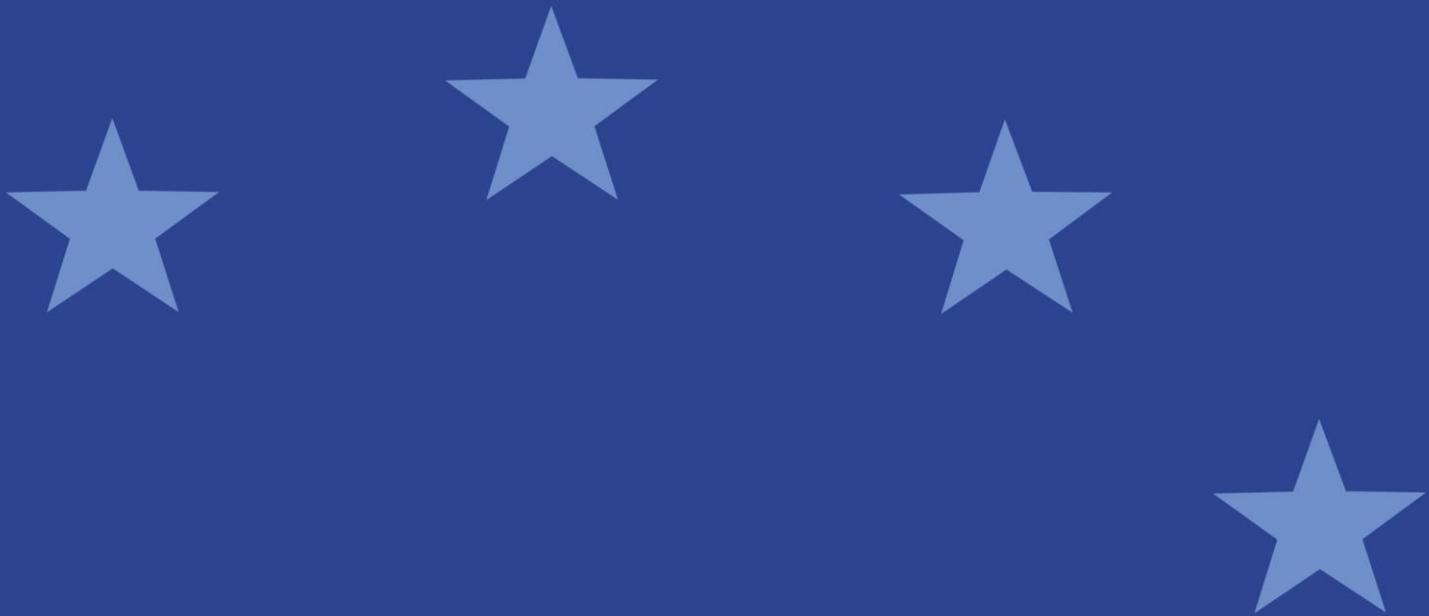




European Securities and
Markets Authority

Consultation Paper

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



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by **6 November 2020**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

Administrators of critical benchmarks and third country administrators that will seek recognition under the BMR framework are invited to reply to this consultation.

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1 Executive Summary

Reasons for publication

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

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

Contents

This Consultation Paper contains ESMA's proposed technical advice on supervisory fees to be paid to ESMA by administrators of a critical benchmark and third country administrators under the recognition regime. The proposal distinguishes between: one-off recognition fee to be paid by third country administrators applying for recognition; one-off authorisation fee to be paid by administrators of critical benchmarks applying for authorisation; annual supervisory fee to be paid by third country administrators and annual supervisory fee to be paid by administrators of a critical benchmark. Annex 1 contains ESMA's consultation questions and Annex 2 includes the Commission's mandate to ESMA.

Next Steps

The deadline to submit feedback to this consultation is 6 November 2020. ESMA, after considering the feedback received, will publish a final report and submit the technical advice to the European Commission by 31st January 2020.

2 Background

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

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

48l(3) on supervisory fees to be paid by administrators that will be supervised by ESMA under the BMR. The mandate for the technical advice is enclosed in Annex 2 of this document, and requests ESMA to provide its advice to the Commission by 31 January 2021.

3 Background on ESMA's budget and proposed approach

6. As required by Article 48l(2) of BMR, each year ESMA should charge the administrators of critical benchmarks and third country administrator, under the BMR recognition regime, fees which are proportionate to the turnover of the administrator concerned and which should fully cover all yearly costs incurred by ESMA for its activities in relation to the BMR supervision. These fees should cover the reimbursement of any costs that national competent authorities may incur as a result of any delegation of tasks by ESMA pursuant to Article 48m of the BMR. Therefore, to ensure an efficient use of ESMA's budget and, at the same time, alleviate the financial burden for Member States and the Union, it is necessary to ensure that benchmark administrators subject to ESMA oversight pay for all of ESMA's necessary expenditures related to their authorisation (for administrator of critical benchmarks) or recognition (for third country administrators) and to their ongoing supervision.
7. ESMA's budget is managed on the basis of an activity-based management method: financial and staff resources are allocated per activity, rather than per functional cost or per internal management hierarchy. This method is used both for budget planning, i.e. for calculating ESMA's estimated costs generated per activity (including the relevant overheads), and for budget costing, i.e. calculating ESMA's actual costs per activity.
8. ESMA applies a universal budgeting approach, which means that income from fees is treated as general revenue². This is in line with the standard practice of other partially funded EU agencies, as recommended by DG Budget of the Commission.
9. ESMA prepares annual budget aiming at balancing income from fees with its relevant expenditure, on the understanding that deficits or surpluses are to be balanced by the

² See Annex III: Budget of ESMA 2020 Annual Work Programme:
https://www.esma.europa.eu/sites/default/files/library/esma20-95-1132_2020_annual_work_programme_revised.pdf

rest of ESMA's income sources. In case of deficits (ESMA collecting less than incurred), ESMA does not recover the deficit from the supervised entities. If the deficit is significant and recurrent, ESMA analyses the reasons why it happened, drawing up lessons for the next budgeting period. For surpluses (ESMA collecting more than incurred) the same reasoning is followed. As a result, no excess of fees is paid back to supervised entities. This mechanism is already in place at ESMA for Credit Rating Agencies (CRAs) and also for Trade Repositories (TRs) under EMIR and under SFTR and is expected to apply also for Securitisation Repositories.

