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| Response Form to the 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:

* 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 **6 November 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\_CP\_TAFE\_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\_TAFE\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TAFE\_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 ESMA’s technical advice to the Commission on fees for benchmark administrators under BMR”).

**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 publically 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.

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**Who should read this paper**

This paper may be specifically of interest to administrators of benchmarks, contributors to benchmarks and to any investor dealing with financial instruments and financial contracts whose value is determined by a benchmark or with investment funds whose performances are measured by means of a benchmark.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | Nikkei, Inc., represented by Schalast Rechtsanwälte |
| Activity | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | Asia-Pacific |

**Introduction**

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

<ESMA\_COMMENT\_CP\_TAFE\_1>

Nikkei, Inc. (“**Nikkei**”) is a Japanese holding company with newspaper businesses as its core. In addition, Nikkei provides certain benchmarks, amongst others the leading Japanese and most important Asian stock index Nikkei Stock Average (Nikkei 225). Nikkei benchmarks are administered by the Nikkei benchmarks subdivision, Index Business Office.

Nikkei welcomes ESMA’s consultation on technical advice to the Commission on fees for benchmark administrators under the BMR.

In this reply document, we suggest to consider implementing certain substantial changes in the draft in order for it to comply with the BMR, good administrative practice and to enable the Commission to adopt a delegated act based on ESMA’s advice.

Most importantly:

1. A fee schedule which involves revolving fees should be linked to Article 51 (5) of the BMR in order to avoid discrimination of early adopters of BMR compliance compared to competitors opting for non-compliance with the BMR until the last possible moment.

2. Heavy reliance of the draft on variable levies charged only to a selected group of supervised entities leads to potential misallocations of chargeable amounts. To comply with Article 48l (3) BMR, instead of a system of flat fees for administrators of critical benchmarks and variable levies for third-country administrators, we suggest to consider a system generally based on flat fees for all entities supervised by ESMA.

3. Article 48l does not contain a legal basis to require administrators to submit audited global revenue figures concerning the provision of benchmarks. Such information is not necessary to adequately calculate fees for the supervision of compliance with the BMR. Further, its collection and analysis would cause disproportionate administrative burden for third-country benchmark administrators.

<ESMA\_COMMENT\_CP\_TAFE\_1>

**Questions**

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

<ESMA\_QUESTION\_CP\_TAFE\_1>

YES.

In principle, Nikkei agrees with the approach for determining the recognition fee for third country administrators. Nikkei welcomes the effort to correlate the fee to the cost of the time a Full-Time Equivalent (“**FTE**”) employee would need to spend on the respective supervisory tasks.

Nevertheless, we wonder whether the absolute amount of 0,33 FTE / EUR 65 000 might be estimated too high. For comparison, the recognition fee for third country administrators charged by our current supervisor, the German Federal Financial Supervisory Authority (“BaFin”) amounts to EUR 11 070 (see: Financial Services Supervision Act, Annex: Schedule of fees, Section 14, No. 14.1 available via: <http://www.gesetze-im-internet.de/findagkostv/anlage.html>), although BaFin as well is financed solely via fees, reimbursements and levies.

We suggest to consider using an average of fees charged by national competent authorities in the EEA in relation to similar supervisory tasks as a guidance for ESMA’s fee schedule.

<ESMA\_QUESTION\_CP\_TAFE\_1>

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

<ESMA\_QUESTION\_CP\_TAFE\_2>

NO.

The recognition fee should not include a proportionality element.

If a proportionality element concerning the recognition fee is introduced it is important that the assessment of such element does not by itself increase the administrative burden on the side of ESMA and of the respective applicant. This means, such proportionality element should only be connected to readily available data (such as the number of benchmarks an administrator provides) and not be linked to information which would need to be collected just to assess the proportionality element (such as revenue of specific business units or other non-public financial data).

<ESMA\_QUESTION\_CP\_TAFE\_2>

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

<ESMA\_QUESTION\_CP\_TAFE\_3>

YES.

Nikkei agrees with the approach for determining the authorisation fee for critical benchmarks and welcomes the effort to correlate the fee to the cost of the time Full-Time Equivalent (FTE) employees would need to spend on the respective supervisory tasks.

