European Securities and Markets Authority

Consultation Paper

ESMA's technical advice to the Commission on fees for TRs under SFTR and on certain amendments to the fees under EMIR

19 December 2016 | ESMA/2016/1672

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 **31 January 2017**

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 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.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

Who should read this paper

This consultation paper may be specifically of interest to trade repositories which plan to apply for registration, extension of registration or recognition under SFTR and EMIR, the already registered trade repositories under EMIR, as well as of interest to trade associations, reporting entities and market infrastructures.

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1 Executive Summary

Reasons for publication

On 15 January 2016 the European Securities and Markets Authority (ESMA) received a formal request from the European Commission (Commission) to provide technical advice to assist the Commission in formulating a Regulation on fees for Trade Repositories (TRs) under SFTR by a delegated act.

Contents

The present report contains nine sections. Section 1 refers to the Executive Summary of the report. Section 2 explains the background to our proposals. Section 3 outlines the ESMA's expected costs. Section 4 establishes the general approach for the determination of fees under EMIR and SFTR. Section 5 explains how ESMA will manage surpluses and deficits under EMIR and SFTR. Section 6 points out the rationale and computation of TRs fees for registration and extension of registration under SFTR. Sections 7 and 8 present the supervision fees under EMIR and SFTR and recognition fees under SFTR. Section 9 refers to the conditions of payment and reimbursement and, finally, Section 10 addresses the instances where delegation to NCAs takes place. Annex I contains the summary of the questions posed by ESMA and Annex II includes the Commission's mandate to ESMA.

The amendments to fees under EMIR that are consulted in this document are required in order to ensure level –playing field with the ESMA's fees to TRs under SFTR.

Next Steps

ESMA will consider the feedback it receives to this consultation in Q1 2017 and expects to publish and submit a final report of the technical advice to the European Commission for endorsement by end of Q1/beginning of Q2 of 2017.

2 Background

1. The objective of the Regulation on transparency of securities financing transactions and of reuse (SFTR, hereinafter) is to enhance the transparency of securities financing markets and thus of the financial system. The SFTR creates a Union framework under which details of securities financing transactions (SFTs) can be efficiently reported to trade repositories (TRs). The SFTR legal framework should, to the extent possible, be the same as that of Regulation No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR, hereinafter) in respect of the reporting of derivative contracts to trade repositories registered for that purpose. This should also enable trade repositories registered or recognised in accordance with EMIR to fulfil the repository function assigned by SFTR, if they comply with certain additional criteria, subject to completion of a simplified registration process.

2. SFTR, like EMIR, grants ESMA direct registration and supervisory powers over trade repositories. In accordance with Article 11(1) of SFTR, ESMA shall charge fees to trade repositories and those fees shall fully cover ESMA's necessary expenditure relating to the registration, recognition and supervision of trade repositories.

3. On 15 January 2016 the European Securities and Markets Authority (ESMA) received a formal request from the European Commission (Commission) to provide technical advice to assist the Commission in formulating an EU Regulation on fees for Trade Repositories (TRs) under SFTR by delegated act. The advice is to be delivered to the Commission by 12 January 2017.

4. This mandate focuses on the technical aspects of the regulation on fees. In providing its advice, the European Commission requested ESMA to build upon its previous experience in advising on supervisory fees for TRs registered under EMIR and on the experience of relevant national authorities in setting supervisory fees for financial institutions.

5. As required under the second paragraph of Article 11 of SFTR, ESMA shall charge the trade repositories fees which are proportionate to the turnover of the trade repository concerned and fully cover ESMA's necessary expenditure relating to the registration, recognition and supervision of trade repositories as well as the reimbursement of any costs that the competent authorities may incur as a result of any delegation of tasks pursuant to Article 9(1) of SFTR. 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 trade repositories pay for all the administrative costs related to their registration, extension of registration, supervision or recognition.

6. It is worth noting that ESMA, to the extent possible, is basing its proposals with regards to ESMA's fees for TRs under SFTR on the Commission Delegated Regulation 1003/2013 (ESMA's fees under EMIR, hereinafter). Where, in the process of elaboration of the technical advice under SFTR, there are instances of departing from the ESMA's fees under EMIR, those are duly justified. There are also certain instances where ESMA, following the experience gained in supervising TRs, is proposing amendments to the current ESMA's

fees under EMIR and is consequently establishing level-playing field with the fees under SFTR.

7. ESMA intends to submit its final technical advice to the European Commission simultaneously with the final report and draft technical standards under SFTR i.e. by the end of Q1/beginning of Q2 of 2017.

8. Following the submission of ESMA's advice, the Commission will need to adopt a Regulation on fees in the form of a delegated act to specify further the types of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

9. The general approach as well as the relevant costs used to determine the fees under this proposal are based on the current EU landscape of reporting. Should this landscape be changed due to further developments related to the already registered TRs established in the United Kingdom, ESMA would assess the need to update its advices to the European Commission in order to ensure the compliance with the requirements established under Article 11 SFTR and Article 72 of EMIR. This might lead to amendments to the current ESMA fees under EMIR as well as to the delegated act adopted by the Commission under Article 11 of SFTR. At this stage the effects of the UK referendum to leave the Union are unknown, therefore the advice is based on the current landscape.

3 ESMA's expected costs

10. ESMA expects that the registration of TRs under SFTR will have a lot of in common with the registration of TRs under EMIR. As explained in the Consultation paper on TS under SFTR and on certain amendments to RTS under EMIR (SFTR CP) [1], the majority of the conditions for registration under SFTR are the same as the amended ones for registration of TRs under EMIR.

11. Therefore, the most realistic way to estimate the potential new registration costs for TRs under SFTR is on the basis of the costs that ESMA has experienced so far in relation to the registration of TRs under EMIR. In this regard it is worth mentioning that those TRs that are already registered under EMIR can apply for extension of their registration under SFTR thorough a simplified process. As further explained, while the simplified process refers to the documentation to be provided, Articles 5(6) and 7(1) of SFTR foresee the same timespan for registration as the one or extension of registration. i.e. 20 working days for assessment of completeness of an application and 40 working days for assessment of compliance.

