one provided in Article 38k(10) of MiFIR as amended. ESMA considers that it makes sense to follow the same logic as in the TR and the CRA Commission Delegated Regulations and, where relevant, to also cover supervisory measures in its proposals. This approach is also in line with the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020.

### **3 General aspects of the feedback to the proposals**

20. In total, ESMA received two responses to its consultation paper. The respondents are a trade association for banks, mortgage institutions, asset management, securities trading and investment funds in Denmark and a UK-based market infrastructure group including a trade repository registered with ESMA under EMIR and SFTR and a DRSP acting both as an Authorised Reporting Mechanism (ARM) and an Approved Publication Arrangement (APA).
21. Overall, the trade association that responded to the consultation agreed with all the proposals in the consultation paper, except with regards to the limitation of the possibility to submit comments until an interim decision is adopted where there is a risk of significant and imminent damage to the financial system. In addition, the trade association stated that it makes sense to have similar rules of procedure in all the areas under ESMA's direct supervision.
22. The response from the DRSP included some general remarks regarding the concept of 'negligence' and the high standard of care that ESMA expects from entities under its direct supervision.
23. In this regard, ESMA notes that ESMA's interpretation of the concept of negligence takes into account the wording, the context and the purpose of the rules of which it is part and that the high standard of care that ESMA expects from professional firms in the financial sector, such as CRAs and TRs, is based on established case-law of the Court of Justice of the European Union and has been confirmed by the Joint Board of Appeal of the three European Supervisory Authorities (ESAs) on several occasions. Moreover, the standard of negligence to be applied by ESMA in enforcement cases has no bearing on the subject of this technical advice, which aims at assisting the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or penalty payments to DRSPs.
24. The same respondent also indicated that "in the context of the cost of a full investigation, the entity under investigation should have the option to negotiate and settle directly with ESMA."



25. In this regard, ESMA notes that settlement powers do exist in competition law<sup>11</sup>. Once an investigation has started, the Commission can grant a reduction of the fine (by 10 per cent once the maximum cap has been applied), where the parties to a cartel acknowledge their involvement in the cartel and their liability for the infringement. However, although the Commission can engage in settlement discussions only upon the written request of the parties concerned, the latter do not have a right to settle and the discussions are not a negotiation as to the existence of an infringement or as to the appropriate sanction to be imposed.
26. ESMA notes that settlement powers (as the ones enjoyed by the Commission) could have advantages both for ESMA and for the persons subject to investigation in the different areas under ESMA's direct supervision. However, this is outside the scope of ESMA's mandate to provide technical advice to the Commission.
27. Section 4 includes ESMA's assessment of the feedback received on the specific proposals that were consulted and the way forward following the assessment of this feedback.

## 4 Assessment of specific feedback and final proposals

### 4.1 Right to be heard by the investigation officer<sup>12</sup>

28. ESMA is invited by the Commission to advise on the procedure regarding the persons subject to the investigations' rights to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.
29. In the consultation paper, ESMA has taken into account the similarities between Article 25i and Article 64 of EMIR, Article 23e of the CRA Regulation and Article 38k of MiFIR as amended. ESMA also considered Articles 2 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020. Furthermore, ESMA has had regard to Recitals (2) and (3) of the TR Commission Delegated Regulation and Recitals (3) and (5) of the CRA Commission Delegated Regulation, as well as, more generally, to Article 41 of the Charter of Fundamental Rights of the European Union<sup>13</sup>.

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<sup>11</sup> Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases.

<sup>12</sup> Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements of the requirements provided for in Title IVa of MiFIR as amended, ESMA shall appoint one of its officers to act as independent investigation officer and investigate the matter. To do so, the appointed officer shall not be involved or have been directly or indirectly involved in the supervision or the authorisation process of the DRSPs and shall not participate in ESMA's deliberations or in any other way intervene in ESMA's decision-making process regarding that matter.

<sup>13</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391.

30. Based on the practice of the investigation officer in previous enforcement cases with respect to TRs and CRAs, ESMA indicated that it did not consider that changes were needed for the procedural rules regarding DRSPs compared to the ones currently applicable to TRs and CRAs or the ones proposed for TC-CCPs.
31. In order to guarantee the rights of defence of the person subject to the investigation, this person should have the right to be heard at different stages of the procedure. One of the stages takes place upon the completion of the investigation officer's investigation, when Article 38k of MiFIR as amended is applicable. This right to be heard should materialise through granting the person the right to make written comments.
32. In practice, after the investigation is completed, the investigation officer has to produce a statement of findings. The person subject to the investigation must be given the right to comment on the statement of findings of the investigation officer before the latter submits the file with his or her findings to ESMA.
33. The statement of findings must set out the facts and the reasons why they constitute one or more of the infringements of the requirements provided for in Title IVa of MiFIR as amended as well as the investigation officer's assessment of the nature and seriousness of each of the infringements, taking into account the criteria laid down in Article 38g(2) of MiFIR as amended.
34. The statement of findings must set a reasonable time limit within which the person subject to the investigation may provide its written submissions. The investigation officer should not be obliged to take into account written submissions received after that time limit has expired. This is justified to ensure that the procedure for the adoption of fines and supervisory measures is not unduly delayed and remains efficient.
35. In its written submissions, the person subject to the investigation should be allowed to comment on the facts set out in the statement of findings, including to set out all the facts known to it which are relevant to its defence. It must attach any relevant documents as proof of the facts set out. This is justified to ensure that the decision taken by ESMA in the enforcement proceedings would be ultimately based on facts and evidence and not on unsubstantiated allegations made by the person subject to the investigation, which would be contrary to the applicable principles governing the burden and standard of proof.
36. In addition, the person subject to the investigation should be able to propose that the investigation officer hears other persons who may corroborate the facts set out in its submissions. The investigation officer may also invite the person subject to the investigation to attend an oral hearing if the investigation officer considers it to be necessary in order to clarify the written submissions made by the person subject to the investigation. However, whether to organise an oral hearing remains a decision of the investigation officer because the right to be heard of the person subject to the investigation would have been already ensured by the opportunity given to that person to provide written comments. Where organised, oral hearings should not be held in public.