<ESMA\_QUESTION\_CP\_TAFE\_3>

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.

<ESMA\_QUESTION\_CP\_TAFE\_4>

YES.

The establishment of a college of supervisors evidently creates substantial additional work. Procedures involving supervisory staff from multiple authorities require complex coordination efforts. In line with ESMA’s principle to allocate costs of supervision corresponding to the actual occurrence, a different authorisation fee should be applied in case the establishment of a college of supervisors is needed.

<ESMA\_QUESTION\_CP\_TAFE\_4>

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

<ESMA\_QUESTION\_CP\_TAFE\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_5>

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

<ESMA\_QUESTION\_CP\_TAFE\_6>

YES.

Nikkei agrees that the turnover size of an administrator of a critical benchmark does not really impact the amount of resources that a competent authority has to dedicate to the supervision of the administrator. Instead, the role that the relevant benchmarks play in the EU financial system determines the amount of resources needed for supervision.

Nikkei welcomes the approach to assign fixed FTE resources needed in the ongoing supervision of administrators.

<ESMA\_QUESTION\_CP\_TAFE\_6>

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

<ESMA\_QUESTION\_CP\_TAFE\_7>

NO.

Nikkei does not agree with the proposed draft concept for an annual supervisory levy for recognised third country administrators in its current draft version.

Article 48l1 contains certain mandatory legal requirements and implies certain administrative law principles (see below Q7.I.), which we believe should be better reflected in the draft (Q7.II.). Therefore, based on ESMA’s draft, Nikkei would like to take the opportunity to submit an amended proposal (Q7.III.).

Footnote:

1 References to articles throughout this document refer to articles of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 (“**BMR**”) as amended by Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019.

**Q7.I. Requirements for a delegated act concerning fees to be compliant with the BMR**

**Q7.I.1. Necessity**

Article 48l (1) stipulates the general approach that ESMA shall charge administrators *to cover necessary expenditures relating to the supervision of administrators.* ESMA may therefore only charge supervisory expenditures to administrators, if such expenditures are necessary. If a supervisory aim could have been achieved in an equally suitable manner causing lower expenditures, only such lower expenditures may be charged.

**Q7.I.2. Equivalence**

Concerning the amount charged to individual administrators, Article 48l (1) is specified by Article 48l (2), which stipulates that the amount shall cover all administrative costs incurred by ESMA *for its activities in relation to the supervision.* By reading Article 48l (2) in the context of Article 48l (1), it becomes clear that Article 48l (2) refers to costs incurred by ESMA for its activities in relation to the supervision *of the respective individual administrator.*

While Article 48l does not strictly limit the chargeable amount of an individual administrator to the administrative costs of ESMA in relation to that specific administrator, it clearly links the chargeable amount to the costs incurred by ESMA for the supervision of the respective administrator.

This link corresponds to the general principle of fee equivalence in the administrative law traditions of EEA jurisdictions. According to this principle, there must at least be some vague link between the fee and the expenditure related to the administrative task connected to the fee. This principle also comes to effect when the authors of the consultation document argue that the turnover size of a critical benchmark administrator does not really impact the amount of resources that a competent authority has to dedicate for the supervision of a critical benchmark and that - because of this - the turnover should not be decisive for the amount of supervisory cost charged to the respective administrator (P. 19, No. 56, 60).

**Q7.I.3. Proportionality**

According to the wording of Article 48l (2), the amount of an individual fee shall be proportionate to the turnover of the respective individual administrator. Reading this wording out of context, one might think that the Article includes a stipulation that there has to be a *direct* link between the administrator’s turnover and the charged supervisory fee – or, if the concept of a levy is used, that the costs incurred by the supervisor should be distributed among supervised entities *directly* proportional to their turnover. This would however constitute a misunderstanding of Article 48l (2). When interpreting an Article, next to its wording, one has to take into account the context of the provision as well as the intention of the legislator. As stipulated by recital 5 of Regulation (EU) 2019/2175 by which Article 48l BMR is introduced, European Supervisory Authorities (“**ESAs**”) should *act in accordance with the principle of proportionality laid down in Article 5 of the Treaty on European Union (TEU), as well as with the better regulation policy. The content and form of the ESAs’ actions and measures (…) should always be (…) within the scope of their powers. The ESAs should not exceed what is necessary to achieve the objectives of this Regulation and should act proportionately to the nature, scale and complexity of the risks inherent in the financial activity or business of the affected financial institution or undertaking.* Against this background, the reference to proportionality in Article 48l (2) is to be primarily understood as a safeguard shielding addressees of supervisory fees against disproportionate fee amounts.