12. ESMA's budget is managed on the basis of an activity-based 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. calculation of

[1] https://www.esma.europa.eu/press-news/consultations/consultation-draft-rts-and-its-under-sftr-and-amendments-related-emir-rts

the estimated costs generated per activity (including the relevant overheads), and for budget costing i.e. calculation of ESMA's actual costs per activity. This method has been enhanced recently and has led to some changes in the way ESMA categorises its sub-activities; these changes are reflected in ESMA's 2017 annual work programme[2]. According to the work program, the sub-activity budget for Trade Repositories in 2017 is 2.5 million EUR and sub-activity staff is 16 FTEs. The average cost of one FTE dedicated to TR Supervision is around 155,000 EUR per year, which includes the salary and all the relevant overheads.

3.1 TR registration and extension of registration costs

3.1.1 Costs of TR registration

13. In order to set out the most plausible scenario for estimation of the registration costs, ESMA considered the actual average registration costs of the TRs in 2013.

14. The first application for registration reached ESMA on 15 March 2013, the 5 subsequent applications followed shortly. The first four TRs were registered on 7 November 2013, the other two were registered on 5 December 2013. Considering the actual number of staff who worked on the TR applications and the working days that they spent to set-up the process, to receive and assess the completeness and compliance of the applications for registration, ESMA concluded that one TR application for registration requires around 0.65 FTE (full-time equivalent) to be processed. It is fairly straightforward to estimate that figure, given that 2013 was almost fully dedicated to registration of TRs and the actual supervision of TRs started only at the end of 2013.

3.1.2 Cost of extension of TR registration

15. There is no actual historical experience available to estimate the costs of an extension for registration. However, ESMA has built up its estimates on the following assumptions:

- An extension for registration will be less time consuming than a new registration under SFTR;

- SFTR introduces more detailed requirements, which would need to be taken on board by the registered TRs and could entail some additional explanatory work for ESMA until a common understanding has been reached.

[2] https://www.esma.europa.eu/sites/default/files/library/esma-2016-1419_-_esma_2017_work_programme.pdf

- An application for extension of registration would require the applicant to submit around 70% of the documentation that it would have submitted if applying for registration[3].

- ESMA would benefit from knowing already the applicant and therefore will gain in terms of efficiency compared to the case where it has to process an application from a new entity. To estimate this efficiency, ESMA leverages on its experience with CRA re-application (either because of previous refusal or withdrawal), where the documentation was processed on average within a timespan 30% shorter than the original application.

16. In summary, based on the above assumptions with regards to the cost of extension of registration, ESMA expects that the estimated cost would be around half the cost of an assessment of an application for new registration, i.e. approximately 0.33 FTE.

3.2 TR supervision costs

17. In order to estimate the cost of one FTE working for TR supervision in the most updated and precise way, ESMA has taken into account the ESMA's 2017 work program which contains a detailed description of ESMA's budget per different activities.

18. As explained earlier, ESMA plans its budget according to an activity-based method, which allocates budgeted financial and staff resources per activity, rather than per functional cost or per internal management hierarchy.

19. ESMA will allocate to TR supervisory costs, the relevant expenditure budgeted for the supervision of the compliance with the SFTR requirements, however this cost would necessarily be separate from the one under EMIR so that entities providing repository services under only one of the two regimes can be accurately charged supervisory fees.

3.3 TR recognition costs

20. Until now ESMA has not processed any application for recognition of third country TRs therefore there is no historical information to rely on.

21. For the recognition of TRs, the following steps are envisaged for TRs under SFTR: 1) the Commission determines the equivalence of the relevant third country jurisdiction; 2) ESMA concludes a co-operation agreement with the relevant third country authority. Where TRs authorised in a third country are not subject to a legally binding and enforceable obligation under the law of that third country to give direct and immediate access to the data to the authorities referred to in Article 12(2) of SFTR, the Commission shall submit recommendations to the Council for the negotiation of international agreements with that

[3] SFTR establishes a simplified registration process for entities which are already registered under EMIR. From that perspective most of the administrative documents, such as ownership, organisational charts, etc. might not need to be submitted, if no change takes place. However, information on the critical operational aspects related to the provision of repository functions under SFTR is required.

third country regarding mutual access to, and exchange of, information on SFTs held in trade repositories which are established in that third country, in order to ensure that all of the entities referred to in Article 12(2) of SFTR have direct and immediate access to all of the information needed for the exercise of their duties. Though slightly different from the recognition process envisaged under Articles 75 and 77 of EMIR, the recognition process under SFTR is expected to require similar level of supervisory effort, thus cost, from ESMA.

22. When defining the recognition fees for TRs under EMIR, ESMA indicated in paragraph 70 of the report on staffing and resources that ESMA expects around 0.1 FTE to process each application. Furthermore, in line with the practical experience in the case of the recognition of third-country CCP, ESMA expects that there will be a one-off cost (i) to assess the equivalence of a jurisdiction and (ii) to establish a cooperation arrangement with the relevant authority, of a total of 0.2 FTE per jurisdiction. The ongoing supervisory cost of recognised third-country TRs is considered below 0.1 FTE per TR.

4 General approach on fees determination under SFTR

23. One of the aspects on which ESMA is requested to provide advice to the European Commission is on the types of fees to be levied by ESMA. Based on the experience with ESMA's fees under EMIR, ESMA would favour the option of a mixed system, levying specific administrative actions fees for (i) the registration process, proportionate to the expected turnover of the TRs, (ii) the extension of registration, and an (iii) annual fee proportionate to the level of turnover of the TRs for on-going supervision, as well as (iv) fees for the initial recognition and (v) on-going supervision of third-country TRs. Furthermore, and in order to cover ESMA's fixed costs relating to supervision, a minimum annual supervisory fee is proposed.

24. The following chapters of this consultation paper describe how this mixed system will work in practice.

5 Managing deficits and surpluses under EMIR and SFTR

25. ESMA applies a universal budgeting approach, which means that income from fees is treated as general revenue. This is in line with the standard practice of other partially funded agencies, as recommended by DG Budget of the European Commission.

26. ESMA prepares annual budgets aiming at balancing the income through fees with the incurred expenditure, understanding that deficits or surpluses are to be balanced by the rest of ESMA's income sources.

27. In case of deficits (ESMA collecting less than incurred), ESMA does not recover the deficit from TRs. If the deficit is significant, ESMA should analyse the reasons why it happened, drawing up lessons for the next budgeting period. For surpluses (ESMA collecting more than incurred) the same reasoning should be followed hence no excess of fees should be paid back to TRs or CRAs. This mechanism is already in place at ESMA for Credit Rating Agencies (CRAs) and also for TRs under EMIR.

28. Through the existing mechanisms in place (EU budgetary procedure, annual reporting, single programming document), the ESMA Management Board and Board of Supervisors, of which the European Commission is a permanent Member, remain fully informed of the fees' collection and expenditure levels.