37. The persons subject to the investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by the investigation officer.
38. The investigation officer should consider whether, as a result of the submissions made by the person subject to the investigation, he or she finds it necessary to amend his or her statement of findings before submitting it to ESMA as part of the complete file . By analogy with Recital (2) of the TR Commission Delegated Regulation, the person subject to the investigation should be given an opportunity to make further submissions in case the amended statement of findings refers to facts which affect the investigation officer's initial findings in a material way and on which it has not yet had the opportunity to comment.
39. ESMA only received comments with regards to the above proposals from one respondent and they were to support them. ESMA thus maintained its original proposal. The final proposal is included below.

Regarding the procedure applicable to the investigation by the investigation officer and the right to be heard at this stage, ESMA proposes that:

- Upon completion of the investigation and before submitting the file to ESMA, the investigation officer shall inform the person subject to investigation in writing stating its findings and shall provide that person with the opportunity to make written submissions. That statement of findings shall set out the facts liable to constitute one or more of the infringements of the requirements provided for in Title IVa of Regulation (EU) No 600/2014, including an assessment of the nature and seriousness of those infringements, taking into account the criteria laid down in Article 38g(2) of Regulation (EU) No 600/2014;
- The statement of findings shall set a reasonable time limit within which the person subject to investigation may make its written submissions. The investigation officer shall not be obliged to take into account written submissions received after that time limit has expired;
- In its written submissions, the person subject to investigation may set out all the facts known to it which are relevant to its defence. It shall attach any relevant documents as proof of the facts set out. It may propose that the investigation officer hears other persons who may corroborate the facts set out in the submissions of the person subject to investigation;
- The investigation officer may also invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by the investigation officer. Oral hearings shall not be held in public.

## 4.2 File to be submitted by the investigation officer

40. ESMA is invited by the Commission to advise on the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding DRSPs.
41. In the consultation paper, ESMA took into account the similarities between Articles 25i(2) and 64(2) of EMIR as amended, Article 23e(2) of the CRA Regulation and Articles 38k(2), 38k(3) and 38k(4) of MiFIR as amended. ESMA also considered Articles 3 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020. Based on its experience, ESMA did not consider that major changes were needed for the procedural rules regarding DRSPs compared to the ones currently applicable to TRs and CRAs or the ones proposed for TC-CCPs.
42. The completeness of the file is assessed by ESMA with regard to the list of documents to be included in the file according to the TR and CRA Commission Delegated Regulations. When one of these documents is missing, ESMA should request it from the investigation officer. However, ESMA cannot direct the investigation of the investigation officer who is independent.
43. Based on the practice of the investigation officer in previous enforcement cases with respect to TRs and CRAs, ESMA considered that, where relevant, it would make sense to provide for the inclusion of a copy of the statement of findings of the investigation officer, as amended, in the file. Following the receipt of the written submissions of the person subject to the investigation, it may happen that the investigation officer produces an amended version of his or her statement of findings. In such cases, both versions of the statement of findings should be included in the file to be submitted to ESMA.
44. ESMA received feedback on the above proposals from two respondents.
45. One of the respondents fully agreed with the proposals and stated that, as indicated in the consultation paper, it makes sense to have similar rules of procedure in all the areas under ESMA's direct supervision. The other respondent indicated that "it would be helpful for the IIO to send a copy of the complete file submitted to ESMA to the entity under investigation directly following the submission to ESMA."
46. In this regard, ESMA notes that access to the file by the person subject to investigation is covered in Section 4.5 of this final report and not by the proposals made in this section, which relate to the file that the investigation officer has to submit to ESMA once the investigation has been finalised.
47. ESMA has thus decided to maintain its original proposal. The final proposal is included below.

ESMA proposes that the complete file to be submitted by the investigation officer to ESMA shall include at least the following documents:

- copy of the statement of findings (including its amended version, where relevant) addressed to the DRSP or the person subject to the investigation;
- copy of the written submissions by the DRSP or the person subject to the investigation;
- minutes of any oral hearing.

Where ESMA considers that the file submitted by the investigation officer is not complete, it shall send back the file to the investigation officer with a reasoned request for additional documents.

### **4.3 Procedure before ESMA with regard to fines and supervisory measures, including the right to be heard**

48. ESMA is invited by the Commission to advise on the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the rights to be heard of the persons subject to the investigation, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
49. In the consultation paper, ESMA took into account the similarities between Articles 25i(5) and 25i(6) of EMIR as amended, Articles 64(5) and 64(6) of EMIR as amended, Articles 23e(5) and 23e(6) of the CRA Regulation and Articles 38k (8) and 38k(9) of MiFIR as amended. ESMA also considered Articles 3 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020. Furthermore, ESMA had regard to Recitals (2) and (3) of the TR Commission Delegated Regulation and Recitals (3), (4) and (5) of the CRA Commission Delegated Regulation, as well as, more generally, to Article 41 of the Charter of Fundamental Rights of the European Union.
50. Based on ESMA's practice in previous enforcement cases with respect to TRs and CRAs, ESMA did not consider that changes were needed for the procedural rules regarding DRSPs compared to the ones currently applicable to TRs and CRAs or the ones proposed for TC-CCPs.
51. Another stage where ESMA has to guarantee the rights of defence of the person subject to the investigation through its right to be heard is before ESMA, once the investigation officer has submitted it the complete file. This right to be heard should take place by granting the person the right to make further written comments.