**Q7.I.4. Specification of types, matters and amounts of fees**

Article 48l (3) stipulates that the delegated act adopted by the Commission must specify different types of fees: the matters for which fees are due, the amount of fees and the manner in which they are to be paid.

Concerning types of fees, administrative bodies commonly differentiate between fees in a narrower sense, reimbursements and levies. *Fees in a narrower sense* include specific amounts charged for specific administrative acts. *Reimbursements* are costs that incure to the supervisor for performing a specific action on behalf of the supervised entity and that afterwards may be reclaimed. *Levies* concern amounts that the supervisor may claim pro rata from supervised entities to cover costs which may not specifically be linked to the supervision of an individual supervised entity and which therefore have to be borne by the supervised entities as a collective.

**Q7.II. Aspects of the proposed draft concept which are non-compliant with Article 48l**

Nikkei believes that the Commission could base the delegated act concerning fees on ESMA’s final technical advice without any substantial amendments if the current draft was amended mainly concerning five aspects:

**Q7.II.1. Potential breach of the necessity requirement as specified in Article 48l (1)**

Article 48l (1) only allows to charge administrators to cover necessary expenditures relating to the supervision of the administrators. According to P. 20, No. 64 of the consultation document, third-country administrators as a collective shall be charged the amount equalling the total ESMA BMR budget for a given year minus the flat fee charged to administrators of critical benchmarks (and, as we suppose, minus the flat fee charged to individual third country administrators for their recognition process). Under the current draft it would therefore be possible that costs, which do not relate to the supervision of administrators within the meaning of Article 48l (1) are charged to third-country administrators.

For example, infrastructure costs relating to e.g. interinstitutional coordination, concerning e.g. the Council initiative mentioned below Q.7.II.4. arises purely from interinstitutional coordination and the set-up of new administrative structures and may not be seen as necessary supervisory expenditures chargeable under Article 48l to the few currently recognised administrators.

A levy, which is against Article 48l (3) not specified concerning its matter (see below Q.7.II.3. in this regard) would not sufficiently prevent such cost from being charged to administrators and would therefore be in breach of Article 48l (1).

**Q7.II.2. Breach of the proportionality principle as specified in Article 48l (2)**

Nikkei appreciates ESMA’s considerations that the turnover size of an administrator of a critical benchmark does not particularly impact the amount of resources that a competent authority has to dedicate for the supervision of a critical benchmark (P. 19, No. 56). We agree, that the annual supervisory fee to be paid by an administrator of a critical benchmark supervised by ESMA should not *primarily* be proportionate to the turnover of the administrator but instead predominantly reflect the expected supervisory effort required for the oversight of the critical benchmark (P. 19, No. 60). We interpret ESMA’s considerations in this regard to have the aim to comply with the principle of equivalence between supervisory expenditures and chargeable costs and welcome this effort.

However, Article 48l (2) stipulates that the amount of an individual fee charged to an administrator shall also in some way be proportionate to the turnover of the administrator. A cost sharing concept, which imposes a flat fee on one group of administrators and a variable levy on another group of administrators may at least theoretically lead to a fee allocation according to which administrators with a lower turnover are systematically charged with higher fees. This may be the case if supervisory costs incurred by ESMA, which are significantly higher than the flat fee, are distributed to one addressee of the flat fee and only few addressees of variable levies. Hence, the current draft technical advice does not ensure the minimum level of fee proportionality and is therefore in breach of Article 48l (2).

As shown below under Q.7.III., by means of a simplified fee schedule the principle of proportionality of individual fees could be better reconciled with the principle of equivalence of fees to the respective supervisory costs.

