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| 19 December 2017 |

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| Response form for the Consultation Paper on Third Party Firm  |
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| Date: 19 December 2017 |

Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on Third Party Firm (ESMA33-128-108). Responses are most helpful if they:

* respond to the question stated;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all responses received by 19 March 2018.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

* Insert your responses to the questions in the Consultation Paper in the present response form.
* Please do not remove tags of the type <ESMA\_QUESTION\_TPF\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
* If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
* When you have drafted your response, name your response form according to the following convention: ESMA\_TPF\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TPF\_ABCD\_RESPONSEFORM.
* Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open consultations” 🡪 “Consultation on draft technical standards on third-party firms providing STS verification services under the Securitisation Regulation”).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed. 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](http://www.esma.europa.eu) under the heading “Data protection”.

Who should read the Consultation Paper

The Consultation Paper may be of particular interest to investors, issuers, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the Third Party Firm.

# General information about respondent

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| Name of the company / organisation | Irish Debt Securities Association (IDSA) |
| Activity | Other Financial service providers |
| Are you representing an association? |[x]
| Country/Region | Ireland |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_TPF\_1>

These responses have been compiled by the Irish Debt Securities Association (IDSA), which is an industry organisation, established to promote and develop Ireland as the premier European location for activities to support the global structured finance, debt securities and the specialist securities industries. The membership of the IDSA includes corporate administrators, trustees, audit firms, legal advisors, listing agents, and other parties involved in the structuring and management of Securitisations and SPVs in the industry in Ireland. The IDSA promotes a responsible, sustainable and effective environment within which debt securities and other specialist securities can be used to facilitate transactions, to create investment products and to raise capital funding, similar to that of the European Commission’s Capital Markets Union (EC CMU) initiative.

The IDSA welcomes the opportunity to reflect the views of the industry and to provide input into this consultation process into ESMA33-128-33 Draft technical standards on content and format of the STS notification under the Securitisation Regulation<ESMA\_COMMENT\_TPF\_1>

1. : Do you agree with the proposed general information required from applicants to provide third-party STS verification services? Are there any other items that should be considered?

<ESMA\_QUESTION\_TPF\_1>

In developing this proposed regulatory technical standard, ESMA has taken into account the existing requirements for authorisation of Credit Rating Agencies and statutory auditors. ESMA states that it has applied a proportional approach and considered the specific circumstances and role of the third party applying for authorisation to be able to verify the compliance of the securitisation with the STS criteria as specified in the Article 28 of the STS Regulation.

Recital 34 of STS Regulation states that the involvement of third parties in helping to check compliance of a securitisation with the STS requirements could be useful for investors, originators, sponsors and SSPEs and contribute to increasing confidence in the market for STS securitisations. Originators, sponsors and SSPEs could also use the services of a third party authorised in accordance with this Regulation to assess whether their securitisation complies with the STS criteria. Those third parties should be subject to authorisation by competent authorities. The notification to ESMA and the subsequent publication on ESMA’s website should mention whether STS compliance was confirmed by an authorised third party. However, it is essential that investors make their own assessment, take responsibility for their investment decisions and do not mechanistically rely on such third parties. The involvement of a third party should not in any way shift away from originators, sponsors and institutional investors the ultimate legal responsibility for notifying and treating a securitisation transaction as STS.

Article 27 (2) of the RTS states that “*the originator, sponsor or SSPE may use the service of a third party authorised under Article 28 to check whether a securitisation complies with Articles 19 to 22 or Articles 23 to 26. However, the use of such a service shall not, under any circumstances, affect the liability of the originator, sponsor or SSPE in respect of their legal obligations under this Regulation. The use of such service shall not affect the obligations imposed on institutional investors as set out in Article 5.*”

