



Brussels, 10.3.2022
C(2022) 1405 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 10.3.2022

**supplementing Regulation (EU) No 600/2014 of the European Parliament and of the
Council by specifying fees relating to the supervision by the European Securities
Markets Authority of data reporting service providers**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2019/2175, amending Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR), was published in the Official Journal on 27 December 2019. It grants the European Securities and Markets Authority (ESMA) direct authorisation and supervisory powers over data reporting services providers (DRSPs), except for those Approved Reporting Mechanisms (ARMs) and Approved Publication Arrangements (APAs) that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State.

As provided in Article 38n(1) of MiFIR, ESMA is to charge fees to data reporting services providers and those fees have to fully cover ESMA's necessary expenditure relating to the authorisation and supervision of data reporting services providers. The amount of a fee charged to a data reporting services provider has to be proportionate to the turnover of the data reporting services provider. Those fees should also cover the reimbursement of any costs that the competent authorities may incur as a result of delegation from ESMA under Article 38o of MiFIR. The power to adopt a delegated act on fees is provided in Article 38n(3) of MiFIR. According to that provision, the Commission is empowered to adopt a delegated act to specify 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.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 18 June 2020, the Commission asked ESMA for an opinion (technical advice) on the Commission delegated regulations to be adopted under Article 2(3), 38k(10) and 38n(3) of MiFIR.

Following an in-depth technical assessment, ESMA conducted a public consultation on the technical aspects of the envisaged delegated regulations on derogation and fees from 20 November 2020 to 4 January 2021. 11 stakeholders responded to this public consultation. The main aspects flagged by respondents to the consultation are related to the minimum fee having regard to a break-even (cost-recovery) functioning of data reporting services providers, the potential increase of fees for data reporting services providers' clients and (upfront) transparency of fees. Other questions relate to the use of revenue for the fee determination, the differences between fees from national supervision versus ESMA supervision and the shape of the market. The Commission notes that the fees are based on ESMA's supervisory budget for the following year, which budget needs to be approved by the Commission. The Commission agrees with ESMA that the share of revenue of an individual DRSP in a specific category (i.e. APA or ARM) relative to the total revenue of all DRSPs in a specific category (i.e. all APAs or all ARMs) is one of several possible criteria to base the amount of annual fees individual DRSPs are due. The minimum fee relates to fixed activities by ESMA, such as periodic information gathering, and ensures that the revenue based division does not lead to the largest DRSPs being responsible for the fees of the smallest DRSPs.

ESMA submitted its technical advice to the Commission on 23 March 2021.

On 19 July 2021, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on ESMA's technical advice and on the content of this delegated act. No EGESC members provided comments regarding the fee determination.

The draft Delegated Regulation was published on the Better Regulation portal for a four-week feedback period from 29 July to 27 August 2021, in accordance with the principles laid down

in the Interinstitutional Agreement on Better Law-Making. The received feedback was thoroughly examined before deciding to move forward with the adoption of the Delegated Regulation. Eight contributions were received. Most responses focussed on the height of supervisory fees, which is determined by the ESMA budget and the Legislative Financial Statement annexed to Regulation (EU) 2019/2175. Furthermore, mixed responses were received regarding the height of minimum fees and the way to calculate market share. In addition, some respondents wanted clarity before 1 January 2022 on the entities that would fall within ESMA supervision and the height of the fees. Finally one responded addressed the issue that in the year that supervision of a DRSP is transferred from ESMA to an NCA as a consequence of a reassessment, this DRSP should not be due the full annual supervisory fee. A provision has been added to accommodate that the annual fee in such case shall be lessened in proportion to the amount of months ESMA supervises the DRSP.

An impact assessment has not been carried out for the following reasons:

- This Delegated Regulation largely follows the measures proposed by ESMA in its technical advice.
- The decision to determine criteria for fees, was taken in the Regulation. The overall objectives and the need for these rules were outlined in the impact assessment accompanying the Commission proposal for Regulation (EU) 2019/2175.
- The provisions for fees in this delegated acts are of a procedural nature. This Delegated Regulation follows the logic from previously adopted Delegated Regulations on criteria for fees that are in ESMA’s supervisory remit.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Articles 1 of the proposed delegated regulation sets out the relevant definitions.

Articles 2 – 8 of the proposed delegated regulation sets out the provisions on fees. The articles contain the fee basis.

Articles 9 – 11 of the proposed delegated regulation sets out the final provisions. The articles contain the transitional provisions including the fee system for 2022, the methodology for the collection of fees for 2023 and the entry into force.