29. On a yearly basis, the correct implementation of ESMA's budget, in particular of the fee-funded budget, versus the EU Financial Regulations is checked by the European Court of Auditors. The final audit report is communicated to the European Parliament and Council.

30. The pro-forma supervisory costs are presented together with the annual workplan in September and the approved budget is published on ESMA's website in January.

31. Stemming from the above considerations, the provisions in Articles 4 and 7 of the ESMA's fees under EMIR on adjustments of fees for the purpose of calculation of the relevant amounts of annual supervisory fees result contrary to the ESMA budgeting framework. For them to be aligned, ESMA would advise the EC to:

    a. Delete Articles 4(2), 4(3), 7(2)(b) of the ESMA's fees under EMIR and to update the relevant references to those articles and ensure a consistent implementation of the above framework in the case of SFTR.

    b. Update the timeline for the second instalment to be paid by TRs and the respective amounts of the two instalments in the case of the ESMA's fees under EMIR and establish them in consistent manner for SFTR as explained in greater detail in section 9.

Q1. Do you agree with the proposed harmonisation of approaches to dealing with surpluses and deficits for the purposes of fees calculation under EMIR and SFTR? Please elaborate on the reasons for your response.

6 Fees for registration or extension of registration

32. As mentioned in paragraph 5, ESMA's fees need to be proportionate to the turnover of the TRs and need to fully cover the administrative costs related to the registration, supervision and recognition of TRs.

6.1 Fees for registration and extension of registration under SFTR

33. The SFTR CP specifies that ESMA will incorporate all the provisions included in RTS 150/2013 into the draft RTS for registration and extension of registration under SFTR and that some of the existing provisions in RTS 150/2013 would be better specified when incorporated to the draft RTS on registration and extension of registration.

34. Hence, if the draft RTS is approved in the current format, the registration process will be very similar in terms of requirements to be checked by ESMA, to the registration process under EMIR.

35. When defining in ESMA's fees under EMIR the types of TRs for the purposes of (i) estimating the workload, i.e. the relevant administrative costs and the (ii) expected turnover of the TRs, ESMA suggested using two criteria – number of derivatives asset classes covered by the TR and provision of ancillary services. From that perspective, the TRs were classified as being low, medium or high expected turnover.

36. As mentioned above, ESMA spent on average 0.65 FTE for the assessment of each application for registration received in 2013. All the TRs registered so far have been classified as TRs with high expected turnover.

6.1.1 Expected turnover

37. While ESMA considers that the past experience on TRs registration could help in making the process more efficient and reducing the expected workload, at the same time ESMA notes that SFTR specifies in greater detail some requirements, which would need to be taken on board by the TRs. The assessment of those could entail some additional work for ESMA. For these reasons, it is deemed appropriate to use the actual figures on the time that was spent on TRs registrations under EMIR also for registrations under SFTR.

38. In order to classify the TRs under SFTR, ESMA proposes to use an approach similar to the one used in EMIR.

39. Although the SFTR reporting rules build up on the pre-existing infrastructures, operational processes and formats which have been introduced with regard to reporting derivatives contracts to trade repositories, there is one important difference which impacts the definition of the registration fees. EMIR envisaged the potential phased in application of the reporting obligation depending on the classes of derivatives for which reporting was offered by the TRs. However, SFTR establishes a phased-in approach from the perspective of the typology of counterparties, e.g. credit institutions, CCPs, funds, non-financials, but not from the perspective of the types of SFTs, e.g. repos, securities lending, etc. This means that it would be impractical to consider the offering of repository services for different types of SFTs as one of the criteria to determine the registration fees.

40. While no specialisation at TR level per type of SFTs is expected to take place, ESMA understands that the provision of services ancillary to SFTR, similar to the provision of ancillary services to EMIR could be an indicator for high expected turnover.

41. Some examples of ancillary services under EMIR are mentioned in Article 78(5) of EMIR, however not all the ancillary services mentioned in that article would be applicable in the case for SFTR. From that perspective, ESMA understands that for the purpose of defining the expected turnover of TRs under SFTR, an ancillary service would be any service whose provision is directly or indirectly related to the provision of SFTR services[4]. The rationale for this approach is that if a TR provides ancillary services (i) it would have a more complete

[4] Some non-exhaustive examples would be trade matching, trade confirmation/affirmation, agent lending, collateral management, collateral valuation, tri-party reporting, etc.

commercial offering towards the entities subject to the reporting obligation under Article 4 of SFTR, hence generate higher revenues, and (ii) it would require greater supervisory effort by ESMA to assess its application for registration under SFTR, in view of its higher complexity and possible impacts or interdependency of ancillary services and the core services.

42. Also similar to the approach taken under EMIR, the provision of ancillary service is considered to take place in the following instances: (i) direct provision by the TR, (ii) indirect provision by a company within the TR's group or (iii) provision by a third entity with which the TR has concluded a material agreement to cooperate in the provision of services in the context of the trading or post-trading chain.

43. Consequently, the TRs will be classified as follows:

    a. in case a TR meets the criterion included in paragraph 40, it would be deemed to be higher expected turnover TR,

    b. in case a TR does not meet the criterion included in paragraph 40, it would be deemed to be lower expected turnover TR.

44. Similarly, as already established in ESMA's fees under EMIR, in case a material change to the conditions of registration of a particular TR under SFTR takes place and it affects the criterion used to estimate the level of turnover of that TR, i.e. a TR starts offering ancillary services, an appropriate adjustment to the registration fees should be done, according to the above-mentioned classification on the basis of expected turnover. This will further align ESMA necessary expenditure thus addional cost regarding a registered TR with the fees charged based on its expected turnover.

Q2. Do you agree with the proposed approach to classify TRs? If not, what other aspects should be taken into account? Please elaborate.

Q3. Do you agree with the proposed criterion to classify TRs? If not, what other aspects should be taken into account? Please elaborate.

6.1.2 Registration fees under SFTR

45. The current registration fees structure for TRs detailed in ESMA's fees under EMIR envisages three groups: EUR 45,000 for TRs with low expected turnover, EUR 65,000 for TRs with medium expected turnover, EUR 100,000 for TRs with high expected turnover.

46. The TRs registered until now by ESMA have all been classified in the third category (high expected turnover). Such classification has allowed ESMA to cover the costs and workload related to registration of TRs. Taking into account the adjustment of the criteria and categories described in Section 6.1.1., ESMA outlines below the relevant fee amounts.