10. Through the existing mechanisms (EU budgetary procedure, annual reporting, single programming document), ESMA's Management Board and Board of Supervisors (of both of which the Commission is a permanent member) remain fully informed of ESMA's fee collection and expenditure levels. ESMA's supervisory costs are presented in its annual work programme and yearly fee income is included in ESMA's budget (which is duly published on its website and in the Official Journal of the European Union).
11. The total amount of the estimated costs is presented together with the annual work plan in September of the year N-1, and the approved budget is published on ESMA's website in January of the year N.
12. On a yearly basis, the European Court of Auditors evaluates the correct implementation of ESMA's budget, including its fee-funded budget, versus the applicable EU Regulations. The final audit report is communicated to the European Parliament and to the European Council.
13. In addition, in 2018 ESMA has been requested by the Internal Audit Service of the Commission to further simplify and harmonise, to the extent feasible, its fee models. Therefore, in this consultation, ESMA is consulting on fee proposals that are in line with these general objectives of simplicity and harmonisation.
14. Furthermore, ESMA aims also at collecting fees by 31 March each year so as to ensure the availability of resources for its activities. The determination of fees needs to be based on the latest available information.
15. To facilitate the set-up of ESMA's new tasks with regards to benchmark administrators, in 2020 and 2021 the Commission has foreseen an advancement of ESMA's fee in order to cover ESMA's overall cost related to the preparatory work. Following the latest

ESMA's budget revision, the amounts currently stand at around EUR 0.2 million in 2020 and EUR 0.3 million in 2021.

16. Any amount advanced by the Commission in 2020 and 2021 to cover ESMA's yearly costs in relation to the oversight of administrators will need to be recovered across the years 2022, 2023 and 2024. This is a one-off situation that is different from the general framework under which ESMA's fees, revenues, and costs operate.

ESMA establishes a harmonised framework for dealing with surpluses and deficits and for treating the annual fees under BMR as general revenue as follows:

- a. In case of deficits (ESMA collects less than incurred), ESMA does not recover the deficit from third country recognised administrators or administrators of a critical benchmark.
- b. In case of surpluses (ESMA collects more than incurred), ESMA does not pay back the surplus to third country recognised administrators or administrators of a critical benchmark.
- c. Fees are to be paid at the beginning of the calendar year (i.e. before 31 March of each year) for which fees are due to ensure availability of resources for the performance of ESMA's tasks.

Fees charged for ESMA's activities related to administrators of benchmarks should be set at a level such as to avoid a significant and recurrent accumulation of deficit or surplus.

By way of derogation to the previous paragraph, in relation to the period 2020-2021 for which an advancement from the European Commission is given to ESMA, in 2022-2024 ESMA will collect from third country recognised administrators and from administrators of a critical benchmark the amount of the advancement on top of the annual supervisory fees and will give it back to the Commission. ESMA will allocate the relevant costs proportionately to third country recognised administrators and to administrators of a critical benchmark.

4 ESMA's excepted total costs

17. In the Legislative Financial Statement accompanying the ESAs Review Regulation, the Commission estimated that 7 additional full-time equivalent staff members (FTEs) should be hired in relation to the BMR new supervisory powers: 5 for EU critical benchmarks and 2 for third country benchmarks. Under this assumption, the BMR supervision maximum budget in the steady state is EUR 1 – 1, 5 million. These supervisory officers will be responsible for the registration phase (authorisation for critical benchmarks and recognition for third country benchmarks) and the ongoing supervisions of all administrators for which ESMA will be the competent authority. However, as explained before, ESMA assesses on an annual basis its budget, which comprises not only the number of staff needed to perform a given task but also the related logistics, IT, communications and general costs. This structure is developed consistently with the ESMA fee regulations for TRs³ and CRAs⁴.

5 ESMA's supervisory activities under BMR

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

- Assessing the application of third country administrators that apply to be recognised in the EU in accordance with Article 32(5) of BMR, including the establishment of cooperation arrangements with third country National Competent Authorities (NCAs) when required by point (a) of Article 32(5) (*third country administrators already recognised in the EU by NCAs before 1 January 2022 will not need to apply again for recognition to ESMA, the recognition decisions will remain valid after the transfer of competences to ESMA*);
- On-going supervision of third country administrators recognised in the EU, including third country administrators recognised by national competent authorities between 1 January 2018 and 31 December 2021;

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:279:0004:0009:EN:PDF>

⁴ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:090:0006:0010:EN:PDF>

- Update the ESMA BMR register⁵ with the identity of the new recognised third country administrators and their benchmarks;
- Assess the application for authorisation of administrators of a critical benchmark, as referred to in points (a) and (c) of Article 20(1) (*administrators of a critical benchmark already authorised by national competent authorities before 1 January 2022 will not need to apply again for authorisation to ESMA, the authorisation decisions will remain valid after the transfer of competences to ESMA*);
- Establish and chair the college of supervisors for each critical benchmark referred to in points (a) and (c) of Article 20(1) (with the exception of benchmarks where the majority of contributors are non-supervised entities);
- On-going supervision of administrators of a critical benchmark, as referred to in points (a) and (c) of Article 20(1), including administrators of a critical benchmark authorised by national competent authorities between 1 January 2018 and 31 December 2021;
- Update the ESMA BMR register with the identity of the new authorised administrators of critical benchmarks.

19. With reference to the recognition regime, there are, at the time of writing, nine recognised administrators in the EU, as can be seen in the ESMA BMR register⁶. ESMA expects this number to increase in the course of 2021 because the BMR transitional period applicable to third country administrators will end on 31 December 2021 (Article 51(5)). To be noted also that, according to Article 48n(2), the application for recognition received by national competent authorities after 1 October 2021 can be transferred from the national competent authorities to ESMA.

20. With reference to critical benchmarks, today the benchmarks included by the Commission in the list of critical benchmarks are: EURIBOR, EONIA, LIBOR, STIBOR and WIBOR.