52. Once ESMA has considered that the file submitted by the investigation officer is complete, it must consider whether it agrees with the investigation officer's statement of findings.
53. If ESMA does not agree with the findings of the investigation officer because none of the facts described in the statement of findings constitute an infringement, it must close the case. It is worth reminding here that it is not for ESMA to investigate the matter itself or direct the investigation of the investigation officer.
54. ESMA may agree with the findings of the investigation officer in whole or in part.
55. If ESMA does not agree with the findings of the investigation officer because it does not agree with the legal qualification of the facts or with the assessment made by the investigation officer of the existence of negligence or intent or of the nature and seriousness of one or more infringements, it must adopt its own statement of findings and submit it to the persons subject to the investigation setting a reasonable time limit within which those persons may make written submissions.
56. The person subject to the investigation should be notified accordingly of the above decision(s) taken by ESMA.
57. In respect of findings of the investigation officer which ESMA agrees to adopt, ESMA must set a reasonable time limit within which the person subject to the investigation may make written submissions to ESMA.
58. ESMA should not be obliged to take into account written submissions received after the expiry of the specified time limit. This is justified to ensure that the procedure for the adoption of fines and supervisory measures is not unduly delayed and remains efficient.
59. Although the right to be heard would already be considered to have been observed where the persons concerned are granted the right to make written submissions, ESMA reserves the right to also invite the persons subject to the investigation to an oral hearing if it considers that it is necessary in order to clarify the written submissions made by those persons.
60. If an oral hearing takes place, the persons subject to the investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings should not be held in public.
61. ESMA received feedback on the above proposals from two respondents.
62. One of the respondents fully agreed with the proposals. The other respondent indicated that it would be helpful for the person subject to investigation to have an independent right of appeal before the publication of the decision by ESMA. This respondent also indicated that ESMA should not publish the public notice until all appeals have been exhausted or at least it should be labelled as 'interim public notice' and that the person under investigation should be consulted about the content of the public notice before its publication.



63. In this regard, ESMA notes that these comments are directly linked to the content of provisions in MiFIR as amended. Pursuant to Article of 38g(1) MiFIR as amended, where ESMA finds that a DRSP under its direct supervision has committed one of the infringements of requirements provided for in Title IVa of MiFIR as amended, it shall take one or more supervisory measures listed in that provision, which include the issuance of public notices. Moreover, pursuant to Article 38g(3) of MiFIR as amended, ESMA shall publicly disclose its enforcement decisions on its website within 10 working days from the date when it was taken. This disclosure must include, among others, a statement affirming the right of the person responsible for the infringement to appeal the decision. However, an appeal does not have suspensive effect.
64. Therefore, ESMA's proposals are consistent with the relevant provisions of MiFIR as amended and it would not be appropriate to modify, through the proposed rules of procedure what was decided by the EU co-legislators.
65. ESMA has thus decided to maintain its original proposal. The final proposal is included below.

Regarding the procedure before ESMA with regards to fines and supervisory measures, including the right to be heard, ESMA proposes that:

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer appear not to constitute any of the infringements of the requirements provided for in Title IVa of Regulation (EU) No 600/2014, it shall decide to close the case and it shall notify that decision to the persons subject to investigation.

Where ESMA does not agree with the findings of the investigation officer it shall submit a new statement of findings to the persons subject to investigation. The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions.

Where ESMA agrees with all or some of the findings of the investigation officer it shall inform the persons subject to investigation accordingly. Such communication shall set a reasonable time limit within which the person subject to investigation may make written submissions.

ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Article 38g and 38h of Regulation (EU) No 600/2014.

ESMA may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

If ESMA decides that one or more of the infringements of the requirements provided for in Title IVa of Regulation (EU) No 600/2014 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 38h, it shall notify immediately that decision to the person subject to investigation.

#### **4.4 Procedure with regard to periodic penalty payments**

66. ESMA is invited by the Commission to advise on the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the rights to be heard of the persons subject to the investigation, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
67. In the consultation paper, ESMA noted that it was key that periodic penalty payments that would be imposed by ESMA, for example, during the investigation phase to compel a DRSP to submit to an investigation or an inspection (Article 38i in relation to Articles 38c or 38d of MiFIR as amended), could be adopted by ESMA within a short timeframe. Such periodic penalty payments should be subject to a fast-track procedure distinct from the one applicable for the adoption of supervisory measures and the imposition of fines. The procedural rules set forth in Article 38k of MiFIR as amended does not apply and, therefore, the investigation officer is not involved in the adoption of the periodic penalty payment.
68. ESMA also considered the persons which could be subject to periodic penalty payment in accordance with Article 38i of MiFIR as amended. These include DRSPs as well as the other persons referred to in Article 38b(1) of MiFIR as amended, i.e. the managers, auditors and advisors of DRSPs, where: (i) they do not supply complete information which has been requested by decision pursuant to Article 38b of MiFIR as amended; (ii) they do not submit to an investigation launched by decision pursuant to Article 38c of MiFIR as amended; or they do not submit to an on-site inspection ordered by decision taken pursuant to Article 38d of MiFIR as amended. With regards to DRSPs, ESMA can in addition impose periodic penalty payments to compel them to put an end to an infringement in accordance with a decision adopted pursuant to point (a) of Article 38g(1) of MiFIR as amended.
69. Moreover, ESMA took into account the similarities between Articles 25k and 66 of EMIR as amended, Article 36b of the CRA Regulation and Article 38i of MiFIR as amended. It also considered Articles 4 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020.
70. ESMA has not yet imposed any periodic penalty payments (neither on TRs nor on CRAs). It does not have relevant experience in this respect and would therefore advise to set up rules for the adoption of periodic penalty payments on DRSP and their managers, auditors and advisors, which are similar to the current ones applicable to TRs and CRAs and to the ones proposed for TC-CCPs.