47. While using the cost estimates included in Section 3.1.1, ESMA notes that the cost of assessment of a high expected turnover application under EMIR is 0.65 FTE per

application and that the average ESMA cost (including overheads, office space, etc) of one FTE dedicated to TR supervision (including registration and recognition) is 155,000 EUR. On that basis, the registration fee for a higher expected turnover TR applicant results to be 100,000 EUR. The expected supervisory effort for a lower expected turnover TRs under SFTR is considered to be the same as the one for medium expected turnover TR under EMIR. Hence the following two levels of fees are proposed:

a. Lower expected total turnover TRs shall pay a registration fee of 65,000 Euros

b. Higher expected total turnover shall pay a registration fee of 100,000 Euros

Q4. Do you agree with the proposed types and amounts of registration fees? Please elaborate.

6.1.3 Fees for extension of registration

48. According to the explanation included in Section 3.1.2, ESMA estimates that the extension of a registration would require half of the time requested for the original registration of a high expected turnover TR.

49. Moreover, ESMA understands that the two levels of registration fees indicated in paragraph 47 should not be replicated in the cases of extension of registration. This is explained mainly by the fact that ESMA is already in possession of certain information regarding the applicant TR, hence it will be able to assess the application for extension of registration without some of the additional costs related to the assessment of a new application for registration. Therefore, the relevant fee should be set at a level consistent with 50% of the registration fee, i.e. 50,000 EUR.

Q5. Do you agree with the proposed type and amount of fees for extension of registration under SFTR? Please elaborate.

Table 1 – Registration fees structure under SFTR

Extension of registration	EUR 50,000
New registration lower expected turnover TR	EUR 65,000
New registration high expected turnover TR	EUR 100,000

6.2 Concurrent application under EMIR and SFTR

50. The current regulatory framework implies that a new TR willing to apply for registration both under EMIR and SFTR or under SFTR before being registered under EMIR, should send two separate applications. This will imply that a given TR will pay up to 50,000 EUR more

(depending on the classification) than in the situation where it is first registered under EMIR and then asks for an extension under SFTR.

51. To avoid such a misalignment, ESMA would propose that if an applicant applies at the same time for a registration under EMIR and SFTR or it has concurrent applications, then the TR should pay (i) the full EMIR fee and (ii) the fee for extension of the registration under SFTR, instead of the full SFTR fee.

52. This reduction of fees will be justified by the synergies that ESMA would experience, such as reviewing only once the type of documents, like organisational chart, ownership, etc., which are not required to be re-submitted in the case of extension. Furthermore, in the case of concurrent applications those documents will be referring to the same information at the same point in time.

53. Given that the objective is to exploit the synergies related to achieve a reduced total fee, ESMA considers necessary making the aforementioned precision.

Q6. Do you agree with this proposal? Please elaborate on the reasons for your response.

7 Supervisory fees

7.1 Determination of total annual supervisory fees for EMIR and SFTR

54. ESMA's fees under EMIR provide that the relevant amount for the calculation of the annual supervisory fee charged to a supervised TR under EMIR for a given year is based on the estimate of expenditure relating to the supervision of TRs under EMIR as included in ESMA's budget for that year set out and approved in accordance with Article 63 of Regulation (EU) No 1095/2010, decreased by (i) recognition fees charged to third country TRs under EMIR, (ii) registration fees and annual supervisory fees under EMIR paid by new TRs, or by already registered TRs, in case a material change to their registration takes place and (iii) surplus of annual supervisory fees under EMIR from the previous year, and increased by the deficit of annual supervisory fees under EMIR from the previous year.

55. However, for the reasons included in section 5, ESMA understands that the aforementioned approach needs to be amended.

56. Therefore, under EMIR as well as under SFTR, the annual supervisory fees would be determined in accordance with the ESMA budgeting procedure, which would take into account all the activities that would result in supervisory effort related to each of the regulations.

57. Once the relevant amount is determined, ESMA proposes that the annual supervisory fees paid by each TR is calculated as the proportion of the relevant expenditure amount which

corresponds to the ratio of the TR's specific turnover to the total turnover of all registered TRs.

Q7. Do you agree with maintaining under SFTR the same approach as under EMIR for allocation of supervisory fees as proportion of the TR's specific turnover to the total turnover of all registered TRs? Please elaborate on the reasons for your response.

7.2 Calculation of applicable turnover under EMIR

58. According to ESMA's fees under EMIR, the applicable turnover of TRs is based on 3 elements: (i) core revenues of TR obtained in the reference period, (ii) number of trades reported to TR during the reference period and (iii) number of outstanding trades at a TR at the end of the reference period.

59. So far, ESMA has not experienced any material difficulties to determine the first component of the applicable turnover, which is the core revenues of a TR. TRs are obliged by national legislation to prepare their financial statements and they regularly submit their financial statements to ESMA, as periodic information. The profit and loss account and the respective notes of the financial statements usually contain the breakdown of the revenues, which enables to identify what part of revenues related to core services under EMIR. As required by TR fees regulation, this information is certified by auditors, therefore the risk that ESMA uses for the calculation of fees the figure which is not accurate is very low.

60. However, with regards to the number of reported trades and the number of outstanding trades ESMA has found certain difficulties to ensure consistency and comparability of data across all TRs. The main reasons are the following:

    a. Difficulties to obtain and confirm the figures on trades reported and outstanding by TRs, due to the inherent nature of the trades and the reporting of the lifecycle events;

    b. Lack of explicit legal obligation for TRs to audit or externally verify the figures.

    c. Persistent problems with reporting of UTI which lead to difficulties in counting accurately the number of trades

    d. Operational incidents take place at TRs from time to time and those can often affect the ability of TRs to timely and precisely determine the number of trades, sometimes TRs need to make retrospective changes.

61. Last but not least, the workload needed to analyse the figures provided has proved to be more burdensome than expected.

7.3 Proposed way forward for calculation of supervisory fees under EMIR and SFTR

62. When providing its advice to EC, ESMA flagged the following aspects regarding the TR industry in 2013: (a) formed on the basis of a new service, which arises partly as a consequence of regulatory development; (b) an emergence of new suppliers and new customers, appearance of different business models and variety of additional/ancillary products and services; (iii) an uncertainty regarding the demand for the TR's product and the growth potential; (iv) a limited track record and market conditions of the companies and the industry itself are still largely unknown; (v) potential for different commercial and business practices; and (vi) cross sector spill-overs, since TRs may use already existing technology and know-how from other market infrastructures, such as CSDs or IT solutions providers.