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supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council by specifying fees relating to the supervision by the European Securities and Markets Authority of data reporting service providers

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 648/2012¹, and in particular Article 38n(3) thereof,

Whereas:

- (1) Given the cross-border dimension of market data handling, data quality and the necessity to achieve economies of scale, and to avoid the adverse impact of potential divergences on both data quality and the task of data reporting providers, Regulation (EU) 2019/2175 of the European Parliament and of the Council² transferred authorisation and supervision powers with regard to the activities of data reporting services providers ('DRSPs') in the Union to the European Securities and Markets Authority ('ESMA').
- (2) It is important to specify the fees that ESMA may charge with regard to the application, authorisation and supervision of data reporting services providers.
- (3) Fees charged to DRSPs are aimed at full recovery of costs made by ESMA related to authorisation and supervision of DRSPs. Supervisory activities include the assessment of suitability of the management body, supervision of compliance by DRSPs with organisational requirements, the exercise of powers to require information, conduct investigations and perform on-site inspections and the imposing of supervisory measures. ESMA assesses its budget on an annual basis.
- (4) Fees charged for ESMA's activities related to DRSPs should be set at a level such as to avoid a significant accumulation of deficit or surplus. Where there is a recurrent significant surplus or deficit, the level of fees should be revised.
- (5) A DRSP should submit its application to ESMA in order to ensure harmonised application of the derogation criteria. During the first phase of the application, ESMA

¹ 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).

should determine if a DRSP is eligible for derogation from ESMA supervision. If the criteria for derogation apply, ESMA should forward the application to the national competent authority. No fee should be charged by ESMA in this case. The fixed fees related to the authorisation by ESMA should be divided between an application fee, which should relate to the assessment of completeness of an application and an authorisation fee. The process of authorisation should be completed within six months.

- (6) ESMA shall assess if DRSPs that are already authorised at national level from 1 January 2022 will fall in scope of ESMA supervision and inform the respective DRSPs. DRSPs that are already authorised at national level should not be subject to reauthorisation by ESMA. These DRSPs already comply with the requirements applicable to DRSPs and should not be charged for a duplication of the authorisation process by ESMA.
- (7) The annual fees charged by ESMA should cover all activities related to the DRSPs. ESMA should assess annually its supervisory budget related to each type DRSP and charge each individual DRSP a fee that is proportionate to its revenue compared to the total revenue of all DRSPs of the same type. Revenue related to activities directly ancillary to core DRSP services should be included in the calculation of the applicable turnover for as far as it is likely to have an impact on ESMA's supervision of the DRSP and it is not already covered by separate supervision activities. A minimum fee for Approved Publication Arrangements (APAs) and Approved Reporting Mechanisms (ARMs) covers the fixed costs related to requests for information, on-going monitoring and, investigations. The annual fee applies per calendar year.
- (8) ESMA may delegate supervisory tasks to national competent authorities, in which case the national competent authorities should be reimbursed by ESMA for their costs incurred.
- (9) As information on cost based supervision is difficult to collect for the supervision in 2022, it is essential to provide for a transitional provision with a calculation method for a fixed fee that applies during the first year of supervision by ESMA and that is based on easily obtainable and objective data. In order to meet the proportionality principle, a distinction between DRSPs should be made by using the number of transactions as a proxy for the relevance of the individual DRSP relative to all DRSPs. The calculation to determine the supervisory fee per DRSP for 2022 should be based on the information provided by national competent authorities on transactions published or reported by APAs and ARMs during the first half of 2021 and should distinguish between larger and smaller DRSPs.
- (10) Audited accounts for DRSPs will only become required after ESMA has taken over DRSP supervision. It is therefore necessary to provide for a transitional provision to adjust the revenue calculation method for 2023, under which the payment of the annual supervisory fee for 2023 is first based on non-audited account information from the first six months of 2022. At a second stage, a correction mechanism should be in place to base the fee on audited accounts of the whole year of 2022.
- (11) In order to ensure smooth functioning of the new supervisory framework for DRSPs, as introduced in Article 4 of Regulation 2019/2175, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1
Definition

For the purpose of this Regulation “data reporting services provider”, or “DRSP”, means an approved publication arrangement or an approved reporting mechanism as defined in Article 2(1)(34) and Article 2(1)(36) of Regulation (EU) No 600/2014.

Article 2
Application and authorisation fees

1. Where a DRSP applies for authorisation to provide data reporting services it shall pay:
 - (a) for APAs and ARMs an application fee of EUR 20 000 for the first application and EUR 10 000 for each following application for authorisation of additional data reporting services in case the applicant does not have a derogation in accordance with [insert reference to Delegated Regulation on derogation criteria - C(2021) 9430 final];
 - (b) for APAs and ARMs an authorisation fee of EUR 80 000 for the first authorisation and EUR 40 000 for each following authorisation of additional data reporting services, in case the applicant does not have a derogation in accordance with [insert reference to Delegated Regulation on derogation criteria - C(2021) 9430 final].