In relation to investors, the RTS states that “*It is necessary that investors also exercise appropriate due diligence with regard to STS securitisations. They can inform themselves with the information disclosed by the securitising parties, in particular the STS notification and the related information disclosed in this context, which should provide investors with all the relevant information on the way STS criteria are met. Institutional investors should be able to place appropriate reliance on the STS notification and the information disclosed by the originator, sponsor and securitisation special purpose entity (SSPE) on whether a securitisation meets the STS requirements. However, they should not rely solely and mechanistically on such a notification and such information.*”

It is clear from the RTS that the third-party verification of the STS status for a securitisation is a useful task, though it does not affect the liability of the originator, sponsor or SSPE in respect of their legal obligations under the STS Regulation or for investors who may not rely solely and mechanistically on this notification.

Credit Ratings Agencies and auditors have a much more onerous role in producing credit ratings which can have a big impact on capital a risk-weightings for regulated institutions and statutory accounts. Yet the information requirements for third-party firms providing STS verification look to be similar to those required for Credit Rating Agencies and auditors.

The information requirements are onerous in terms of the level of detail that needs to be supplied to the competent authority, and cover a wide range of areas including the management, ownership and organisational structures, internal controls, corporate governance, policies and procedures to ensure independence and avoidance of conflicts of interest and as well as fee structures. Finally, there is the necessity to have operational safeguards and internal processes to assess STS compliance.

As this is a new market, there is a danger that the lack of clarity on how pricing is to be calculated and the onerous registration process could result in a few firms applying for approval to verify STS transactions which could result in a lack of competition and a concentration in the firms providing verification services.

The IDSA is concerned that the onerous information requirements may result in few participants applying for verification status which could lead to an uncompetitive market dominated by one or a small number of firms, at worst a monopoly and at best an oligopoly.

<ESMA\_QUESTION\_TPF\_1>

1. : Do you agree with the proposed information required from applicants on their pricing policies? Are there any other items that should be considered to determine that fees are non-discriminatory and cost-based, and not differentiated depending on the results of the applicant’s STS assessment?

<ESMA\_QUESTION\_TPF\_2>

The proposals have been drafted to enable the competent authorities to assess any application to provide third-party verification with the requirement that it charges only non-discriminatory and cost-based fees to the originators, sponsors or SSPEs without differentiating fees depending on, or correlated to, the results of its assessment.

There is little discussion in the RTS on how to determine cost-based fees. Some guidance can be found in a recent ESMA publication, *Thematic Report On fees charged by Credit Rating Agencies and Trade Repositories (ESM A80-196-954)* published in January 2018. This looks at existing analysis carried out in relation to Credit Rating Agencies (CRAs)and Trade Repositories (TR).

The European Commission’s Impact Assessment accompanying the Proposal for a Regulation amending CRAR (CRAR III) defines “*not-discriminatory*” practices as fully based on the costs and not based on any form of contingency, thus stressing the link between non-discriminatory and cost-based principles. The CRAR further explains that “*in order to further mitigate conflicts of interest and facilitate fair competition in the credit rating market, it is important to ensure that the fees charged by credit rating agencies to clients are not discriminatory. Differences in fees charged for the same type of service should only be justifiable by a difference in the actual costs in providing this service to different clients*”.

For the EMIR provisions on fees, it should be noted that non-discriminatory access to TRs is a broader requirement that goes beyond pricing practices. The Principles for Financial Market Infrastructures (PFMIs) provides that a Financial Market Infrastructure (FMI) should have “*objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access*”. The PFMIs explain in particular that the non-discrimination provision aims at i) ensuring fair and open access to TR services to the extent possible and ii) not differentiating between specific types and classes of participants.

The other key concept for the regulation of fees is the “cost-based” (for CRAs) and “cost-related” (for TRs) requirement. Similarly, the regulations do not develop on how this principle should be applied. Therefore, the interpretation should be in line with other provisions of the CRAR and EMIR.

