

PUBLIC STATEMENT

On transfer of competences and duties relating to certain data reporting services providers from National Competent Authorities to ESMA

The European Securities and Markets Authority (ESMA) is issuing this Statement to clarify the transfer of competences and duties relating to supervisory and enforcement activity in the field of certain data reporting services providers (DRSPs) from National Competent Authorities (NCAs) to ESMA.

According to Articles 27b and 54a of Regulation (EU) No 600/2014¹ ('MiFIR'), as amended by Regulation (EU) 2019/2175² ('ESAs Review Regulation'), the operations of certain DRSPs will be subject to ESMA's authorisation and supervision as of 1 January 2022.

Pursuant to the empowerments for delegated acts contained in Articles 2(3), 38k(10) and 38n(3) of MiFIR (as amended by the ESAs Review Regulation) the European Commission shall specify, respectively: (i) the criteria to identify DRSPs derogated from ESMA supervision; (ii) the rules of procedure for the exercise of the power to impose fines and periodic penalty payments by ESMA with regard to the DRSPs in scope of its supervision; and (iii) the rules for ESMA to charge supervisory fees to those DRSPs.

The Commission has gathered feedback from stakeholders on a draft delegated act encompassing all these empowerments from 30 July to 27 August 2021. However, as of today, the delegated act has not been adopted yet.

MiFIR does not envisage the consequences of a late application date of the above-mentioned delegated acts, including the one on the criteria for the derogation from ESMA supervision. It therefore remains unclear which authority (ESMA or the relevant NCA) would be competent for authorisation and ongoing supervision of DRSPs from 1 January 2022 until the entry into force of the delayed delegated act.

¹ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

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

Given these circumstances, with this public statement, ESMA wishes to outline the approach for DRSP supervision that it intends to follow in the interim period until the above-mentioned delegated acts become applicable.

ESMA, having regard to the new supervisory framework for DRSPs³, will be, in principle, the supervisor of DRSPs, with NCAs only becoming supervisors of certain DRSPs by way of derogation, if the respective DRSPs fulfil the derogation criteria as detailed in the forthcoming Commission delegated act. Therefore, pending the adoption of such delegated act, all DRSPs would be supervised by ESMA as of 1 January 2022.

However, ESMA expects that the abovementioned delegated act will be adopted and become applicable shortly after 1 January 2022. Therefore, to avoid imposing on supervised entities the unnecessary burden of potentially having to change supervisor twice over a few months, ESMA considers following the below pragmatic supervisory approach:

1) As of 1 January 2022, ESMA would take over supervisory responsibilities from the NCAs only for the DRSPs which, according to ESMA's best estimations, and on the basis of the derogation criteria as identified in the 30 July 2021 draft delegated act⁴ published by the Commission on its website⁵, may likely fall under its remit once the delegated act will apply. ESMA will bilaterally inform the DRSPs that it is planning to start supervising from 1 January 2022.

2) Once the delegated act on derogation criteria and supervisory fees becomes applicable, ESMA will charge fees to the DRSPs which are not derogated and fall under its supervision, for the entire period starting from 1 January 2022.

ESMA encourages NCAs to continue to oversee DRSPs which will likely be subject to derogation from ESMA supervision and, therefore, fall under NCAs supervisory purview once the delegated act will apply.

ESMA will continue to monitor market and regulatory developments, and to periodically reassess whether this approach remains fit for purpose.

³ In particular to Article 27b of MiFIR (as amended by the ESAs Review Regulation)

⁴ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13064-EU-securities-markets-supervisory-fees-fines-penalties-&-derogation-criteria-for-data-reporting-service-providers_en

⁵ Should the adoption of the delegated acts take place in 2021, ESMA will rely on any more recent official version available.