⁵ <https://www.esma.europa.eu/databases-library/registers-and-data>

⁶ https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_bench_entities

21. EONIA is expected to be discontinued on 3 January 2022⁷; LIBOR will no longer be classified as critical benchmark once the UK becomes a third country; STIBOR and WIBOR are classified as critical benchmarks under point (b) of Article 20(1), meaning that their supervision will continue to be carry out by the two local national competent authorities.

22. Against this background, only EURIBOR is expected to be supervised by ESMA starting in January 2022. EURIBOR has been already authorised by the Belgian FSMA in July 2019, and therefore a new authorisation for this benchmark is not needed.

5.1 Recognition fees

23. The BMR transitional period applicable to third country benchmarks will end on 31 December 2021. For this reason, ESMA expects that several third country administrators will apply for recognition in the course of 2021. As mentioned in Article 48m(2), the applications for recognition submitted after 1 October 2021, can be transferred from national competent authorities to ESMA. ESMA will be able to formally take a decision to grant or refuse recognition on 1 January 2022.

24. Starting in January 2022, ESMA will directly receive any application for recognition by third country administrators.

25. Article 32(5) states that ESMA should assess any application for recognition within 90 working days, corresponding to 18 weeks, i.e. roughly a period of four months. NCAs currently have the same time to assess the applications for recognition they receive, and their experience indicates that the full period of four months is needed to develop a thorough assessment of the recognition application and take the final decision to grant or refuse a recognition.

26. The assessment of a recognition application includes the following activities:

- A check that the information provided by the third country administrator are sufficient to assess whether the third country administrator complies with the

⁷ See statement by EONIA administrator, EMMI: To ensure a smooth transitioning from EONIA to the €STR, EMMI will continue to publish EONIA every TARGET day until 3rd January 2022, the date on which the benchmark will be discontinued. <https://www.emmi-benchmarks.eu/euribor-eonia-org/about-eonia.html>

relevant BMR provisions or the corresponding IOSCO principles for financial benchmarks or IOSCO principles for Price Reporting Agencies;

- The assessment that the third country administrator complies with the relevant BMR provisions or the corresponding IOSCO principles. To fulfil this task, besides the analysis of the internal organisation of the administrator, ESMA will have to consider the nature of the benchmarks provided by the third country administrators (including the degree of their use in the EU), the requirements applicable to them and the potential request for exemptions (included in Articles 25 and 26 of BMR) by the third country administrators;
- Make sure that the two conditions included in Article 32(5) are fulfilled: 1) where an administrator located in a third country is subject to supervision, an appropriate cooperation arrangement is in place between ESMA and the competent authority of the third country where the administrator is located; and 2) the effective exercise by ESMA of its supervisory functions is neither prevented by the laws, regulations or administrative provisions of the third country where the administrator is located, nor, where applicable, by limitations in the supervisory and investigatory powers of that third country's competent authority.

27. So far, the experience of NCAs in relation to recognition applications is that the assessments of applications submitted by large and small administrators is equally resource intensive. All assessments are based on the same procedure and timeframe and the estimated workload for each recognition application is approximately the same. ESMA therefore proposes to have a simple lump-sum recognition fee.

28. The assessment of a recognition application lasting four months corresponds to roughly a third of the yearly work of a single Full-Time Equivalent (FTE) at ESMA. ESMA internal analysis indicates a yearly average cost of EUR 195,000 for each FTE (including indirect costs). The cost of assessing a recognition application should be therefore EUR 65,000 (equivalent to four months of work of a single FTE), which should correspond to the amount of ESMA's recognition fee. This level of recognition fee should cover the full cost of assessing the recognition application, as requested by the mandate for technical advice.

29. The recognition fee is payable at the time of the submission of the application, in line with ESMA approach towards the registration of entities it supervises.

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

For third country administrators applying for recognition under BMR ESMA proposes a one-off fee of EUR 65,000.

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

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

Q1: Do you agree with the approach for determining the recognition fees for third country administrators? Please elaborate.

Q2: Do you think that the recognition fee should include a proportionality element? Please elaborate.

5.2 Authorisation fees for administrators of a critical benchmark

31. ESMA will become the competent authorities of administrators of a critical benchmark, as defined in points (a) or (c) of Article 20(1). These two definitions of critical benchmarks are based also on quantitative criteria that a benchmark should meet in order to be classified as critical benchmark: the benchmark should be used (directly or indirectly within a combination of benchmarks) as a reference for financial instruments, contracts or for measuring the performance of investment funds, having a total value of at least EUR 500 billion (point (a) of Article 20(1)) or of at least EUR 400 billion (point (c) of Article 20(1)).

32. Also, critical benchmarks can be classified as such only when they are provided by administrators located within the EU. Considering the BMR transitional period applicable to EU administrators ended on 31 December 2019, it is likely that any new

critical benchmark (and its European administrator) would be already either authorised or registered by the relevant national competent authority.

33. In cases where the administrator is already authorised by a national competent authority, the authorisation decision will remain valid after the transfer of competences to ESMA on 1 January 2022. This is the case for EURIBOR, that was authorised by the FSMA in July 2019 and for which a new BMR authorisation by ESMA is not needed.
34. Where instead the administrator of the critical benchmark is already registered by a national competent authority, or is neither authorised nor registered, ESMA will have to carry out an authorisation process, as defined in Article 34 of the BMR.
35. The authorisation process starts with a completeness phase, during which ESMA will have 15 working days from the receipt of the application to assess whether the application is complete. If the application is incomplete, the applicant should submit the additional information required by the relevant competent authority. The time limit of 15 working days apply from the date on which such additional information is provided by the applicant.
36. The completeness phase is followed by the compliance phase, in which ESMA should examine the application for authorisation and adopt a decision to authorise or refuse to authorise the applicant within four months of receipt of a complete application. The requirements applicable to critical benchmarks are the most stringent, and the assessment of compliance with them is more complex, if compared with authorisation processes regarding administrators of non-critical benchmarks.
37. As the application will concern a critical benchmark, ESMA may need to carry out additional tasks. If the critical benchmark is based on contribution, with the exception of critical benchmarks where the majority of contributors are non-supervised entities, ESMA will have to establish and chair a college of supervisors, as indicated in Article 46 of BMR. The college should comprise the competent authorities of the supervised contributors, and additional authorities applying in accordance with Article 46(3). The college should be established within 30 working days from the inclusion by the Commission of a benchmark in the list of critical benchmarks⁸. The college must be consulted by ESMA on the decision of granting authorisation to the administrator of the critical benchmarks (and other important decisions too, such as the application of

⁸ Under Article 20(1) of BMR, the Commission has established a list of critical benchmarks, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0482>

mandatory contribution as per Article 23 of BMR). The details of the process of consulting the college for the authorisation decision should be defined by ESMA in the written arrangements for the college, which define in detail the functioning of the college chaired by ESMA.