**Q7.II.3. No sufficient specification of types of fees, the matters for which fees are due and the amount of fees as stipulated by Article 48l (3)**

**Q7.II.3.a. Strict application of the draft concept may lead to grossly misallocated levies**

In line with common administrative practice, the current draft technical advice suggests a combination of different types of chargeable costs - in particular fees in the narrower sense as described above in Q7.I.4. and levies.

The draft suggests fees as follows:

*1,3 FTE/EUR 253 000 for the authorisation of an administrator of a critical benchmark (P. 15, No. 24);*

*0,8 FTE/EUR 156 000 for the ongoing supervision of an administrator of a critical benchmark (P. 19, No. 61);*

*1,0 FTE/EUR 195 000 for the ongoing supervision of an administrator of a critical benchmark if a college of supervisors is required (P. 19, No. 61);*

*0,33 FTE/EUR 65 000 for the process of recognition of a third country administrator (P. 12, No. 28).*

Although the draft does include the amount of fees for the ongoing supervision of an administrator of a critical benchmark, the current draft does not yet include a maximum amount for the ongoing supervision of a third-country administrator. We believe that a delegated act concerning fees requires this information in order to fulfil the stipulations of Article 48l (3) to specify the amount of chargeable fees..

Other than the above fee amounts, the draft does not contain information concerning the amount of fees. According to the draft, all other costs incurred by ESMA shall be distributed as levies to third-country administrators.

Although it is common for administrative bodies to combine different types of chargeable costs, the current draft technical advice deviates from traditional administrative practice in two ways:

*Firstly*, the current draft does not consider the instrument of reimbursements. We therefore suggest to include specifications concerning the conditions under which reimbursements may be charged to the supervised entities in the technical advice.

*Secondly*, deviating from the general concept of levies, the draft technical advice in its current version does not suggest to distribute the amount of supervisory costs which is not directly linkable to a specific supervisory action to all respective supervised entities.

Instead, the draft in its current version suggests to charge a flat fee to one group of supervised entities (administrators of critical benchmarks) and to distribute all remaining costs to another group (recognised third country administrators) – regardless of whether such cost incurred by ESMA may be linked to the supervision of third country administrators as a group, to an individual third country administrator or not at all to any third country administrator. This means, the draft suggests a flat fee for one group of supervised entities (administrators of supervised entities) and a levy for the other group (recognised third country administrators).

The second deviation from the administrative theory of fair cost allocation does not in all cases lead to substantially unfair cost allocation. It is possible, that -due to a specific ratio of the number of administrators of critical benchmarks to the recognised number of third country administrators- in result, the amount attributed to each supervised entity is fair, corresponds to the resources needed by ESMA for the supervision of the respective entity and is therefore in line with Article 48l (2) and the general principle of equivalence of fees. This may most probably be the case if the assumptions made by the authors of the draft technical advice will occur unchanged.

However, based on ESMA’s draft we suggest an adapted approach for the following reasons:

From a practical perspective, it can’t be ruled out that the assumptions which the draft is based on do not occur: It is possible, that the number of recognised administrators will decrease instead of increase as assumed,2 while the number of administrators of critical benchmarks supervised by ESMA (to date only EURIBOR) remains stable - as assumed.3 If, for example the number of recognised administrators decreases to four, a strict application of the current draft concept would lead to an annual supervisory levy for each recognised third country administrator which is higher than the fixed amount foreseen for administrators of critical benchmarks.

This would result in a drastically unfair cost allocation and therefore a divergence from the spirit of Article 48l (2) as well as the activity based management method of ESMA, ESMA’s principle of allocation of resources per supervisory activity as well as ESMA’s risk-based approach to supervision.

*Sample calculation:*

*Lower end of ESMAs supervisory budget according to P. 9, No 42 of the Consultation Paper: EUR 1 000 000 (One million)*

*minus:*

*EURIBOR annual supervisory fee according to P. 19, No. 61:*

*EUR 195 000 (One hundred and ninety five thousand)*4

*=*

*EUR 805 000 (Eight hundred and five thousand)*

*divided by four recognised third-country supervisors:*

*EUR 201 250 (Two hundred and one thousand) of annual supervisory fee for each third-country administrator plus approximately EUR 33 600 (thirty-six thousand) fees related to preparatory work according to current draft technical advice.*

As shown below (Q7.II.4), a decrease instead of an increase of the number of recognised administrators cannot be ruled out currently.