63. In that context, ESMA indicated that it would not be unlikely that TRs (i) face different cost structures and, therefore, apply pricing policies that vary significantly between them, causing significant revenue variability; (ii) lack previous financial track records or these are based on very short periods; and (iii) produce financial estimates and business plans that are either over-conservative or overambitious.

64. Now, three years later, ESMA understands that many of the potential difficulties regarding the establishment of the industry, the initial business practices and the potential cost structures of the TRs are overcome. Furthermore, ESMA and the TRs are in possession of historical financial track record on the performance of TRs. In addition, the relevant business plans have been widely reviewed and adjusted to the reality of the TR market. All this reduces the need to establish a more complex system for calculation of applicable turnover.

65. To that extent, ESMA understands that, for the purpose of calculating the applicable turnover under SFTR, the core revenues for centrally collecting and maintaining the records of SFTs should be taken into account. Similar to what is provided in ESMA's fees under EMIR, the revenue figures for the purpose of calculation of the annual supervisory fees under SFTR should be taken from the audited accounts of the TR. In case the audited accounts are not available at the moment of calculation of the relevant instalment, the previous year's annual accounts should be used.

$$\frac{Turnover\ TRi}{\sum Turnover} = \frac{SFT\ revenue\ TRi}{\sum SFT\ revenues\ TR}$$

66. Notwithstanding this, it is possible that, although under SFTR[5] the fees that the TR charges to its participants shall be cost-related, it can happen that the fees are (significantly) lower than those of its peers due to a different cost structure. Such lower fees could potentially lead to a greater market share, hence the TR would receive more SFT reports and would

[5] Pursuant to Article 5(2) of SFTR, the applicable provision is the same article as for cost-relatedness of fees under EMIR, i.e. Article 78(8) of EMIR

require greater supervisory effort (e.g. more data quality related issues). In this case, expenditure related to the on-going supervision of the individual TR, as required under Article 11 of SFTR might not necessarily be fully covered, although globally (at the level of all TRs) it would be covered. Hence at this stage, the supervisory efforts are mostly concentrated on the TRs that have the highest revenues, which are typically the ones with the biggest market share. The supervisory experience so far has demonstrated that the reporting fees are not the only criterion used by the reporting entities to select one or another TR.

67. ESMA is also aware that the simplified approach outlined above might create an incentive for TRs to reduce their fees thus revenues for core repository services and cross-subsidise the repository services with revenues from ancillary activities. This might create unfair competition between TRs. Similar situation might arise if more complex ownership structures are put in place.

68. While at this stage ESMA understands that, with some level of tolerance, supervisory efforts are proportionate to the supervisory fees charged based on core revenues only, this might not be the case in the future. For instance, to address this situation, at least at supervised entities level, ESMA's fees for credit rating agencies[6] are calculated based on all the revenues of the entity, not only those related to the core rating services.

Q8. Do you agree with the proposed methodology to calculate the annual turnover of TRs under SFTR based only on the core revenues from SFT reporting? Please elaborate on the reasons for your response.

Q9. Alternatively, do you consider that to calculate the annual turnover of TRs under SFTR all revenues related to SFT reporting, i.e. core and ancillary services related to SFTs, should be taken into account? Please elaborate on the reasons for your response.

69. ESMA believes that, the simplified formula related only to the revenues of TRs outlined in paragraph 65 should also replace the currently existing approach to define applicable turnover for the purpose of supervisory fees calculation under EMIR. Therefore, the number of trades reported and the number of outstanding trades at the end of the period should not be taken into consideration and the supervisory fees should be only based on revenues. The limitations of this methodology have been explained above.

Q10. Do you agree to amend and simplify the methodology to calculate the annual turnover of TRs under EMIR? Please elaborate on the reasons for your response.

[6] Commission Delegated Regulation (EU) No 272/2012 of 7 February 2012, supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to credit rating agencies, OJ L90, 28.3.2012, p.6

7.4 Minimum supervisory fees under SFTR

70. The supervision of TRs requires the performance of certain activities towards all TRs. These activities are stemming from ESMA's supervision workplan. ESMA adopts a risk-based approach to supervision and prioritises the supervisory action that it will take each year in accordance with its objectives of promoting financial stability and orderly markets and enhancing investor protection[7]. While the supervisory actions may vary per TR, to be able to perform its tasks, ESMA always needs to undertake a minimum level of supervisory activities.

71. To that extent, and given that the risk-based approach for supervision most probably would be extended also for supervision of TRs under SFTR, as it is under EMIR and as it is for CRAs under CRAR, ESMA believes that the minimum annual supervisory fee to be paid by TR registered under SFTR should be similar as the one set out in ESMA's fees under EMIR, i.e. it should be 30,000 EUR.

72. Furthermore, the minimum set of common activities at the level of each regulation would be based on the risk-based approach and would be most likely specific, hence existence of potential synergies as the ones referred in section 6.2 would be hardly achievable. Therefore, ESMA understands that the minimum supervisory fee under SFTR should be the same irrespective of whether it refers to a TR registered only under SFTR or to a TRs which has extended its registration under SFTR.

73. For the avoidance of doubt, in case an entity is subject to minimum supervisory fees under both EMIR and SFTR, it would be required to pay two minimum supervisory fees, one under each regulation, totalling 60,000 EUR.

Q11. Do you agree with the proposed minimum supervisory fee? Please elaborate on the reasons for your response.

7.5 First-year supervisory fee under SFTR

74. ESMA's experience with the registration and supervision of TRs has shown that the supervision in the first months after the TR is registered requires similar effort as the one during registration and more importantly, the supervisory effort is not related to the actual level of activity of the TR, but is quite similar across all TRs.

75. According to the provisions in Article 33(2)(a) of SFTR, the reporting obligation would start 12 months after the entry into force of the delegated act adopted by the European Commission pursuant to Article 4(9) of SFTR for credit institutions and investment firms. The other entities would follow in accordance with a phased approach. In that regard, the period of time between the registration or extension of registration of TR and the start of

[7] Link to the latest one can be found here https://www.esma.europa.eu/sites/default/files/library/2016-234_esma_2015_annual_report_on_supervision_and_2016_work_plan.pdf

the reporting obligation would be part of the preparatory phase for ESMA, the national authorities, the reporting entities and the TRs.