38. Articles 21 and 23 of BMR describe special powers that ESMA will have in relation to critical benchmarks. While these tasks belong to the ongoing supervisory activity of the critical benchmark, when a critical benchmark is undergoing an authorisation assessment, ESMA will have to start preparing the internal procedures defining how it intends to use the powers under Article 21 when the ongoing supervision will start. This will imply, inter alia, a detailed analysis of the underlying market that the critical benchmark seeks to measure, including data sources that ESMA can use to fulfil its tasks.
39. The authorisation process of an administrator of a critical benchmark will also include one or more on-site inspections in the premises of the administrator, to ensure that all the organisational arrangements needed for compliance with the BMR are in place.
40. The authorisation process for critical benchmarks is therefore the most articulated registration activity under the BMR. It includes a completeness and compliance phase (lasting at least five months), but also it requires ESMA to establish a college of supervisors (if the benchmark is based on contribution provided by a majority of supervised entities) as well as to define dedicated internal procedures to deal with the specific powers applicable to critical benchmarks.
41. ESMA estimates that the fulfilment of the tasks needed for the authorisation of an administrator of a critical benchmark will require the involvement of several staff members. The authorisation fee should cover the full cost of assessing the application of a critical benchmark administrator. The authorisation fee should therefore be higher than one FTE because, during a period of at least five months (and likely to be longer), several staff members will work on this process simultaneously.
42. Against this background, it is proposed that the authorisation fee for critical benchmarks corresponds to about 1.3 FTEs, i.e. EUR 250,000. The authorisation fee is payable at the time of the submission of the application, in line with ESMA approach towards the registration of entities it supervises.

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

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

Q3: Do you agree with the approach for determining the authorisation fee for critical benchmarks? Please elaborate.

Q4: Do you think that a different authorisation fee should apply when ESMA has to establish a college of supervisors for the critical benchmark? Please elaborate.

6 First-year supervisory fees

43. With reference to third country administrators, it seems unlikely that a recognition decision would take place on the last day of a calendar year and it will enter into force on the first day of the subsequent calendar year. Normally, such administrative decisions take place during the calendar year. This requires that the supervisory costs until the end of the year in which a third country administrator is recognised are covered by fees which are not the recognition fees.
44. Consistently with previous ESMA advices under EMIR and SFTR, ESMA proposes that the supervisory activities in the first year after registration are linked to the registration process and includes a formula for calculating the first-year fee as a percentage of the recognition fee. ESMA's experience with the registration and supervision of supervised entities has shown that its supervisory efforts in the first months after registration are similar to its supervisory efforts during registration.
45. The percentage should be related to the period of time during which the third country administrator is supervised in its first year of operations under the BMR.
46. ESMA therefore proposes that third country administrators who are (regardless of the year) in their first calendar year of recognition (i.e. have been recognised earlier in the same year) would pay a first-year supervisory fee equal to the recognition fee adjusted

by a coefficient. The coefficient would reflect the share of remaining days until the end of the year from the date the recognition is granted, as follows:

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

47. ESMA understands that this is the most proportionate approach and the one ensuring greater alignment with other types of fees already charged by ESMA, in line with the harmonisation principles across fees charged by ESMA.
48. In a similar fashion, ESMA proposes that administrators of critical benchmarks who are (regardless of the year) in their first calendar year of authorisation (i.e. have been authorised earlier in the same year) would pay a first-year supervisory fee equal to the authorisation fee adjusted by a coefficient equal to the one used for third country administrators.
49. With reference to both recognised third country administrators and administrators of a critical benchmark, the first-year supervisory fees should be payable after the firm has been notified by ESMA that its application has been successful and within 30 days from the date of issuance of ESMA's relevant debit note.

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

- The recognition fee adjusted by the coefficient.

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

- The authorisation fee applicable that administrator of a critical benchmark, adjust by the coefficient.

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

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

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

Q5: Do you agree with the proposed first-year fee arrangements? Please elaborate.

7 Annual supervisory fees

50. In line with ESMA's previous technical advices for the calculation of fees, ESMA proposes that its BMR annual supervisory fees are determined in accordance with its budgeting procedure, which takes into account all the activities that would result in supervisory efforts related to the BMR.
51. Once the relevant total amount of supervisory costs for BMR is determined for the year (*the BMR supervisory budget*), ESMA proposes that these costs are allocated to each administrator it supervises.
52. The proposal for administrators of a critical benchmarks is an annual supervisory fee covering the cost of direct supervision of a critical benchmark. ESMA believes that these supervisory costs related to critical benchmarks will be basically fix for each critical benchmark, as their supervision will need constant work and will not be affected by the level of turnover of their administrator.
53. Third country administrators recognised under BMR should instead participate with an annual supervisory fee according to the ratio of the third country administrator's specific turnover versus the total turnover of all recognised third country administrators.

7.1 Annual supervisory fees for administrators of critical benchmarks

54. According to BMR, the failure of critical benchmarks can impact market integrity, financial stability, consumers, the real economy, or the financing of households and businesses in the EU. The supervision of a critical benchmark is therefore a crucial responsibility for which ESMA will dedicate appropriate resources.
55. The classification of a benchmark as critical benchmark under points (a) and (c) of Article 20(1) does not take into account the turnover of the administrator. It does instead consider quantitative and qualitative criteria (e.g. its extensive use in financial instruments, contracts and investment funds). These criteria indicate that the existence

and accuracy of the critical benchmark are relevant for market integrity, financial stability or consumer protection in the EU.