71. ESMA received feedback on the above proposals from two respondents.
72. One of the respondents fully agreed with the proposals. The other respondent indicated that “periodic penalty payments should be limited to a very narrow set of circumstances where the entity under investigation either refuses to cooperate with ESMA’s investigation or has taken no steps to mitigate or resolve an existing infringement”. It also indicated that “it would be helpful for ESMA to clarify whether there is a limit on how long it can impose periodic penalty payments for”.
73. In this regard, ESMA notes that these comments are directly linked to the content of provisions in MiFIR as amended. Pursuant to Article of 38i(1) of MiFIR as amended “ESMA shall, by decision, impose periodic penalty payments in order to compel:(a) a person to put an end to an infringement in accordance with a decision taken pursuant to point (a) of Article 38g(1); (b) a person referred to in Article 38b(1):(i) to supply complete information which has been requested by a decision pursuant to Article 38b;(ii) to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision pursuant to Article 38c; or (iii) to submit to an on-site inspection ordered by a decision taken pursuant to Article 38d.” Likewise, it is clear from Article 38i(4) of MiFIR as amended that “periodic penalty payment shall be imposed for a maximum period of six months following the notification of ESMA’s decision. Following the end of the period, ESMA shall review the measure.” If the EU co-legislators would have wanted to further limit the application of periodic penalty payments, they would have done so explicitly in MiFIR as amended.
74. ESMA’s proposals are consistent with the relevant provisions of MiFIR as amended and it would not be appropriate to modify, through the proposed rules of procedure what was decided by the EU co-legislators. ESMA has thus decided to maintain its original proposal. The final proposal is included below.

Regarding the procedure for the imposition of periodic penalty payments, ESMA proposes that:

Before making a decision imposing a periodic penalty payment according to Article 38i of Regulation (EU) No 600/2014, ESMA shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a penalty payment and the amount of the penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person concerned may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

Once the DRSP or person concerned has complied with the relevant decision referred to in Article 38i(1) of Regulation (EU) No 600/2014, a periodic penalty payment can no longer be imposed.

The decision imposing a periodic penalty payment shall indicate the legal basis and the reasons for the decision, the amount and the starting date of the periodic penalty payment.

ESMA may also invite the person subject to the proceedings to attend an oral hearing. The person subject to the proceedings may be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

## 4.5 Access to the file

75. ESMA is invited by the Commission to advise on the procedure regarding the rights to access to the file of the persons subject to the investigation, including the limits to such access to protect other persons' business secrets, ESMA's internal preparatory documents and other confidential information.
76. In the consultation paper, ESMA took into account the similarities between Articles 25i(4), 25l(2), 64(4) and 67(2) of EMIR as amended, Articles 23e(4), 25(2) and 36c(2) of the CRA Regulation and Articles 38k(5) and 38l(2) of MiFIR as amended. It also took into consideration Articles 5 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020.
77. Based on ESMA's practice in previous enforcement cases with respect to TRs and CRAs, ESMA did not consider that changes would be needed and saw merits in having similar rules for DRSPs, i.e. to foresee the possibility for the parties to whom a statement of findings has been sent to request and thus to have access to the file following the notification of such statement of findings but to restrict the use of any documents obtained through such a request to judicial or administrative proceedings concerning the application of Regulation (EU) No 600/2014.
78. ESMA received feedback on the above proposals from two respondents.
79. One of the respondents fully agreed with the proposals. The other respondent indicated that "it would be helpful for the entity under investigation to have access to the file before the receipt of the Statement of Findings to allow them to be fully informed when responding to requests for information".
80. In this regard, ESMA notes that the above proposals mirror the Commission's practice in competition law<sup>14</sup> and that according to established case law from the Court of Justice of the European Union, "it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of

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<sup>14</sup>See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004.

the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised” (see e.g. Case T- 133/07, Mitsubishi Electric Corp, ECLI:EU:T:2011:345, para. 41).

81. Moreover, the procedural rules under MiFIR as amended are very similar to the procedural rules set out in EMIR and the CRA Regulation and that ESMA’s proposals seek alignment with the TR and CRA Commission Delegated Regulations as well as with its proposals to the Commission regarding TC-CCPs.
82. ESMA has thus decided to maintain its original proposal. The final proposal is included below.

Regarding the access to the file by DRSPs, ESMA proposes that:

If so requested, ESMA shall grant access to the file to the parties to whom the investigation officer or ESMA has sent a statement of findings. Access shall be granted following the notification of any statement of findings.

File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 600/2014.

## 4.6 Procedure for interim decisions

83. ESMA is invited by the Commission to advise on the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the rights to be heard by ESMA of the persons subject to the investigation as soon as possible after the adoption of such interim decisions.
84. In the consultation paper, ESMA noted that, even though Article 25(1), second paragraph, of the CRA Regulation provides for the adoption of interim measures in cases where urgent action is needed, there is no procedure laid down in the CRA Commission Delegated Regulation regarding the adoption of such kind of measures. ESMA likewise noted that no procedure for interim decisions yet exists in the TR Commission Delegated Regulation because the possibility to adopt interim decisions was not foreseen in EMIR until the amendments in EMIR REFIT<sup>15</sup>. ESMA made proposals to include such provisions in the rules of procedure to impose fines on CRAs, TRs and TC-CCPs in the technical advice that it provided to the Commission on 31 March 2020.