It can be argued, that in case the assumptions which the draft technical advice is based on do not occur, the budget planning of ESMA may be adapted and workaround solutions may be implemented. However, from a theoretical perspective a fee schedule imposed by legislative (delegated) act should be generally applicable and not be constrained to current specific circumstances or a fairly adjusted administrative budget planning.

Footnotes:

2 According to P. 10, No. 19 of the Consultation paper, the authors expect the number of recognised administrators in the EU to increase in the course of 2021.

3 See. P. 11, No. 22 of the Consultation Paper.

4 The consultation document does not explicitly state that recognition fees should be deducted from the ESMA BMR supervisory budget before distributing the remaining amount to all recognised third country administrators. We assume that the authors of the consultation document nevertheless suggest so. In this sample calculation, no recognition fee is deducted because we expect no administrator to apply for recognition in case of a postponement of the date specified in Article 51 (5) of the BMR.

**Q7.II.3.b. The minimum annual fee is not substantiated**

The consultation document refers to a minimum annual fee to be paid by third country administrators even if their turnover is equal to zero. There is no specification of the matters for which such fee is due other than that the amount would be in line with the minimum supervisory fees ESMA applies to other entities it supervises.

As the business model, risk-profile and consequently the regulation applying to third-country administrators differs greatly from other entities under the supervision of ESMA, we think that this is no sufficient substantiation of a supervisory fee and therefore against Article 48l (3). In addition, as shown below under Q.7.III.2, a consequent application of the draft leads to a *maximum* annual supervisory fee which is in a similar range as the currently proposed minimum supervisory fee.

**Q7.II.4. The proposed draft does not take a potential postponement of the mandatory application of the BMR into account**

On 7 October 2020, EU Member states ambassadors agreed on the Council of the European Union's mandate for negotiations with the European Parliament on the amendments to the BMR proposed by the EU Commission on 24 July 2020.5 The Councils position6 includes a replacement of the current Article 51 (5) of the BMR with the following paragraph:

*“5. Unless the Commission has adopted an equivalence decision as referred to in Article 30(2) or (3) or unless an administrator has been recognised pursuant to Article 32, or a benchmark has been endorsed pursuant to Article 33, the use in the Union by supervised entities of a benchmark provided by an administrator located in a third country where the benchmark is already used in the Union as a reference for financial instruments, financial contracts, or for measuring the performance of an investment fund, shall be permitted only for such financial instruments, financial contracts and measurements of the performance of an investment fund that already reference the benchmark in the Union on, or which add a reference to such benchmark prior to, 31 December 2025."*

**Q7.II.4.a. Discrimination against early adopters of BMR compliance**

If as a result of the negotiations, the above clause will be adopted, administrators who chose a best-in-class approach by opting for an early authorisation or recognition procedure must not be punished by being subject to recurring supervisory fees before the application of the BMR to all their competitors in the EEA Market.

At the time when Nikkei, Inc. decided to undergo the recognition procedure in accordance with Article 32 BMR, it calculated with a one-off recognition fee of EUR 11 070 payable to BaFin. Nikkei cannot be discriminated because it chose to implement compliance with European regulations early and must not have to pay a fee, which competitors in the EEA are not subject to.

Footnotes:

5 COM(2020) 337.

6 Interinstitutional File 2020/0154 (COD); 11049/20, available via: <https://data.consilium.europa.eu/doc/document/ST-11049-2020-ADD-1-REV-1/en/pdf>; see also : <https://eur-lex.europa.eu/procedure/EN/2020_154>.

**Q7.II.4.b. Potential effect of a postponement of mandatory compliance with the BMR**

In case the mandatory compliance with the BMR is postponed as suggested by the Council, it is highly improbable that further benchmark administrators will seek authorisation or recognition under the BMR and thus become subject to ESMA supervision before Q3/Q4 of 2024.

In addition, as pointed out by ESMA80-187-610 of 1 October 2020, third country benchmarks previously endorsed or recognised in the UK by the FCA will be deleted from the ESMA register after the Brexit transition period ending on 31 December 2020 and would have to apply again for recognition or endorsement in the EU in order to be subject to ESMA supervision - and fees.