56. The size of the turnover of an administrator of a critical benchmark does not really impact the amount of resources that a competent authority has to dedicate for the supervision of a critical benchmark. It is instead the important role that it plays in the EU financial system that determines the amount of resources needed for its proper supervision.
57. Irrespective of the turnover of the administrator of a critical benchmark, ESMA will have to bear important costs for the supervision of the critical benchmark.
58. In line with the analysis proposed for the authorisation of an administrator of a critical benchmark, one additional factor to be considered is whether the supervision of the critical benchmark includes the creation of a college of supervisors that should be established and consulted by ESMA in accordance with Article 46 of BMR.
59. A college of supervisors should be established when a critical benchmark under either point (a) or (c) of Article 20(1) is based on input data provided by contributors the majority of which are supervised entities (as defined in point 17 of Article 3(1) of BMR).
60. Against this background, ESMA proposes that the annual supervisory fee to be paid by an administrator of a critical benchmark supervised by ESMA should not be proportionate to the turnover of the administrator but rather reflect the expected supervisory effort required for the oversight of the critical benchmark. In this respect, the annual supervisory fee should be higher when ESMA chairs a college of supervisors dedicated to the supervision of the critical benchmark.
61. The experience of national competent authority dealing with critical benchmarks under points (a) or (c) of Article 20(1) indicates that the supervision of those benchmarks requires continuous actions by the relevant supervisory officers. During a year, the work of the supervisory officers in relation to a critical benchmark will be constant and not limited to a certain number of months. For this reason, ESMA proposes a basic annual supervisory fee equivalent to about 0.8 FTE, i.e. EUR 155,000. In cases where ESMA has to chair a college of supervisors dedicated to the oversight of the critical benchmarks, the annual supervisory fee is proposed to be equivalent to one FTE, i.e. EUR 195,000.

For administrators of a critical benchmark supervised by ESMA, ESMA proposes the following annual supervisory fees:

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

Q6: Do you agree with the proposed definition of annual supervisory fee for administrators of a critical benchmark supervised by ESMA? Please elaborate.

7.2 Annual supervisory fees for recognised third country administrators

62. The approach proposed to compute the annual supervisory fees payable by third country recognised administrators is different from the one proposed for administrator of critical benchmarks as it takes into account the turnover of the third country administrators.

63. It should be noted that while ESMA currently expects to supervise only one administrator of a critical benchmark (EMMI, the administrator of EURIBOR), the number of recognised third country administrators is set to be much higher.

64. To calculate the annual supervisory fee to be paid by recognised third country administrators, it is suggested to take into account the BMR supervisory budget for the year N, defined by ESMA in the year N-1. The annual supervisory fees to be paid by administrators of critical benchmarks supervised by ESMA for the year N should be deducted from the BMR supervisory budget for the year N. The remaining BMR supervisory budget for the year N should then be covered by the annual supervisory fees to be paid by the recognised third country administrators.

65. ESMA proposes that these costs should be allocated to each third country administrator (in the form of an annual supervisory fee) according to the ratio of the third country administrator's turnover to the total turnover of all recognised third country administrators supervised by ESMA. Additionally, the minimum annual supervisory fee for a third country administrator should be defined for the following reason.

66. It is true that ESMA adopts a risk-based approach to supervision and, as set out in its supervision work programme, prioritises the supervisory actions that it will take each year in accordance with its objectives of promoting financial stability, orderly markets and enhancing investor protection. At present, ESMA expects that its risk-based approach to supervision would most probably be extended to the supervision of third country administrators under the recognition regime.
67. However, although specific supervisory actions may vary per third country administrators, ESMA will systematically undertake a minimum level of supervisory activities in order to be able to perform its tasks, i.e. ESMA bears fixed costs in relation to recognised third country administrators. Therefore, ESMA believes that a minimum annual supervisory fee is warranted.
68. ESMA considers that the minimum annual fee to be paid by a recognised third country administrators should be EUR 30,000, in line with the minimum supervisory fees ESMA apply to other entities it supervises. This minimum amount is proposed to be also applicable in cases where the turnover of the third country administrator is equal to zero.

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

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

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

- The minimum annual supervisory fee for recognised third country administrators should be EUR 30,000, including when the applicable turnover of the recognised third country administrator is equal to zero.

Q7: Do you agree with the proposed definition of annual supervisory fee for recognised third country administrators? Please elaborate.

7.3 How to define applicable turnover

69. In line with its past advice under SFTR, EMIR and Securitisation Regulation, ESMA proposes that the term 'turnover', for the purposes of implementing Article 48l(2) of BMR, should be based on revenue figures.
70. Global total revenues should be relatively simple to find, e.g. in annual reports. Nevertheless, it may be overreaching to look at total revenues, as those could include revenues from lines of business other than benchmarks provision, depending on the corporate structure of the third country administrator. In this respect, comparing administrators' revenues from benchmarks provision (defined in point (5) of Article 3(1) of BMR) would seem more appropriate in the context of BMR. Looking at revenues from benchmarks generated in the EU could also amount to appropriate criteria to reflect turnover. Such information is not however readily available. It could involve significant administrative burden for third-country administrators to provide such information in a standardised manner, and for ESMA to analyse it. It is therefore proposed to compare third country administrators' global revenues from benchmarks provision as an appropriate proxy for reflecting turnover in the fees to be paid by third-country administrators.
71. To enable the identification of global revenues stemming from the provisions of benchmarks to be performed smoothly and accurately, ESMA proposes that recognised third country administrators would regularly prepare and share with ESMA the audited figures of the revenues generated by the provision of benchmarks globally, i.e. within the EU and outside of it.
72. Global revenues of third country administrators stemming from benchmark provision are likely to be reported in currencies different from the EUR. ESMA should convert them into EUR using the average EUR foreign exchange rate applicable to the period

during which the revenues were recorded. For that purpose, the euro foreign exchange reference rate published by the European Central Bank should be used.