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<sup>15</sup> Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, OJ L 141, 28.5.2019, p. 42.

85. The second subparagraph of Article 38l(1) of MiFIR as amended provides that, where urgent action is needed in order to prevent significant and imminent damage to the financial system, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision. In line with Article 38l(1) of MiFIR as amended, this interim decision can be a decision to take one or more supervisory measures pursuant to Article 38g of MiFIR as amended, including a decision imposing a fine pursuant to Article 38h of MiFIR as amended or a periodic penalty payment pursuant to Article 38i of MiFIR as amended.
86. ESMA considered that the rules of procedure should specify two stages. The first stage would lead to the adoption of an interim decision which would be adopted without the opportunity for the person concerned to submit comments on ESMA's findings. However, if so requested, the persons subject to the investigation would be granted access to the file once the investigation officer has submitted the file, including his or her statement of findings, to ESMA. Such access to the file should not, however, suspend ESMA's power to adopt the interim decision. The second stage would lead to the adoption of a decision on whether to confirm the interim decision (i.e. a confirmatory decision); during this second stage, the person concerned must have the right to provide written comments on the interim decision before a confirmatory decision is adopted. Also, at this stage, the person subject to the investigation would be granted access to the file, if it so requests it.
87. The second subparagraph of Article 38l(1) of MiFIR as amended refers to ESMA in general, without excluding that this could also cover the investigation by the investigation officer. In light of the objective pursued by the second subparagraph Article 38l(1) of MiFIR as amended, which is to ensure that an interim decision could be adopted as soon as possible to avoid significant and imminent damage to the financial system, ESMA considers that it is justified that the exception to the right to provide comments on the findings before they are adopted should also cover the findings of the investigation officer. In order to ensure the rights of defence of the person concerned, it would be sufficient to provide that person with the opportunity to submit comments before the decision-making body of ESMA during the second phase, i.e. before the adoption of the confirmatory decision.
88. Therefore, except to capture any difference in scope, in the consultation paper, ESMA advised to set up rules for the adoption of interim measures on DRSPs, which are similar to the ones proposed for CRAs, TRs and CCPs in the technical advice provided to the Commission on 31 March 2020.
89. ESMA received feedback on the above proposals from two respondents.
90. The comments received from one of the respondents were in relation to the limitation of the possibility to make submissions until an interim decision is adopted.
91. In this regard, ESMA notes that the wording of Article 38l(1) of MiFIR as amended and the wording of Article 25l(1) and Article 67(1) of EMIR and Article 25(1) of the CRA Regulation are clear on this point: the right to be heard before ESMA takes a decision does not apply at the interim stage when urgent action is needed in order to prevent significant imminent damage to the financial system. In such cases, ESMA adopts an interim decision and only

gives the person concerned the opportunity to be heard after taking that decision. Therefore, ESMA's proposals are consistent with the relevant provisions of MiFIR as amended and it would not be appropriate to modify, through the proposed rules of procedure what was decided by the EU co-legislators.

92. The comments received from the other respondent were in relation to the meaning of the sentence "urgent action is needed in order to prevent significant and imminent damage to the financial system" and the issuance of public notices by ESMA within this context. In particular, the respondent indicated that "it is important for legal certainty purposes for ESMA to specify exactly when it would be able to rely on such powers" and that ESMA should not publish the public notice until the confirmatory decision has been reached or, at least, it should be made clear that the public notice is adopted only as a result of an interim decision. In the respondent's view, if the interim decision is ultimately not confirmed ESMA should published a further public statement repealing its original statement.
93. First, with regards to the circumstances under which ESMA can use the procedure for interim procedure, ESMA notes that "urgent action is needed in order to prevent significant and imminent damage to the financial system" is the wording used by the co-legislators in Article 38l of MiFIR as amended (as well as in Articles 25l and 67 of EMIR and Article 25 of the CRA Regulation) and therefore cannot be changed. ESMA also notes that the specification of the circumstances under which ESMA should consider that there is a significant and imminent damage to the financial system is outside the scope of the empowerment under Article 38k(10) of MiFIR as amended.
94. Second, with regards to the possibility to issue a public notice following the adoption of an interim decision, ESMA notes that pursuant to Article 38l(1) of MiFIR as amended, the interim decision can be a decision to impose a fine or a periodic penalty payment but it can also be a decision to take one or more supervisory measures, including the issuance of public notices.
95. Therefore, ESMA's proposals are consistent with the relevant provisions of MiFIR as amended and it would not be appropriate to modify, through the proposed rules of procedure what was decided by the EU co-legislators. ESMA has thus decided to maintain its original proposal. The final proposal is included below.

Regarding the procedure for the adoption of interim decisions imposing fines when urgent action is needed, ESMA proposes that:

Where an urgent action by ESMA is needed in order to prevent significant and imminent damage to the financial system, the specific procedure for the adoption of an interim decision is applied.

The investigation officer shall submit the file to ESMA, including his / her statement of findings.

The investigation officer shall inform the person subject to investigation of his/her findings but shall not provide that person with the opportunity to make submissions.

If so requested, the investigation officer shall grant access to the file to the person subject to investigation who has been informed about his / her findings. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 600/2014.