Of the currently ten recognised third-country administrators, six have been recognised by the UK FCA.7 This means that in case of a postponement of mandatory compliance with the BMR, by 1 January 2021 only four third-country administrators will remain under ESMA supervision.

As shown above, strict application of the draft technical advice would in such case lead to an excessive, unacceptable and unfair supervisory cost burden for each remaining third-country administrator under the current draft.

**Q7.II.5. ESMA’s general objective of simplicity of fees**

The suggested heavy reliance of the cost distribution among supervised entities on levies, i.e. on distribution of costs to a not yet known number of supervised entities (in particular if their turnover or any other internal information is taken into account) without any link to the expenditure of ESMA on each individual administrator leads to the effect that it is unforeseeable for the supervised entities to calculate approximate fees. In case the fees would be calculated strictly in accordance with the currently suggested model and as shown above, Nikkei, Inc. benchmark business unit might incur costs which are grossly disproportionate. In case ESMA chose to adapt its budget in accordance with a lower number of assumed applications for recognition within the next year(s), the cost share allocated to Nikkei might be lower. In any case, it is unacceptable for Nikkei and a fundamental breach of the principle of simplicity if a fee regulation does not allow for a sufficiently clear estimate of approximate supervisory fees.

Footnote

7 <https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_bench_entities>, accessed on 12 October 2020.

**Q7.III. Suggestions for adaptions to the draft technical advice**

The proposed definition of an annual supervisory fee for recognised third country administrators should, as shown above, be amended in order to comply with Article 48l, the principle of proportionality, and the principle of equivalence. We believe that such amendments are necessary mainly because of the heavy reliance of the draft on levies instead of flat fees.

Therefore, we suggest adapting the current draft, based on different flat annual supervisory fees for different types of administrators. By means of such simplification, the Internal Audit Service of the Commission’s request to ESMA to simplify its fee models could also be comforted.

**Q7.III.1. Different groups of supervised entities require different supervisory scrutiny**

We suggest following the differentiation of the BMR also concerning fees related to the supervision of BMR compliance. Fees should therefore differentiate between administrators of critical benchmarks where the establishment of a supervisory college is required, administrators of critical benchmarks without the need for a supervisory college and third country administrators. Among third-country supervisors, an additional differentiation according to the number of benchmarks provided could be implemented. If appropriate, when calculating this number, significant benchmarks could be assigned more weight than non-significant benchmarks. Priority in this regard should be to base a differentiation of administrators on data which is already in possession of ESMA as opposed to data whose collection would cause administrative burden to administrators and whose analysis would tie up supervisory resources.

The above differentiation introduced by the BMR legislator broadly reflects risks connected to the activities of, as well as supervisory resources needed for the supervision of the respective entities. In addition, it may also be assumed that generally the turnover of the relevant administrators is influenced by the category they fall in within the meaning of the BMR. A differentiation among administrators as suggested above would therefore also fulfil Article 48l, which requires a link between expenditures incurred by ESMA during the supervision of a respective administrator and the respective individual fee, as well as a linkage between individual fees and turnover.

**Q7.III.2. Specification of type, matter and amount of fees in accordance with Article 48l (3)**

**Q7.III.2.a. Amount chargeable to third-country administrators for their ongoing supervision must be specified**

Concerning the type of fees and the matters for which fees are due we agree with the ESMA draft: There should be a fee for authorisation/recognition as well as for ongoing supervision. Nikkei would welcome the introduction of further specifications concerning fees related to specific supervisory tasks.

In order to fully comply with the stipulation of Article 48l (3) according to which the amount of fees must be specified, as well as with the request of the Commission (P. 35 of the consultation document, first indent), Nikkei believes that ESMA’s technical advice must also specify the amount chargeable to third-country administrators for their ongoing supervision.

Such flat-fee based approach would in addition be coherent with the approach suggested in the consultation document for administrators of critical benchmarks and in line with ESMA’s general objective of simplicity of fees.