73. ESMA is also aware that the business year for the third country administrators may differ. However, ESMA proposes to compare administrators' global revenues from benchmark provision as an appropriate proxy for reflecting turnover in the fees to be paid by third-country administrators. To simplify and reduce the reporting burden, ESMA proposes to look at revenues in the administrator's last reporting year, despite the fact that reporting years and accounting standards may differ between administrators. The relevant information should be readily available to administrators and in some cases it may be a public figure included in annual reports.
74. The relevant turnover of administrators supervised by ESMA should therefore be their worldwide revenues accrued from provision of benchmarks during the administrators' most recent financial year.
75. Recognised third country administrators should provide ESMA, on an annual basis, with audited figures confirming its worldwide revenues accrued from the provision of benchmarks. The audited figures should be submitted to ESMA no later than 30 September each year. The documents containing audited figures should be provided in a language custom to the financial services.
76. With reference to third country administrators recognised by NCAs before the end of 2021, they should provide ESMA with the relevant turnover of 2021 by 31 January 2022, so that ESMA can calculate the relevant annual supervisory fee for the year 2022 by 31 March 2022 (see section 9.3 of this document).

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

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

documents containing audited figures should be provided in a language custom to the financial services.

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

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

Q8: Do you agree with the proposed approach to determine the applicable turnover? Please elaborate.

8 Supervisory fees related to the preparatory work

77. As mentioned in section 3 of this document, for the years 2020 and 2021 ESMA will receive by the European Commission a total amount of around EUR 500,000 to cover the expenditures related to the preparatory work needed for the fulfilment of ESMA supervisory tasks under BMR. This preparatory work covers duties related to both third country administrators and administrators of a critical benchmark. ESMA will have to reimburse the Commission in a three-year period: from 2022 to 2024.
78. For the years 2022, 2023 and 2024 ESMA therefore has to collect extra-fees for a total amount of EUR 500,000, i.e. roughly EUR 167,000 per year.
79. In order to recover this amount of money by administrators it supervises in the three relevant years, ESMA proposes that each administrator supervised by ESMA contributes with an yearly extra-fee (in 2022, 2023 and 2024) proportionally to the amount paid by each administrator as its annual supervisory fees over the total BMR supervisory budget for that year.
80. For example, if in the year 2022 ESMA BMR supervisory budget is fixed to EUR 1 million, and a recognised third country administrator is asked to pay EUR 50,000 for annual supervisory fee, its contribution to the BMR supervisory budget is equal to 5% of the total BMR supervisory budget. This third country administrator will have therefore to pay, in addition to its annual supervisory fee of EUR 50,000, an extra-amount of EUR

8,350, corresponding to the 5% of the EUR 167,000 that ESMA has to charge in 2022 to repay the advancement to the European Commission.

In addition to the annual supervisory fee, for the years 2022, 2023 and 2024, ESMA will charge the administrators it supervises with an additional fee needed for the repayment of the advancement received by ESMA from the European Commission in the period 2020 – 2021.

Each administrator supervised by ESMA should pay the additional fee proportionally to the ratio of its annual supervisory fee over the total BMR supervision budget.

This additional fee should be paid on top and together with the annual supervisory fee for the years 2022, 2023 and 2024. The supervisory fees related to the preparatory work are not reimbursed.

Q9: Do you agree with the proposed approach for the supervisory fees related to preparatory work? Please elaborate.

9 Payment and reimbursement conditions

9.1 Timing of payment of recognition and authorisation fees

81. Similar to the established practices for the payment of fees to ESMA under other Regulations, ESMA understands that the fees for recognition of third country administrators and the fees for authorisation of administrators of critical benchmarks are due at the time of application for recognition / authorisation and should be paid by administrators upon the initiation of the recognition / authorisation process.

82. This will result in only one payment made by each administrator.

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

Q10: Do you agree with the proposed timing of payment of recognition and authorisation fees? Please elaborate.

9.2 No reimbursement of fees in case of withdrawal of application by an administrator

83. ESMA proposes to not reimburse fees to a third country administrator which decides to withdraw its application before recognition is granted by ESMA. Similarly, ESMA proposes to not reimburse fees to an administrator of a critical benchmark which decides to withdraw its application before authorisation is granted by ESMA.

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

- Lowering the expected cost of an incomplete process (by reimbursing a part of the fee) could allow for spurious applications;
- ESMA will in such case sustain the costs of analysing all the application dossiers submitted and any follow-up action required until the withdrawal; and
- ESMA has to concentrate the limited resources available on the applications that carry a true intention of becoming a third country administrator or administrator of a critical benchmark and to discourage the submission of spurious applications.

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

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

Q11: Do you agree with the proposal to not reimburse administrators in case they decide to withdraw their application for recognition / authorisation before the end of the assessment by ESMA? Please elaborate.

9.3 Timing of payment of annual supervisory fees

85. To fully support its supervisory activities vis-à-vis administrators, ESMA will need to be paid their fees in the first three months of the calendar year and at the latest on 31 March each year. This approach is aligned with the ESMA's budgeting approach outlined in section 3 of this document.
86. This means that ESMA should compute the relevant annual supervisory fees for administrators it supervises by the end of Q4 of the previous year. In all cases, ESMA should send invoices to all administrators it supervises specifying the amount of the annual supervisory fees at least 30 calendar days before the day when annual fees are to be paid.
87. Given the frequency of performance of ESMA's activities, they will produce administrative effects and potential changes in fees only from one calendar year to another.

ESMA proposes that administrators pay their relevant annual supervisory fees to ESMA in the first three months of the calendar year and at the latest on 31 March of the year for which they are due. The fees should be calculated on the basis of the latest available information for annual fees. The annual fees paid are not reimbursed.

**Q12: Do you agree with the proposed timing of payment of annual supervisory fees?
Please elaborate.**

9.4 Reimbursement of competent authorities

88. As set out in Article 48m(3) of BMR, any costs incurred by national competent authorities while carrying out supervisory tasks delegated by ESMA will be covered by ESMA's supervisory fees. This implies that, when a delegation of tasks takes place, the national competent authority will not seek to recover these costs directly from the administrator of benchmarks.
89. ESMA considers that the costs to be reimbursed to national competent authorities must:
- have been previously agreed between ESMA and the competent authority;

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

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

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

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

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

Q13: Do you agree with the proposed approach defining the reimbursement of costs to a national competent authority in case of delegation of tasks by ESMA under Article 48m of BMR? Please elaborate.