76. It is worth noting however that in case the reporting obligation under Article 4 of SFTR kicks in in the same calendar year in which the TR is registered, this gives rise to a somehow different situation in which the supervision in this first year is more closely related to the business-as-usual supervision. From that perspective, it is expected that ESMA will turn sooner to a business-as-usual risk-based supervision, rather than mainly supervising implementation and deployment of systems and reporting channels. In the case of TRs, the start of the reporting obligation ensures stable revenue flow to them.

77. It is worth highlighting that, whichever of the two below alternatives is put in place, in case the total supervisory fees charged by ESMA are below ESMA's supervisory cost, the mechanism to addressing deficits outlined in section 10 would apply.

7.5.1 Alternative A – EMIR-like first-year supervisory fee

78. Irrespective of whether the reporting obligation starts in the year of registration of the TR or in the following one, as in the case of the ESMA's fees under EMIR, the SFTR supervisory fees in the first year could be based on the registration or extension of registration fees further adjusted by a coefficient. The coefficient may be the ratio between the working days until the end of the year from the date the registration is granted, and ESMA's average registration processing time which as mentioned in section 3.1.1 is equal to 0.65 FTE=150 working days. In that case the maximum amount due for annual supervisory fee by a TR in its first year of operation shall be equal to the amount of the relevant registration fee. The denominator of the formula deviates from the one included in the first-year supervisory fees under EMIR, given the experience acquired by ESMA.

TR supervisory fee in year 1 = Min (TR registration or extension of registration fee, TR registration fee * coefficient)

$$\text{Coefficient} = \frac{Supervisory\ working\ days\ in\ year\ 1}{150}$$

7.5.2 Alternative B – EMIR-like fee based on interim period

79. Alternatively, in case the reporting obligation under Article 4 of SFTR kicks in the first year of supervision of the TRs under SFTR, ESMA could propose that the fees are calculated on the basis of turnover indicator calculated for an interim period. A similar approach is detailed in Article 15 of ESMA's fees under EMIR.

80. In that case the supervisory fees for the TRs in the year when the reporting started, i.e. 2014, were computed on the basis of the turnover using the three relevant indicators – revenues, number of reported derivatives trades and number of outstanding derivatives trades - for the period between 1 January 2014 and 30 June 2014, instead on using the turnover indicators from 2013 which in fact were inexistent.

81. While Alternative B would not allow the TRs to plan in advance their costs, it would be closer to the actual supervisory costs and efforts by ESMA in supervising the TRs.

Q12. Which alternative for supervisory fees do you prefer? Please elaborate on the reasons for your response.

8 Recognition fees under SFTR

82. Given the similarities of the recognition process under EMIR and under SFTR, and in particular the required effort, ESMA suggests to maintain the same level of fees already envisaged for recognition of third countries TRs under EMIR, which is structured in the following way: (i) 20,000 EUR for the processing of the application for recognition and (ii) the amount resulting from dividing the costs for equivalence assessment and cooperation arrangement, estimated at 35,000 EUR, by the total number of TRs that are either recognised or applying for recognition from that jurisdiction, including the concerned applicant. As explained in ESMA's final advice to the European Commission on ESMA's fees under EMIR, the supervisory effort towards third country entities is somehow reduced in comparison with the directly supervised ones.

83. Under Article 19(4)(b) of SFTR, it is provided that a third country TR may submit an application for extension of registration in the case that the TR is already recognised under EMIR. Given that similar approach to the one on extension of registration should be applied the first component of the recognition fee relating to the assessment of the application, it is proposed that it should be reduced by 50%. The second component, however, will entail costs particular to ensuring compliance with SFTR, hence it is proposed to be kept as it is. Therefore, the fees in the case of extension of registration for a recognised TR would be (i) 10,000 EUR for the processing of the application for extension of registration in case of recognition and (ii) the amount resulting from dividing the costs for equivalence assessment and cooperation arrangement, estimated at 35,000 EUR by the total number of TRs that are either recognised or applying for recognition from that jurisdiction, including the concerned applicant.

84. Finally, given the reduced supervision by ESMA of recognised TRs, ESMA proposes that the on-going recognition fee for all TRs recognised under SFTR is kept at 5,000 EUR, which is the same level as under EMIR.

85. For the avoidance of doubt, in case an entity is recognised under both regimes, it would pay a total annual recognition fee of 10,000 EUR.

Q13. Do you agree with the proposed types and amounts of recognition fees? Please elaborate on the reasons for your response.

9 Payment and reimbursement conditions under SFTR

9.1 Fees for registration, extension of registration and recognition

86. As indicated in paragraph 32 of the SFTR CP, Chapter III SFTR includes also Article 11 which establishes the need for ESMA to charge fees to the TRs to "fully cover ESMA's necessary expenditure relating to the registration, recognition and supervision of trade repositories as well as the reimbursement of any costs that the competent authorities may incur as a result of any delegation of tasks pursuant to Article 9(1) of [SFTR]". In that respect, it can be understood that the payment of the relevant fees is essential condition for the TR to be registered, extended registration or recognised under SFTR.

87. A TR should therefore pay the relevant fees established in Sections 5 and 8 at the time at which it applies to ESMA. This is in line with the requirements under ESMA's fees under EMIR.

Q14. Do you agree with the proposal related to the payment of fees related to registration, extension of registration and recognition? Please elaborate on the reasons for your response.

9.2 Reimbursement conditions in case of withdrawal of application

88. ESMA's fees under EMIR do not envisage reimbursement to applicant TRs in case of withdrawal of application prior to the registration of the entity under EMIR. ESMA proposes that the same approach is taken with regards to fees for registration and extension of registration under SFTR as well as to the application part of the recognition fee under SFTR. The main reasons supporting this proposal are the following ones:

    a. SFTR establishes a reporting obligation to TRs which creates a market in itself;

    b. Lowering the expected cost of an incomplete process (by reimbursing a part of the fee) could allow for spurious applications, from companies aiming at establishing a TR without fulfilling a minimum set of requirements; and

    c. ESMA has to concentrate the limited resources available on the applications that carry a true intention of becoming a trade repository and to discourage the submission of spurious applications.

89. To sum up, the possibility of reimbursement runs contrary to that goal and the applications that end up withdrawing would reduce the available resources for those that do not, thus compromising the proper review of the latter.

Q15. Do you agree with the proposal related to reimbursement of fees? Please elaborate on the reasons for your response.