**Q7.III.2.b. Amount charged by national competent authorities should serve as guidance for maximum amount chargeable by ESMA**

National competent authorities currently performing the supervision of compliance with the BMR have experience in adequately allocating supervisory resources to the specific tasks required for the supervision of benchmark administrators. Therefore, Nikkei generally suggests using an average of fees charged by national competent authorities in relation to supervision of benchmark administrators as a guidance for the maximum amount chargeable by ESMA for the ongoing supervision of third-country administrators.

**Q7.III.2.c. Maximum amount chargeable to third-country administrators calculated based on the consultation document**

Based on the consultation document, Nikkei expects that a maximum amount chargeable by ESMA to third-country administrators should by no means exceed an amount in the range of EUR 26 000 to EUR 32 500.

This is based on the following:

As explained on P. 9, No. 17, the Commission estimated that the supervision of third-country supervisors requires 2 FTE. As pointed out on P. 10, No. 19, at the time of the writing of the consultation document, there have been nine recognised administrators in the EU. According to P. 11, No. 23, at the time of the writing of the consultation document, ESMA expected several third country administrators to apply for recognition in the course of 2021. For matters of budget calculation, Nikkei assumes that by “several”, ESMA referred to three to six third-country administrators. This means that 12 to 15 third-country administrators were expected to be supervised by 2 FTE, implying an average fee of EUR 26 000 (in case of a total of 15 third country administrators: [(2 x EUR 195 000)/15]) to EUR 32 500 (in case of a total of 12 third country administrators: [(2 x EUR 195 000)/12]).

The above maximum range may also be supported by the following calculation:

In accordance with ESMA’s risk based supervisory approach and ESMA’s activity-based management method, as a starting point, one could use the 1:4 ratio of

FTE resources assumed for an recognition process (0,33)8 : to an authorisation process (1,3)

also to the

ongoing supervision of a recognised administrator (X) : to the ongoing supervision of an administrator of a critical benchmark (0,8).

Following this logic, the starting point for a calculation of FTE required for the ongoing supervision of a recognised administrator would be 0,2 FTE. On this basis, the following should be taken into account: According to Article 26 BMR, administrators may choose not to apply Articles 4(2), points (c), (d) and (e) of Article 4(7), Articles 4(8), 5(2), 5(3), 5(4), 6(1), 6(3), 6(5), 7(2), point (b) of Article 11(1), points (b) and (c) of Article 11(2), and Articles 11(3), 13(2), 14(2), 15(2), 16(2) and (3) of the BMR with respect to their non-significant benchmarks. It can be assumed that administrators which provide non-significant benchmarks will to a significant extent choose non-application of said provisions. We expect that this does not lead to a material difference of the supervisory resources required for the recognition process as the Article 26 (3) compliance statement has to be assessed. We do however assume, that non-application of provisions mentioned in Article 26 (1) significantly reduces the resources required for the *ongoing* supervision of administrators which exclusively provide non-significant benchmarks. Taking such reduction into account, following the logic of the consultation document, the amount of supervisory FTE required per third-country administrator would be in the range of 0,13 to 0,16.

Footnote:

8 The consultation document suggests the following FTE allocations:

1,3 FTE for the authorisation of an administrator of a critical benchmark (P. 15, No. 24);

0,8 FTE for the ongoing supervision of an administrator of a critical benchmark (P. 19, No. 61);

1,0 FTE for the ongoing supervision of an administrator of a critical benchmark if a college of supervisors is required (P. 19, No. 61);

0,33 FTE for the process of recognition of a third country administrator (P. 12, No. 28).

**Q7.III.3. No discrimination of early adopters of BMR Compliance**

One-off fees such as fees for authorisation of critical benchmarks and recognition of third-country administrators may be charged as soon as the application documents are formally submitted and ESMA confirmed receipt.

Recurring annual fees may only be charged from the date specified in the last sentence of Article 51 (5) of the BMR because of two reasons:

Firstly, otherwise administrators are incentivised to postpone compliance with the BMR until that date. Secondly, early adopters of BMR Compliance would be discriminated if they had to pay a fee which is not charged to their competitors in the EEA.

To avoid costs for ESMA until the date specified in Article 51 (5), we suggest that ESMA should delegate its supervisory tasks concerning administrators currently complying with the BMR to the respective national competent authorities which currently perform such tasks.