10 Annexes

10.1 Annex 1

List of questions

- Q1: Do you agree with the approach for determining the recognition fee for third country administrators? Please elaborate.**
- Q2: Do you think that the recognition fee should include a proportionality element? Please elaborate.**
- Q3: Do you agree with the approach for determining the authorisation fee for critical benchmarks? Please elaborate.**
- Q4: Do you think that a different authorisation fee should apply when ESMA has to establish a college of supervisors for the critical benchmark? Please elaborate.**
- Q5: Do you agree with the proposed first-year fee arrangements? Please elaborate.**
- Q6: Do you agree with the proposed definition of annual supervisory fee for administrators of a critical benchmark supervised by ESMA? Please elaborate.**
- Q7: Do you agree with the proposed definition of annual supervisory fee for recognised third country administrators? Please elaborate.**
- Q8: Do you agree with the proposed approach to determine the applicable turnover? Please elaborate.**
- Q9: Do you agree with the proposed approach for the supervisory fees related to preparatory work? Please elaborate.**
- Q10: Do you agree with the proposed timing of payment of recognition and authorisation fees? Please elaborate.**
- Q11: Do you agree with the proposal to not reimburse administrators in case they decide to withdraw their application for recognition / authorisation before the end of the assessment by ESMA? Please elaborate.**

**Q12: Do you agree with the proposed timing of payment of annual supervisory fees?
Please elaborate.**

**Q13: Do you agree with the proposed approach defining the reimbursement of costs
to a national competent authority in case of delegation of tasks by ESMA under
Article 48m of BMR? Please elaborate.**



10.2 Annex 2

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

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

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

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

The mandate follows the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the “**ESMA Regulation**”),¹ the Communication from the Commission to the European Parliament and the Council - Implementation of Article 290 of the Treaty on the Functioning of the European Union (the “**290 Communication**”),² and the Framework Agreement on Relations between the European Parliament and the European Commission (the “**Framework Agreement**”).³

The formal mandate consists of two parts.

Part I (MiFIR)

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

1. DA specifying the criteria to identify those ARMs and APAs that, by way of derogation from this Regulation on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State (Article 2(3) of Regulation (EU) No 600/2014);
2. DA specifying the conditions in determining ESMA’s suspension possibility for FIRDS and the circumstances under which the suspension ceases to apply (Article 27(4) of Regulation (EU) No 600/2014);
3. DA with regard to imposing fines or penalty payments to DRSPs, specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the

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

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

³ OJ L 304, 20.11.2010, p. 47

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

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

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

Part II (BMR)

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

2. DA with regard to imposing fines or penalty payments to benchmark administrators, specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments (Article 48i(10) of Regulation (EU) 2016/1011);
3. DA with regard to the supervisory fees to be charged to benchmark administrators, specifying further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid (Article 48l(3) of Regulation (EU) 2016/1011).

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

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

CONTEXT

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

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

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

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

PRINCIPLES THAT ESMA SHOULD TAKE INTO ACCOUNT

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

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

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

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

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

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

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

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

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

ISSUES ON WHICH ESMA IS INVITED TO PROVIDE TECHNICAL ADVICE

Part I (MiFIR)

- 1) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act on the criteria to identify those ARMs and APAs that, by way of derogation from this Regulation on account of their limited relevance for the internal

market, are subject to authorisation and supervision by a competent authority of a Member State. More specifically, ESMA is invited to:

- advise on a method to determine if the APA or ARM services are provided to investment firms authorised in one Member State only;
- advise on the calculation method with regard to the number of trade reports or transactions;
- advise on the method to determine whether the ARM or APA is part of a group of financial market participants operating cross border;
- come forward with other qualitative and quantitative elements to determine if APAs or ARMs should have a derogation on account of their limited relevance for the internal market;
- come forward with criteria that determine upfront which data reporting services providers are derogated from ESMA supervision;
- clarify whether the elements to determine if an ARM or APA should have a derogation are cumulative or not.

2) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying the conditions under which ESMA can suspend the FIRDS reporting obligations for certain or all financial instruments. More specifically, ESMA is invited to advise on:

- the criteria to determine if the suspension is necessary in order to preserve the integrity and quality of the reference data subject to reporting obligation which may be put at risk, including:
 - (i) serious incompleteness, inaccuracy or corruption of the submitted data, or
 - (ii) unavailability in a timely manner, disruption or damage of the functioning of systems used for the submitting, collecting, processing or storing the respective reference data by ESMA, national competent authorities, market infrastructures, clearing and settlement systems, and important market participants;
- the criteria to determine that the existing Union regulatory requirements that are applicable do not address the threat;
- the criteria to determine that the suspension does not have any detrimental effect on the efficiency of financial markets or investors that is disproportionate to the benefits of the action;
- the criteria to determine that the suspension does not create any regulatory arbitrage;
- the criteria to determine that the measure ensures the accuracy and completeness of the reported data;
- the method to notify the relevant competent authorities of the proposed suspension;
- the circumstances under which the suspension ceases to apply.

3) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or penalty payments to DRSPs including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments. More specifically, ESMA is invited to advise on:

- the procedure regarding the persons' subject to the investigations rights to be heard by the investigation officer upon his or her completion of the investigation

but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.

- the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding data reporting services providers.
 - the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
 - the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
 - the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.
 - the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information.
 - the limitation periods for the imposition of fines and penalty payments.
 - the limitation periods for the enforcement of fines and penalty payments.
 - the calculation of periods, dates and time limits to be laid down in the delegated act.
 - the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.
- 2) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the supervisory fees to be charged to DRSPs including the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid. More specifically:
- ESMA is invited to reflect on the type of fees that could be levied. Fees could be provided for specific supervisory actions or a general flat fee (for example annual) could be levied which would cover all supervisory activity for a year. A mixed system (fees for individual supervisory actions complemented by a general flat fee to cover the remaining expenditure) could also be considered.
 - In case ESMA suggests fees for specific supervisory actions, ESMA should draw up a list of supervisory actions with the corresponding amounts of fees. ESMA is also invited to advice on whether exceptional circumstances need to be foreseen in the fees structures to take into account potential exceptional/non-routine supervisory activities.
 - In case ESMA suggests annual flat fees, ESMA should indicate how the flat fee should be calculated, i.e. how its expenditure necessary for the registration and supervision of data reporting services providers should be distributed to the

individual supervised data reporting services providers. ESMA is invited to advise on whether fees should be yearly adjustable or fixed.