The statement of findings of the investigation officer shall set out the facts liable to constitute one or more of the infringements of the requirements provided for in Title IVa of Regulation (EU) No 600/2014, including the investigation officer's assessment of the nature and seriousness of each of the infringements, taking into account the criteria laid down in Article 38g(2) of Regulation (EU) No 600/2014;

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement of the requirements provided for in Title IVa of Regulation (EU) No 600/2014, it shall decide to close the case and it shall notify that decision to the persons subject to investigation.

Where ESMA agrees with all or some of the findings of the investigation officer, it shall adopt an interim decision based on those findings.

If ESMA decides that one or more of the infringements of the requirements provided for in Title IVa of Regulation (EU) No 600/2014 has been committed by a person subject to investigation and has adopted an interim decision imposing a supervisory measure in accordance with Article 38g, it shall notify immediately that interim decision to the person subject to investigation.

ESMA shall set a reasonable time limit within which the persons subject to investigation may make written submissions on the interim decision. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit.

If so requested, ESMA shall grant access to the file to the parties to whom it has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 600/2014.

ESMA may also invite the persons subject to investigation to whom the interim decision has been notified to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

If ESMA decides that one or more of the infringements of the requirements provided for in Title IVa of Regulation (EU) No 600/2014 has been committed by a person subject to investigation and adopts a confirmatory decision imposing a supervisory measure in



accordance with Article 38g, it shall notify immediately that decision to the persons subject to investigation.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed.

#### **4.7 Limitation periods for the imposition of fines and penalty payments**

96. ESMA is invited by the Commission to advise on the limitation periods for the imposition of fines and penalty payments.
97. In the consultation paper, ESMA took into account the similarities between Articles 25m and 68 of EMIR as amended, Article 36d of the CRA Regulation and Article 38j of MiFIR as amended. It has also taken into consideration Article 6 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020.
98. Based on its experience in previous enforcement cases, ESMA did not consider that changes to the existing rules were needed. ESMA therefore advised to adopt similar rules regarding the limitation periods for the imposition of penalties imposed on DRSPs.
99. ESMA has received feedback on the above proposals from two respondents.
100. The first respondent indicated that while under its national legislation the limitation periods are different to the ones proposed by ESMA in the consultation paper, it had no objections, notably since the proposed limitation periods are aligned with the ones for TRs and CRAs.
101. The second respondent requested ESMA to clarify: (i) the precise start date for the limitation period; (ii) when a limitation period restarts following a situation in which it has been interrupted and (iii) what are the maximum limitation periods.
102. In this regard, ESMA considers the proposals in the consultation paper to be clear:
  - the limitation period begins to run on the day following that on which the infringement is committed, except in case of continuing or repeated infringements, where it begins to run on the day on which the infringement ceases. The precise start date for the limitation period however can only be determined on a case-by-case basis;
  - any action taken by ESMA for the purpose of the investigation or proceedings shall interrupt the limitation period with effect from the date on which the action is notified to the DRSP and each of these interruptions causes the limitation period to start running afresh; and

- the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period (i.e. ten years) has elapsed without ESMA having imposed a fine or a period penalty payment, but that this time shall be extended by the time during which the limitation period was suspended due to proceedings pending before the Board of Appeal or the Court of Justice of the European Union.

103. ESMA further notes that, as already explained, the procedural rules under MiFIR as amended are very similar to the procedural rules set out in EMIR and the CRA Regulation and, therefore, ESMA's proposals seek alignment with the TR and CRA Commission Delegated Regulations as well as with its proposals to the Commission regarding TC-CCPs.
104. ESMA has thus decided to maintain its original proposal. The final proposal is included below.

Regarding the limitation periods for the imposition of penalties on DRSPs, including for the imposition of penalty payments on their managers, auditors and advisors, ESMA proposes that:

The powers conferred on ESMA to impose fines and periodic penalty payments on DRSPs and other persons subject to investigation shall be subject to a limitation period of five years.

The limitation period referred to in paragraph 1 shall begin to run on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, that limitation period shall begin to run on the day on which the infringement ceases.

Any action taken by ESMA for the purpose of the investigation or proceedings in respect of an infringement of Regulation (EU) No 600/2014 shall interrupt the limitation period for the imposition of fines and periodic penalty payments. That limitation period shall be interrupted with effect from the date on which the action is notified to the DRSP or the person subject to the investigation in respect of an infringement of Regulation (EU) No 600/2014.

Each interruption shall cause the limitation period to start running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without ESMA having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

The limitation period for imposing fines and periodic penalty payments shall be suspended for as long as the decision of ESMA is the subject of proceedings pending before the Board of Appeal, in accordance with Article 58 of Regulation (EU) No



1095/2010, and before the Court of Justice of the European Union, in accordance with Article 38m of Regulation (EU) No 600/2014.

#### 4.8 Limitation periods for the enforcement of penalties

105. ESMA is invited by the Commission to advise on the limitation periods for the enforcement of fines and penalty payments.
106. In the consultation paper, ESMA took into account the similarities between Articles 25m and 68 of EMIR as amended, Article 36d of the CRA Regulation and Article 38j of MiFIR as amended. It also took into consideration Articles 7 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020.
107. ESMA did not consider that major changes were needed and aimed at ensuring consistency between the rules applicable to DRSPs and the ones applicable to the other financial market participants under ESMA's direct supervision. ESMA therefore sees merits in having the same rules for DRSPs.
108. ESMA has only received comments on the above proposals from one respondent and they were to support them. ESMA thus maintained its original proposal. The final proposal is included below.

Regarding the limitation periods for the enforcement of penalties imposed on DRSPs, including for the imposition of penalty payments on their managers, auditors and advisors, ESMA proposes that:

The power of ESMA to enforce decisions taken pursuant to Articles 38h and 38i of Regulation (EU) No 600/2014 shall be subject to a limitation period of five years.