<ESMA\_QUESTION\_CP\_TAFE\_7>

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

<ESMA\_QUESTION\_CP\_TAFE\_8>

NO.

Nikkei appreciates that ESMA seeks to avoid significant administrative burden for third-country administrators to provide information needed to calculate fees in a standardised manner, and for ESMA to analyse it (P. 22, No. 70). Nikkei further appreciates the aim to simplify and reduce the reporting burden for third-country administrators (P. 23, No. 73).

Against this background, Nikkei strongly opposes the proposed approach requiring third-country administrators to annually provide ESMA with audited figures confirming their worldwide revenues accrued from the provision of benchmarks.

This has legal as well as practical reasons:

*Firstly*, there is no legal basis in the BMR to require such information from administrators. As shown above, Article 48l (2) includes a safeguard for addressees of supervisory fees, that the total amount should generally not be disproportionate. This stipulation does not require the supervisory authority to demand the administrators to submit specific, difficult to calculate in a standardised manner and potentially secret data. As shown, Article 48l may be complied with by clustering supervised entities in groups which among other things also reflect their approximate turnover. By no means does Article 48l contain a legal basis to require supervised entities to submit revenue figures and any such request would therefore be illegal.

*Secondly*, from a practical perspective, there is no necessity for ESMA to analyse revenue figures of third-country administrators.

As the consultation document points out, the turnover size of a critical benchmark administrator does not really impact the amount of resources that a competent authority has to dedicate for the supervision of a critical benchmark (P. 19, No. 56). The consultation document also correctly states that the annual supervisory fee to be paid by a critical benchmark administrator supervised by ESMA should not primarily be proportionate to the turnover of the administrator but instead predominantly reflect the expected supervisory effort required for the oversight of the critical benchmark (P. 19, No. 60).

These considerations apply in the same way for third-country administrators and for revenue instead of the exact turnover. Therefore, there is no justification for a different treatment of third-country administrators in this regard.

*Thirdly*, also from a practical perspective, Nikkei’s services to customers usually consist of the provision of multiple business information services. Against this background it would in some instances be impossible to calculate isolated revenue from benchmark provision and in all cases cause excessive administrative burden for Nikkei to compile such data in an auditable way. In this regard it also has to be taken into account that benchmark business at Nikkei is a relatively small sub-entity with relatively little resources available to manage the post-Brexit EEA market - which according to current estimations will have relatively low relevance.

<ESMA\_QUESTION\_CP\_TAFE\_8>

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

<ESMA\_QUESTION\_CP\_TAFE\_9>

NO.

Early adopters of BMR compliance may not be charged before the date specified in the last sentence of Article 51 (5) of the BMR. Therefore, in case of an amendment of said article with the consequence of a postponement of the mandatory compliance with the BMR, supervisory fees related to preparatory work may not be charged as suggested. ESMA should only begin to charge necessary supervisory costs related to preparatory work as soon as there is a significant number of supervised entities.

<ESMA\_QUESTION\_CP\_TAFE\_9>

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

<ESMA\_QUESTION\_CP\_TAFE\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_10>

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.

<ESMA\_QUESTION\_CP\_TAFE\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_TAFE\_11>

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

<ESMA\_QUESTION\_CP\_TAFE\_12>

NO.

In a flat fee based system as suggested above in Section Q7.III, fees may be collected as suggested at the beginning of the budgetary year. In the technical advice it should be further clarified that any surplus at the end of the year should be deducted from the sum of the fees collected in the following year (P. 7, No. 9).

In a variable levy based system, levies need to be based on the supervisory cost which actually accrued in a given budgetary year. Levies based on estimated future supervisory cost may lead to grossly misallocated and disproportionate chargeable amounts as shown above in Section Q7.II.2.

<ESMA\_QUESTION\_CP\_TAFE\_12>

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.

<ESMA\_QUESTION\_CP\_TAFE\_13>

Nikkei agrees that in general, reimbursement amounts should be calculated with the same FTE based method used to calculate ESMA’s total supervisory costs. That means, that the National competent authority (“**NCA**”) should indicate the amount of FTE required and the associated total cost, which ESMA should then charge to the respective supervised entity and reimburse to the NCA.

<ESMA\_QUESTION\_CP\_TAFE\_13>