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| Response Form to the Consultation Paper |
| Guidelines on Outsourcing to Cloud Service Providers |

**Responding to this paper**

ESMA invites comments on all matters in this consultation paper on guidelines on outsourcing to cloud service providers and in particular on the specific questions summarised in Appendix I. Comments are most helpful if they:

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

ESMA will consider all comments received by **01 September 2020.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**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:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_COGL\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. 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.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_COGL\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_COGL\_ABCD\_RESPONSEFORM.
5. 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 Outsourcing to Cloud Service Providers”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. 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](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

This paper is primarily of interest to national competent authorities and financial market participants. In particular, this paper is of interest to alternative investment fund managers, depositaries of alternative investment funds, undertakings for collective investment in transferable securities (UCITS) management companies, depositaries of UCITS, central counterparties, trade repositories, investment firms and credit institutions which carry out investment services and activities, data reporting services providers, market operators of trading venues, central securities depositories, credit rating agencies, securitisation repositories and administrators of benchmarks (“firms”), which use cloud services provided by third parties. This paper is also important for cloud service providers, because the draft guidelines seek to ensure that the risks that may arise for firms from the use of cloud services are properly addressed.

**General information about respondent**

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| --- | --- |
| Name of the company / organisation | Euronext |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |  |
| Country/Region | Netherlands |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_COGL\_1>

Euronext is an operator of Regulated Markets, Multilateral Trading Facilities, Central Security Depositories and a Registered Benchmark Administrator located in 8 EEA countries. As a group of regulated entities in multiple countries we consider the ESMA Draft guidelines a welcome step towards a supervisory convergent approach. Outsourcing is often a group wide coordinated activity and Euronext will address the consultation from a cross border group perspective.

<ESMA\_COMMENT\_COGL\_1>

**Questions**

1. : Do you agree with the suggested approach regarding a firm’s governance and oversight in relation to its cloud outsourcing arrangements? Please explain.

<ESMA\_QUESTION\_COGL\_1>

Euronext operates multiple regulated entities in scope of these Draft Guidelines. Typically, the work involved is performed at group level. Could ESMA clarify in Paragraph 25 **that a cloud outsourcing strategy can be set at group level regardless of the type of regulated entities involved**?

Paragraph 26 requires separate decisions with respect to responsibilities, resources and oversight allocations. We believe this work to be part of the day to day internal management of processes. Separating this out would lead to an artificial documentation process. CEO and Board members of each market operator and CSD have a responsibility to ensure that adequate risk management structures are in place for the effective day to day oversight and management of the outsourcing arrangements. They are generally supported by a contract manager, a person or a department responsible to define, control and enforce critical and important operational functions. This dynamic is part of the day to day internal management of processes.

<ESMA\_QUESTION\_COGL\_1>

1. : Do you agree with the suggested documentation requirements? Please explain.

<ESMA\_QUESTION\_COGL\_2>

Paragraph 29 of the Draft Guidelines lists the information to be included in a register. We believe some **flexibility with respect to the format** would be preferable. Euronext has a record keeping policy in place that – in terms of content – meets these requirements already. Having to set up new records, templates and registers for information that is already properly recorded would in our view be disproportionate.

With respect to the information required to be included: the MiFID II framework (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014) already subjects outsourcing of operational functions to strict requirements (Articles 47.º and 48.º, further developed in Commission Delegated Regulation (EU) 2017/584 of 14 July 2016). With respect to CSDs, the CSDR framework requires that the outsourcing by CDSs of Services or Activities to a third party must also comply with specific requirements. Notwithstanding the abovementioned we believe that the **commercial aspects of the outsourcing agreement, i.e. the costs** as described under Paragraph 29 (m) **do not need to be included** as they would not impact the regulatory goal of this register.

It is not clear how Paragraph 30 relates to the requirement in Paragraph 28/29 to only include further detailed information on outsourcing with respect to critical or important functions. We would suggest leaving out any requirement to include non-critical functions as that would lead to diverging interpretations and unclarity as to what further information to include, ultimately leading to a disproportionate workload. The register (or records) **should be limited to critical/important functions only**.

<ESMA\_QUESTION\_COGL\_2>

1. : Do you agree with the suggested approach regarding the pre-outsourcing analysis and due diligence to be undertaken by a firm on its CSP? Please explain.

<ESMA\_QUESTION\_COGL\_3>

Euronext agrees that the pre-outsourcing analysis and due diligence should be proportionate to the nature, scale and complexity of the function that the firm intends to outsource and the risks inherent to the function. However, the current draft guidelines seem to be formulated broadly. We believe that the focus should be placed on the need to have an internal policy that defines a clear due diligence process carried out in the outsourcing of operational functions, including critical operational functions.