The five-year period referred to in paragraph 1 shall start to run on the day following that on which the decision becomes final.

The limitation period for the enforcement of penalties shall be interrupted by:

(a) a notification by ESMA to the DRSP or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;

(b) any action of ESMA, of the authority of a Member State concerned acting at the request of ESMA, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.

Each interruption shall cause the limitation period to start running afresh.

The limitation period for the enforcement of penalties shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a pending decision of ESMA Board of Appeal, in accordance with Article 58 of Regulation (EU) No 1095/2010, and the Court of Justice of the European Union, in accordance with Article 38m of Regulation (EU) No 600/2014.

## 4.9 Collection of fines and periodic penalty payments

109. ESMA is invited by the Commission to reflect on the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.
110. In the consultation paper, ESMA took into account the similarities between Articles 25m and 68 of EMIR as amended, Article 36d of the CRA Regulation and Article 38j of MiFIR as amended. ESMA also took into consideration Articles 8 of the TR and CRA Commission Delegated Regulations and the recent technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020.
111. Based on its experience, ESMA did not consider that major changes were needed. The only change which would make sense on the basis of ESMA's practice in previous enforcement cases with respect to CRAs and TRs would be to specify that in cases where multiple decisions imposing fines or periodic penalty payments are adopted in parallel, the respective amounts collected by ESMA shall be lodged to different accounts (or subaccounts).
112. In addition, ESMA noted that the reference to "DG MARKT" which is included in Articles 8 of the TR and CRA Commission Delegated Regulations should be updated, for example, to a reference to "the relevant Directorate-General of the Commission in charge of financial matters".
113. ESMA received no comments regarding the above proposals. ESMA thus maintained them. The final proposal is included below.

Regarding the fines and periodic penalty payments collected from DRSPs, their managers, auditors and advisors, ESMA proposes that:

The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest-bearing account opened by the accounting officer of ESMA until such time as they become final. Such amounts shall not be entered in ESMA's budget or recorded as budgetary amounts. In case of multiple fines and periodic penalty payments collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

Once ESMA's Accounting Officer has established that the fines or periodic penalty payments have become final following the outcome of all possible legal challenges he/she shall transfer those amounts plus any interest accruing to the Commission. These amounts shall then be entered in the Union budget under general revenue.

ESMA's Accounting Officer shall report on a regular basis to the Authorising Officer of the relevant Directorate-General of the Commission in charge of financial matters on the amounts of fines and periodic penalty payments imposed and their status.

#### **4.10 Calculation of periods, dates and time limits**

114. ESMA is invited by the Commission to advise on the calculation of periods, dates and time limits to be laid down in the delegated act.
115. In this regard, in the consultation paper ESMA referred to Articles 9 of the TR and CRA Commission Delegated Regulations.
116. ESMA was of the view that the rule laid down in these provisions could be taken up in the relevant provision of the new delegated act on DRSPs. There is no reason why not to follow the same approach and it is appropriate to apply rules that already exist within the Union legislation, namely Regulation (EEC, Euratom) No 1182/71. This is also in line with the technical advice on procedural rules to impose penalties on TC-CCPs provided to the Commission on 31 March 2020.
117. ESMA only received comments with regards to the above proposals from one respondent. According to this respondent, "Regulation (EEC, Euratom) No 1182/71 [...] covers the definition of public holidays, business days, a period, etc. but does not contain specific time limits or periods as relevant to the investigation process in question".
118. In this regard, ESMA notes that the above proposal does not intend to identify specific time limits but proposes to set up a rule for the calculation of any periods, dates and time limits set out in the rules of procedure for DRSPs, such as for instance, the limitation periods for the imposition and enforcement of penalties.
119. Article 3 of Regulation (EEC, Euratom) No 1182/71 explains how periods expressed in hours, days, weeks, months or years must be calculated and the TR and CRA Delegations already refer to it for the same purpose. Therefore, it is relevant to apply these rules also for DRSPs.
120. ESMA's proposals in this final report and technical advice aim at ensuring consistency between the rules applicable to DRSPs and the ones applicable to the other financial market participants under ESMA's direct supervision. ESMA has thus decided to maintain the original proposal. The final proposal is included below.



ESMA proposes that Regulation (EEC, Euratom) No 1182/71 shall apply to periods of time, dates and time limits.

## Annex I

### Mandate to provide technical advice

With this mandate, the Commission seeks ESMA's technical advice on delegated acts to supplement certain elements of the Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 (the "**Regulation**"). In particular we seek ESMA's advice on the Regulation's Article 4 amending Regulation (EU) No 600/2014 on markets in financial instruments (the "**MiFIR**") and the Regulation's Article 5 amending Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the "**BMR**").

These delegated acts should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),<sup>16</sup> the Communication from the Commission to the European Parliament and the Council - Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "290 Communication"),<sup>17</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").<sup>18</sup>

The formal mandate consists of two parts.

#### 5 Part I (MiFIR)

The technical advice for the following delegated acts ('DA') should be received by the Commission:

1. DA specifying the criteria to identify those ARMs and APAs that, by way of derogation from this Regulation on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State (Article 2(3) of Regulation (EU) No 600/2014);
2. DA specifying the conditions in determining ESMA's suspension possibility for FIRDS and the circumstances under which the suspension ceases to apply (Article 27(4) of Regulation (EU) No 600/2014);

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<sup>16</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84.

<sup>17</sup> Communication of 9.12.2009. COM (2009) 673 final.