9.3 Annual supervisory fees

90. In accordance with ESMA's fees under EMIR, the TRs need to pay their annual supervisory fees in two instalments – first one by 28 February and second one by 31 August. This calendar ensures that ESMA's supervisory costs are covered in a timely manner and it is also aligned with the payments calendar for CRAs.

91. However, as mentioned in Section 5, following discussions with DG Budget of the European Commission, ESMA has updated its approach to budgeting and more specifically to the management of surpluses and deficits.

92. From that perspective, all the costs related to the supervision of TRs would be considered for budget purposes. Given that there might be unexpected applications for registration or recognition, ESMA proposes that the date of the second instalment is moved to 31 October, while the date of the first one is kept at 28 February. This would significantly reduce the risk of having surplus due to unexpected applications and it will also increase the quality of the data used to calculate fees, i.e. any potential adjustments to the financial accounts.

93. To ensure however that ESMA has at all times the relevant means to undertake its duties, the amounts of the two instalments would need to be updated. The first instalment, which would cover ten months of supervision, would be equal to 5/6 of the annual supervisory fees, instead of 2/3 or 4/6 which is the case currently and the second one would be equal to 1/6 instead of 1/3 or 2/6.

94. For the reasons mentioned, ESMA understands that the calendar provided in ESMA's fees under EMIR should be updated also in line with SFTR, i.e. the TRs would need to pay 5/6 of their annual supervisory fee by 28 February and 1/6 of their annual supervisory fee by 31 October.

Q16. Do you agree with the proposed frequency of payments of the annual supervisory fees for the purposes of SFTR? Please elaborate on the reasons for your response.

Q17. Do you agree with the harmonising the frequency of payments of the annual supervisory fees under EMIR with SFTR? Please elaborate on the reasons for your response.

9.4 Annual recognition fees

95. ESMA understands that given the reduced amount of the annual recognition fees, those should be paid in only one instalment by 28 February.

Q18. Do you agree with the suggested approach on annual recognition fees? Please elaborate on the reasons for your response.

10 Reimbursement of competent authorities under SFTR

96. Any delegation of tasks has to follow the principles established in SFTR. Prior to any delegation of a task to the relevant competent authority, ESMA should consult and agree with such authority the scope and complexity of the task, the timetable for its performance and the transmission of necessary information to ESMA. Any costs incurred by national competent authorities while carrying out supervisory tasks delegated by ESMA will be covered by ESMA's supervisory fees and the NCA will not look to recover these costs directly from the TR.

97. Stemming from the above, the costs to be reimbursed to national competent authorities need to fulfil the following conditions:

    a. they should be previously agreed between ESMA and the NCA;

    b. they should be calculated in accordance to the method used to determine ESMA's total administrative costs regarding TRs;

    c. they should be proportionate to the turnover of the relevant TR; and

    d. they should not be greater than the total amount of supervisory fees paid by the relevant TR.

98. Any delegation of tasks by ESMA to national competent authorities will be determined on an independent basis, may be revoked at any time and will not impact the amount of fees charged to a particular TR.

Q19. Do you agree with the proposed approach to dealing with the reimbursement of costs to the competent authorities in case of delegation of ESMA tasks under Article 9(1) SFTR? Please elaborate on the reasons for your response.

11 Annexes

11.1 Annex I - Summary of questions

Q1. Do you agree with the proposed harmonisation of approaches to dealing with surpluses and deficits for the purposes of fees calculation under EMIR and SFTR? Please elaborate on the reasons for your response.
Q2. Do you agree with the proposed approach to classify TRs? If not, what other aspects should be taken into account? Please elaborate.
Q3. Do you agree with the proposed criterion to classify TRs? If not, what other aspects should be taken into account? Please elaborate.
Q4. Do you agree with the proposed types and amounts of registration fees? Please elaborate.
Q5. Do you agree with the proposed type and amount of fees for extension of registration under SFTR? Please elaborate.
Q6. Do you agree with this proposal? Please elaborate on the reasons for your response.
Q7. Do you agree with maintaining under SFTR the same approach as under EMIR for allocation of supervisory fees as proportion of the TR's specific turnover to the total turnover of all registered TRs? Please elaborate on the reasons for your response.
Q8. Do you agree with the proposed methodology to calculate the annual turnover of TRs under SFTR based only on the core revenues from SFT reporting? Please elaborate on the reasons for your response.
Q9. Alternatively, do you consider that to calculate the annual turnover of TRs under SFTR all revenues related to SFT reporting, i.e. core and ancillary services related to SFTs, should be taken into account? Please elaborate on the reasons for your response.
Q10. Do you agree to amend and simplify the methodology to calculate the annual turnover of TRs under EMIR? Please elaborate on the reasons for your response.
Q11. Do you agree with the proposed minimum supervisory fee? Please elaborate on the reasons for your response.
Q12. Which alternative for supervisory fees do you prefer? Please elaborate on the reasons for your response.
Q13. Do you agree with the proposed types and amounts of recognition fees? Please elaborate on the reasons for your response.
Q14. Do you agree with the proposal related to the payment of fees related to registration, extension of registration and recognition? Please elaborate on the reasons for your response.
Q15. Do you agree with the proposal related to reimbursement of fees? Please elaborate on the reasons for your response.
Q16. Do you agree with the proposed frequency of payments of the annual supervisory fees for the purposes of SFTR? Please elaborate on the reasons for your response.
Q17. Do you agree with the harmonising the frequency of payments of the annual supervisory fees under EMIR with SFTR? Please elaborate on the reasons for your response.
Q18. Do you agree with the suggested approach on annual recognition fees? Please elaborate on the reasons for your response.

Q19. Do you agree with the proposed approach to dealing with the reimbursement of costs to the competent authorities in case of delegation of ESMA tasks under Article 9(1) SFTR? Please elaborate on the reasons for your response.

11.2 Annex II – EC request to ESMA for technical advice

REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE SUPERVISORY FEES TO BE CHARGED TO TRADE REPOSITORIES

With this mandate the Commission seeks ESMA's technical advice on possible delegated acts concerning the Regulation on transparency of security financing transactions and of reuse ('SFTR')[8] or the "**legislative act**"). 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 formal mandate. The technical advice received on the basis of this mandate should not prejudge 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**"),[9] 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**"),[10] and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").[11]

According to Article 11(2) of the legislative act and with regard to the supervisory fees to be charged to trade repositories, the Commission shall adopt a delegated act to specify 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.