<ESMA\_QUESTION\_COGL\_3>

1. : Do you agree with the proposed contractual requirements? Please explain.

<ESMA\_QUESTION\_COGL\_4>

Euronext agrees that the proposals meet current practices. However, some clarification from ESMA on the level of engagement on this would be helpful. In case of outsourcing by EU regulated entities to non-EU or non-regulated entities, these requirements might only apply only to one contracting party. Engaging the non-EU contracting party will purely be based on commercial terms and may vary – depending on the size and level of services offered. It should be clear that these requirements are to be complied with on a best effort basis considering different circumstances.

These concerns also exist with regard to the NCA’s supervision. Should a contracting party not meet its contractual requirements, the EU regulated entity should not face any punitive actions for a commercial contracting dispute attributable to the non-EU or non-regulated entity for which remedy is being sought at a commercial level.

<ESMA\_QUESTION\_COGL\_4>

1. : Do you agree with the suggested approach regarding information security? Please explain.

<ESMA\_QUESTION\_COGL\_5>

Euronext agrees with the suggested approach

<ESMA\_QUESTION\_COGL\_5>

1. : Do you agree with the suggested approach regarding exit strategies? Please explain.

<ESMA\_QUESTION\_COGL\_6>

Exit strategies need to be maintained. We do suggest however to align the approach of Paragraph 44 with Paragraph 45, **implementing a risk based approach**. Having theoretical exit strategies in place should be dependent on scope following an internal risk assessment which can be documented accordingly.

With respect to testing exit strategies, requiring full scale testing would be disproportionate. Testing in a real environment will be challenging as not all elements of an exit strategy (the circumstances of the specific case or reason for the exit) will be known beforehand, this will depend on specific circumstances of the contract parties involved and could be subject to new technology available by the time the exit is needed. An exit strategy can be tested beforehand but only at a high and theoretic level.

<ESMA\_QUESTION\_COGL\_6>

1. : Do you agree with the suggested approach regarding access and audit rights? Please explain.

<ESMA\_QUESTION\_COGL\_7>

Euronext agrees with the proposed approach which appears balanced. We do note however that:

There is no mention of the supervision of the potential necessary remediation action(s). In the case of outsourcing providers not under any form of ESMA supervision, we believe it is important to strike the right balance between:

- the need to ensure remedies – following the audit recommendations of the outsourcing entity - are being followed by the outsourcee; and

- the acknowledgement of these provisions being agreed on in a commercial contract.

Furthermore, when performing an audit, costs are involved on both sides of the contract. The requirements should not lead to disproportionate costs on either side.

<ESMA\_QUESTION\_COGL\_7>

1. : Do you agree with the suggested approach regarding sub-outsourcing? Please explain.

<ESMA\_QUESTION\_COGL\_8>

We understand ESMA requires the regulated entity to ensure that the CSP oversees the sub outsourcer (Paragraph 55(c)). While we understand this can be part of the contracting arrangements, we would suggest this to be further detailed with respect to the responsibilities involved and the obligations towards the regulator. As stated before, the (sub)contracting party may not be an EU and/or regulated entity. A best effort basis with respect to setting up the relationship may not prevent a commercial party defaulting. This should not lead to disproportionate regulatory consequences for the EU regulated entity.

<ESMA\_QUESTION\_COGL\_8>

1. : Do you agree with the suggested notification requirements to competent authorities? Please explain.

<ESMA\_QUESTION\_COGL\_9>

Euronext agrees with the notification principle of the outsourcing of critical or important functions in a timely manner. The ESMA Draft guidelines should have a supervisory convergent approach since outsourcing is often a group wide coordinated activity.

<ESMA\_QUESTION\_COGL\_9>

1. : Do you agree with the suggested approach regarding the supervision of cloud outsourcing arrangements by competent authorities? Please explain.

<ESMA\_QUESTION\_COGL\_10>

Euronext agrees with the suggested approach but notes the need for further guidance with respect to **cross border groups operating multiple regulated entities**. Of course, NCAs should be able to execute effective oversight. With respect to cloud outsourcing however, this is often done at group level. We would wish to avoid duplicative efforts by NCAs when the guidelines underpinning this are ESMA based. NCAs involved in group oversight could coordinate supervisory efforts with the aim to avoid multiple audits in a relative brief period.

<ESMA\_QUESTION\_COGL\_10>

1. : Do you have any further comment or suggestion on the draft guidelines? Please explain.

<ESMA\_QUESTION\_COGL\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_COGL\_11>

1. : What level of resources (financial and other) would be required to implement and comply with the guidelines and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organization, where relevant.

<ESMA\_QUESTION\_COGL\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_COGL\_12>