<sup>18</sup> OJ L 304, 20.11.2010, p. 47

3. DA with regard to imposing fines or penalty payments to DRSPs, specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the ; imitation periods for the imposition and enforcement of fines and periodic penalty payments (Article 38k(10) of (EU) No Regulation 600/2014);

4. DA with regard to the supervisory fees to be charged to DRSPs, specifying further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid (Article 38n(3) of Regulation (EU) No 600/2014).

The deadline set to ESMA to deliver the technical advice is 31 January 2021.

[...]

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The European Parliament and the Council shall be duly informed about this mandate.

## CONTEXT

On 20 September 2017, the Commission adopted a package of proposals to strengthen the European System of Financial Supervision ('EFSF'). The proposals aim to improve the mandates, governance and funding of the 3 European Supervisory Authorities ('ESAs') and the functioning of the European Systemic risk Board ('ESRB') to ensure stronger and more integrated financial supervision across the EU. On 21 March 2019, the European Parliament and Member States agreed on the core elements of reforming the European supervision in the areas of EU financial markets. On 18 April 2019, the European Parliament endorsed the legislation setting the building blocks of a capital markets union, including the review of the ESFS. On 18 December 2019, the European Parliament and the Council signed Regulation (EU) 2019/2175, which reviews the powers, governance and funding of the ESAs.

With regard to the changes foreseen for MiFIR and BMR, the main objective is additional supervisory power for ESMA with regard to data reporting services providers and certain benchmark administrators.

Certain elements of the Regulation need to be further specified in delegated acts and shall be adopted by the Commission no later than 1 October 2021. Those elements refer to the possibility for ESMA to impose fines or penalty payments and to charge supervisory fees.

Other elements of the Regulation provide the Commission with the empowerment to adopt delegated acts. The Commission has decided to also ask for technical advice on the derogation for data reporting services providers and the suspension of the financial instrument reference data reporting obligation.

## PRINCIPLES THAT ESMA SHOULD TAKE INTO ACCOUNT

In developing its technical advice, ESMA should take account of the following principles:

- **Lamfalussy:** The principles set out in the de Larosière Report and the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- **Internal Market:** The need to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to the financial markets, and a high level of investor protection.
- **Proportionality:** The technical advice should not go beyond what is necessary to achieve the objectives of the Regulation. It should be simple and avoid creating divergent practices by national competent authorities in the application of the Regulation.
- **Comprehensiveness:** ESMA should provide comprehensive advice on all subject matters covered by the mandate regarding the delegated powers included in the Regulation.
- **Coherence:** While preparing its advice, ESMA should ensure coherence within the wider regulatory framework of the Union.
- **Autonomy in working methods:** ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different strands of work being carried out by ESMA.
- **Consultation:** ESMA is invited to consult market participants (practitioners, consumers and end-users) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.
- **Evidence and justification:**
  - ESMA should justify its advice by identifying, where relevant, a range of technical options and undertaking an evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its delegated acts. Where administrative burdens and compliance costs on the side of the industry could be significant, ESMA should where possible quantify these costs.
  - ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data

gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.

- ESMA should provide comprehensive technical analysis on the subject matters described below, covered by the delegated powers included in the relevant provisions of the Regulation, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.
- **Clarity:** The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.
- **Advice, not legislation:** ESMA should provide the Commission with a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology used in the field of securities markets in the Union.
- **Responsive:** ESMA should address to the Commission any question it might have concerning the clarification on the text of the Regulation, which it should consider of relevance to the preparation of its technical advice.

The Commission requests the technical advice of ESMA for the purpose of the preparation of the delegated acts to be adopted pursuant to the legislative act.

This mandate is made in accordance with the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate if needed. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice, the Commission will continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the Regulation.

Moreover, in accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.



The Commission has informed the European Parliament and the Council about this mandate. As soon as the Commission adopts delegated acts, it will simultaneously notify to the European Parliament and the Council.

## **ISSUES ON WHICH ESMA IS INVITED TO PROVIDE TECHNICAL ADVICE**

### ***Part I (MiFIR)***

[...]

- 3) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or penalty payments to DRSPs including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments. More specifically, ESMA is invited to advise on:
- the procedure regarding the persons' subject to the investigations rights to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.
  - the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding data reporting services providers.
  - the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
  - the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
  - the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.

- the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information.
- the limitation periods for the imposition of fines and penalty payments.
- the limitation periods for the enforcement of fines and penalty payments.
- the calculation of periods, dates and time limits to be laid down in the delegated act.
- the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

[...]

### INDICATIVE TIMELINE

This mandate takes into consideration the date of application of the Regulation, that ESMA needs enough time to prepare its technical advice, and that the Commission needs to adopt the delegated acts in accordance with Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 4(10) (amending Article 50 MiFIR) and Article 5(20) (amending Article 49 of BMR) of the Regulation.

The delegated acts provided for by the Regulation and addressed under this mandate should be adopted no later than **1 October 2021**. Therefore the deadline set to ESMA to deliver the technical advice is **31 January 2021**

<b>Deadline</b>	<b>Action</b>
30 December 2019	Date of entry into force of the Regulation (third day following that of its publication in the Official Journal of the European Union)
31 January 2021	ESMA provides its technical advice.
Until October 2021	Preparation of the draft delegated acts by Commission services on the basis of the technical advice by ESMA.  The Commission will consult with experts appointed by the Member States within the Expert Group of the European Securities Committee (EG ESC) and will publish for feedback on the Better Regulation portal.
1 October 2021	Translation and adoption procedure of draft delegated acts.

Until end December 2021	Objection period for the European Parliament and the Council (three months which can be extended by another three months) followed by the publication in the Official Journal of the European Union
1 January 2022	Date of application of [...] Article 5 (BMR) of the Regulation and delegated acts.