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

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 within the European Securities Committee,[12] the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States 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 powers of the Commission to adopt delegated acts are subject to Article 82 of the legislative act. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context

1.1 Scope

The objective of the Regulation on transparency of securities financing transactions and of reuse (SFTR) is to enhance the transparency of securities financing markets and thus of the financial system. The SFTR creates a Union framework under which details of securities financing

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[8] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2365&from=DE
[9] 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
[10] Communication of 9.12.2009. COM (2009) 673 final.
[11] OJ L 304, 20.11.2010, p. 47.
[12] Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p.45.

transactions (SFTs) can be efficiently reported to trade repositories (TRs). The SFTR legal framework should, to the extent possible, be the same as that of Regulation No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ('EMIR') in respect of the reporting of derivative contracts to trade repositories registered for that purpose.

SFTR, like EMIR, grants ESMA direct registration and supervisory powers over trade repositories. In accordance with Article 11(1) of SFTR, ESMA shall charge fees to trade repositories and those fees shall fully cover ESMA's necessary expenditure relating to the registration, recognition and supervision of trade repositories.

The Commission shall adopt a Regulation on fees, to be adopted in the form of a delegated act, to specify 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.

This mandate focuses on the technical aspects of the Regulation on fees. In providing its advice, ESMA should build upon its previous experience in advising on supervisory fees for TRs registered under EMIR and from the experience of relevant national authorities in setting supervisory fees for financial institutions.

1.2 Principles that ESMA should take into account

On the working approach, ESMA is invited to take account of the following principles:

- It should respect the requirements of the ESMA Regulation, and, to the extent that ESMA takes over the tasks of CESR in accordance with Art 8(1)(l) of the ESMA Regulation, take account of the principles set out in the Lamfalussy Report[13] and those mentioned in the Stockholm Resolution of 23 March 2001[14].

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the delegated acts set out in the legislative act. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens for trade repositories.

- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union, in particular with the EMIR framework.

- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.

- ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in

[13] Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, chaired by M. Lamfalussy, Brussels, 15 February 2001.
(http://ec.europa.eu/internal market/securities/docs/lamfalussy/wisemen/final-report-wise-men en.pdf)
[14] Results of the Council of Economics and Finance Ministers, 22 March 2001, Stockholm Securities legislation, (http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/105&format=HTML&aged=0&language=EN&guiLanguage=en).

such a way as to ensure coherence between different standards of work being carried out by the various expert groups.

- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants 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 detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This should be annexed to its technical advice. The technical advice should justify ESMA's choices vis-à-vis the main arguments raised during the consultation.

- ESMA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed.

- 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 at European level.

- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the legislative act, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.

- The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means 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 in the Union.

- ESMA should address to the Commission any question they might have concerning the clarification on the text of the legislative act, which they should consider of relevance to the preparation of its technical advice.

2 Procedure

The Commission is requesting the technical advice of ESMA in view of the preparation of the possible delegated acts to be adopted pursuant to the legislative act and in particular regarding the questions referred to in section 3 of this formal mandate.

The mandate takes into account the ESMA Regulation, the 290 Communication and the Framework Agreement.

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

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the legislative act.

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

3 ESMA is invited to provide technical advice on the following issues

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act on fees for trade repositories, and more specifically on the following aspects:

- In order to ensure a fair treatment of trade repositories within the Union framework, ESMA should base its work, to the fullest possible extent, on Commission Delegated Regulation (EU) No 1003/2013 of 12 July 2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to trade repositories ('EMIR Delegated Regulation on trade repositories' fees')[15]. In particular, ESMA should duly justify and substantiate any potential need to depart in its technical advice from the principles contained in 'EMIR Delegated Regulation on trade repositories' fees.

- ESMA is invited to reflect on the type of fees that could be levied. Fees could be provided for specific supervisory actions (e.g. registration fees) 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 taking into account any applicable fees on trade repositories already registered under EMIR where such repositories extend their services under SFTR. ESMA is also invited to advise on whether exceptional circumstances need to be foreseen in the fees structures to take into account potential exceptional/nonroutine 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, recognition and supervision of trade repositories should be distributed to the individual supervised trade repositories. ESMA should take into account any applicable fees on trade repositories already registered under EMIR where such repositories extend their services under SFTR. ESMA is invited to advise on whether fees should be yearly adjustable or fixed.

- According to Article 11(1) of SFTR, the amount of fees charged to a trade repository shall fully cover all necessary expenditure incurred by ESMA for its registration, recognition and supervision activities under SFTR. ESMA is invited to detail its assessment of the necessary expenditure it will incur for the registration, recognition and supervision of trade repositories, and provide information on its estimates and methods of calculation. ESMA should build upon its existing experience of registering and supervising trade repositories under EMIR to inform its analysis. ESMA should also advise on how the surpluses/deficits in ESMA's supervision budget for trade repositories should be managed.

[15] OJ L 279, 19.10.2013, p. 4.

- According to Article 11(1) of SFTR, the amount of fees charged to a trade repository shall be proportionate to the turnover of the trade repository concerned. ESMA is invited to provide its technical advice on the appropriate method for considering the turnover of the trade repository 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 trade repository activity. ESMA should take into account any applicable fees on trade repositories already registered under EMIR where such repositories extend their services under SFTR.

- According to Article 11(1) of SFTR, the fees charged to trade repositories shall also fully cover the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to SFTR in particular as a result of any delegation of tasks in accordance with Article 9(1) of SFTR. 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 trade repository for undertaking a supervisory action.

- According to Article 11(1) of SFTR, where a trade repository has already been registered under EMIR, the supervisory fees charged under SFTR shall only be adjusted to reflect additional necessary expenditure and costs relating to the registration, recognition and supervision stemming from the SFTR. ESMA is invited to reflect on whether there is any need to adapt the methodologies and fees specified in the EMIR Delegated Regulation on trade repositories' fees, to the situation where a trade repository chooses to provide services under both SFTR and EMIR. In this regard, ESMA should consider that additional operational costs for market participants should be minimised.

- ESMA should suggest the timing and appropriate modalities of the payment of the fees taking into account existing rules under the EMIR Delegated Regulation on trade repositories 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 trade repositories. This could for instance be achieved by requiring the supervised trade repositories to pay the expected fees upfront, drawing up an account at the end of the year.

4. Indicative timetable

This mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 30 of the legislative act which allows the European Parliament and the Council to object to a delegated act within a period of 2 months, extendable by 2 further months. The delegated act will only enter into force if neither the European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

The deadline set to ESMA to deliver the technical advice is twelve months after the entry into force of SFTR.