From a semantic point of view, “cost-based” appears to be a more stringent notion compared to “cost-related”. However, the focus of both the CRAR and EMIR provisions is that price setting should not be arbitrary and the baseline for price setting should be costs rather than any other possibly discriminatory criteria. The legislator seeks costs to be the underlying factor in pricing policy, while no factual importance seems to be given to the level at which the costs determine the fee. Therefore, considering that the CRAR and EMIR establish concepts which are closely related, ESMA will apply a similar supervisory approach to ensure that costs are a key factor of CRAs and TRs’ pricing.

The analysis of existing market practices suggests that companies use different pricing models depending on the nature of their business and needs. Cost-based pricing (or “cost-plus” pricing), value-based pricing and dynamic pricing (or demand pricing) are among prevailing pricing models. Companies with cost-based pricing use the production costs as a basis to set the final price by adding a profit margin. Cost-based pricing is different from value-based pricing in that in value-based pricing the company determines how much money or value its product/service would generate for the client and bases its price on this assessed value. Cost-plus pricing is also different from dynamic pricing (also referred to as demand pricing) in which businesses define and change prices, for instance, based on algorithms, that take into account competitor pricing, supply, demand and other external factors. When prescribing that fees should be cost-based/cost-related, the legislator appears to not allow CRAs and TRs to have other models than cost-based pricing, like value-based and dynamic pricing.

The cost-based/cost-related provision implies that CRAs and TRs are required to record and maintain costs of their services/products and be transparent about the underlying costs with their clients. The transparency about costs is particularly important when CRAs or TRs modify their fees so that it is clear to their clients whether the increase/decrease occurred due to an increase/decrease in the underlying costs or due to a decision to raise/decrease the margin.

The issue here is that while it can be inferred from other European Regulations that Companies with cost-based pricing use the production costs as a basis to set the final price by adding a profit margin, what is unclear is how that profit margin should be set. There is also an issue in relation to the costs of the services/products and how are the initial setup cost to be incorporated.

The IDSA would welcome more guidance on ESMAs definition of cost-based, in terms of this regulation, and how costs, including initial costs, should be addressed.

<ESMA\_QUESTION\_TPF\_2>

1. : Do you agree with the proposed information required to assess the independence of a firm seeking authorisation to provide STS verification services? Are there other items that should be considered for this assessment?

<ESMA\_QUESTION\_TPF\_3>

See 1 Above.

<ESMA\_QUESTION\_TPF\_3>

1. : Do you agree with the proposed information required to assess the applicant’s management body, as well as the independent directors? Are there other items that should be considered for this assessment?

<ESMA\_QUESTION\_TPF\_4>

See 1 Above.

<ESMA\_QUESTION\_TPF\_4>

1. : Do you agree with the proposed information required to assess the presence of existing or potential conflicts of interest? Are there other items that should be considered for this assessment?

<ESMA\_QUESTION\_TPF\_5>

See 1 Above.

<ESMA\_QUESTION\_TPF\_5>

1. : Do you agree with the information required to assess the third party firm’s operational safeguards and internal processes for assessing STS compliance? Are there other items that should be required in the application?

<ESMA\_QUESTION\_TPF\_6>

See 1 Above.

<ESMA\_QUESTION\_TPF\_6>

**Questions to stakeholders regarding the preliminary cost-benefits analysis:**

1. : Do you agree with the ESMA’s preliminary analysis on the main costs and benefits of (i) the information to be submitted to the respective competent authorities and, specifically (ii) the information on the extent of outsourcing of the activities of the applicant applying for providing the STS verification services.

<ESMA\_QUESTION\_TPF\_7>

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<ESMA\_QUESTION\_TPF\_7>

1. : Please provide quantitative estimates of the magnitude of expected one-off and ongoing costs of complying with the proposed RTS requirements (both at the time of application and thereafter)? When specifying and quantifying the costs please refer to the individual cost types as a percentage of applicant’s current/budgeted operational costs.

<ESMA\_QUESTION\_TPF\_8>

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<ESMA\_QUESTION\_TPF\_8>