- According to Article 38n(1) of the Regulation, the amount of fees charged to data reporting services providers shall fully cover all necessary expenditure incurred by ESMA for its supervision under the MiFIR. Accordingly, ESMA is invited to detail its assessment of the necessary expenditure it will incur for the registration and supervision of data reporting services providers, and provide information on its estimates and methods of calculation. ESMA should also advise on how the surpluses/deficits in ESMA's supervision budget for data reporting services providers should be managed.
- According to Article 38n(2) of the Regulation, the amount of fees charged to data reporting services providers shall be proportionate to the turnover of the data reporting services providers concerned. ESMA is invited to provide its technical advice on the appropriate method for considering the turnover of the data reporting services providers in fee calculations, including the use of activity indicators when revenue figures are not yet existent, are not reliable or are not an adequate measure of the data reporting services provider's activity.
- According to Article 38o(3) of the Regulation, the fees charged to data reporting services providers shall also fully cover the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to the Regulation in particular as a result of any delegation of tasks in accordance with Article 38o(1) of the Regulation. ESMA is invited to suggest a method for calculating the amount that competent authorities may claim from ESMA. The amount should depend on the scope and complexity of the task to be delegated and should be consistent with any specific supervisory fee that ESMA can claim from the data reporting services providers for undertaking a supervisory action.
- ESMA should suggest the timing and appropriate modalities of the payment of the fees. ESMA is invited to advise on appropriate schedules for the collection of fees (one single payment vs several payments). It has to be ensured that ESMA has at its disposal the resources to finance its activities related to data reporting services providers. This could for instance be achieved by requiring the supervised data reporting services providers to pay the expected fees upfront, drawing up an account at the end of the year.

Part II BMR

- 2) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or penalty payments to benchmark administrators, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments. More specifically, ESMA is invited to advise on:
 - the procedure regarding the persons' subject to the investigations rights to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.
 - the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into

consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding benchmark administrators.

- the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.
- the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information.
- the limitation periods for the imposition of fines and penalty payments.
- the limitation periods for the enforcement of fines and penalty payments.
- the calculation of periods, dates and time limits to be laid down in the delegated act.
- the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

2) ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the supervisory fees to be charged to benchmark administrators including the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid, and more specifically on the following aspects:

- ESMA is invited to reflect on the type of fees that could be levied. Fees could be provided for specific supervisory actions or a general flat fee (for example annual) could be levied which would cover all supervisory activity for a year. A mixed system (fees for individual supervisory actions complemented by a general flat fee to cover the remaining expenditure) could also be considered.
- In case ESMA suggests fees for specific supervisory actions, ESMA should draw up a list of supervisory actions with the corresponding amounts of fees. ESMA is also invited to advice on whether exceptional circumstances need to be foreseen in the fees structures to take into account potential exceptional/non-routine supervisory activities.
- In case ESMA suggests annual flat fees, ESMA should indicate how the flat fee should be calculated, i.e. how its expenditure necessary for the supervision of benchmark administrators should be distributed to the individual supervised benchmark administrators. ESMA is invited to advise on whether fees should be yearly adjustable or fixed.
- According to Article 481(1) of the Regulation, the amount of fees charged to benchmark administrators shall fully cover all necessary expenditure incurred by ESMA for its supervision under the BMR. Accordingly, ESMA is invited to detail

its assessment of the necessary expenditure it will incur for the registration and supervision of benchmark administrators, and provide information on its estimates and methods of calculation. ESMA should also advise on how the surpluses/deficits in ESMA's supervision budget for benchmark administrators should be managed.

- According to Article 48l(2) of the Regulation, the amount of fees charged to benchmark administrators shall be proportionate to the turnover of the benchmark administrator concerned. ESMA is invited to provide its technical advice on the appropriate method for considering the turnover of the benchmark administrators in fee calculations, including the use of activity indicators when revenue figures are not yet existent, are not reliable or are not an adequate measure of the benchmark administrator's activity.
- According to Article 48m(3) of the Regulation, the fees charged to benchmark administrators shall also fully cover the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to the Regulation in particular as a result of any delegation of tasks in accordance with Article 48m(1) of the Regulation. ESMA is invited to suggest a method for calculating the amount that competent authorities may claim from ESMA. The amount should depend on the scope and complexity of the task to be delegated and should be consistent with any specific supervisory fee that ESMA can claim from the benchmark administrators for undertaking a supervisory action.
- ESMA should suggest the timing and appropriate modalities of the payment of the fees. ESMA is invited to advise on appropriate schedules for the collection of fees (one single payment vs several payments). It has to be ensured that ESMA has at its disposal the resources to finance its activities related to benchmark administrators. This could for instance be achieved by requiring the supervised benchmark administrators to pay the expected fees upfront, drawing up an account at the end of the year.

INDICATIVE TIMETABLE

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

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

Deadline	Action
30 December 2019	Date of entry into force of the Regulation (third day following that of its publication in the Official Journal of the European Union)
31 January 2021	ESMA provides its technical advice.
Until October 2021	Preparation of the draft delegated acts by Commission services on the basis of the technical advice by ESMA. The Commission will consult with experts appointed by the Member States within the Expert Group of the European Securities Committee (EG ESC) and will publish for feedback on the Better Regulation portal.
1 October 2021	Translation and adoption procedure of draft delegated acts.
Until end December 2021	Objection period for the European Parliament and the Council (three months which can be extended by another three months) followed by the publication in the Official Journal of the European Union
1 January 2022	Date of application of Article 4 (MiFIR) and Article 5 (BMR) of the Regulation and delegated acts.