Article 3
Annual supervisory fees

1. A DRSP which is subject to ESMA supervision shall be charged an annual supervisory fee.
2. The total annual supervisory fee and the annual supervisory fee for a given DRSP shall be calculated as follows:
 - (a) the total annual supervisory fee for a given year (n) shall be the estimate of expenditure relating to the supervision of data reporting services providers’ activities under Regulation (EU) No 600/2014 as included in ESMA’s budget for that year;
 - (b) a data reporting services provider’s annual supervisory fee for a given year (n) shall be the total annual supervisory fee determined pursuant to point (a) divided between all data reporting services providers authorised in year (n), in proportion to their applicable turnover calculated pursuant to Article 4.
3. In no case shall an APA or ARM authorised by ESMA pay an annual supervisory fee of less than EUR 30 000.

In case an entity is subject to minimum supervisory fees for more than one data reporting service, it shall pay the minimum supervisory fee for each service provided.
4. By way of derogation of paragraphs 2 and 3, the first-year fee shall be calculated by lessening the authorisation fee referred to in Article 2(1), point (b) with a factor that

is equal to the days between authorisation and the end of the year divided by the total number of days in that year. It shall hence be calculated as follows:

*data reporting services provider first-year fee = Min (Authorisation fee, Authorisation fee * Coefficient)*

Coefficient = $\frac{\text{Number of calendar days from the date of authorisation until 31 December}}{\text{Number of calendar days in year (n)}}$

Where a DRSP is authorised during the month of December, it shall not pay the first-year supervisory fee.

5. By way of derogation from paragraph 2 and 3, where the reassessment referred to in Article 1(3) of [insert reference to Delegated Regulation on derogation criteria - C(2021) 9430 final] results in the derogation of ESMA supervision of a DRSP, the annual supervisory fee for the year in which the derogation applies shall be calculated solely for the 5 months in that year during which ESMA continues to be the supervisor of the DRSP in accordance with Article 1(4) of [insert reference to Delegated Regulation on derogation criteria - C(2021) 9430 final].

Article 4 *Applicable turnover*

1. DRSPs shall keep audited accounts for the purposes of this Regulation which distinguish between at least the following:
 - (a) revenues generated from ARM services;
 - (b) revenues generated from APA services;
 - (c) revenues generated from ancillary services to ARM activities;
 - (d) revenues generated from ancillary services to APA activities.
2. The applicable turnover of a DRSP for a given year (n) shall be the sum of:
 - (a) its revenues generated from the core functions of the provision of ARM or APA services on the basis of the audited accounts of the year (n-2), or, if they are not yet available of the year previous to that (n-3) and
 - (b) its applicable revenues from ancillary services on the basis of audited accounts of the year (n-2), or, if they are not yet available of the year previous to that (n-3),divided by the sum of:
 - (c) the total revenues of all authorised ARMs or APAs generated from core functions of provision of ARM or APA services on the basis of the audited account during the year (n-2), or, if they are not yet available of the year previous to that (n-3) and
 - (d) the total applicable revenues from ancillary services of all ARMs or APAs on the basis of audited accounts during the year (n-2), or, if they are not yet available of the year previous to that (n-3).
3. Where the data reporting services provider did not operate during the full year (n-2), its applicable turnover shall be estimated according to the formula set out in paragraph 2 by extrapolating for the data reporting services provider the values calculated for the number of months during which the data reporting services provider operated in year (n-2) to the whole year (n-2).

4. DRSPs shall provide ESMA, on an annual basis, with audited accounts as referred to in paragraph 1. The documents shall be submitted to ESMA by electronic means no later than 30 September each year (n-1). If a DRSP authorised after 30 September, it shall provide the figures immediately upon authorisation and by end of the year of authorisation.

Article 5

General payment modalities

1. All fees shall be payable in euro. They shall be paid as specified in Articles 6 and 7.
2. Any late payments shall incur the default interest laid down in Article 99 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council³.

Article 6

Payment of application and authorisation fees

1. The fees for application, authorisation or extension of authorisation shall be due at the time the DRSP applies and shall be paid in full within 30 days from the date of issuance of ESMA's invoice.
2. When a DRSP decides to withdraw its application for authorisation before ESMA adopts its reasoned decision to authorise or refuse authorisation, the application or authorisation fees shall not be reimbursed.

Article 7

Payment of annual supervisory fees

1. The annual supervisory fee referred to in Article 3 shall be due at the beginning of each calendar year and paid in full to ESMA in the first three months of that year. ESMA shall submit an invoice specifying the full amount of the supervisory fee at the latest thirty days before the final payment date. The fees shall be calculated on the basis of the latest available information for annual fees.
2. When a DRSP decides to withdraw its authorisation, the annual supervisory fee shall not be reimbursed.

Article 8

Reimbursement of national competent authorities

1. In case of a delegation of tasks by ESMA to national competent authorities, the national competent authority shall not recover costs incurred while carrying out supervisory tasks delegated by ESMA directly from the DRSP.
2. ESMA shall reimburse a competent authority for the actual costs incurred as a result of work carried out pursuant to Regulation (EU) No 600/2014, in particular as a

³ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

result of any delegation of tasks pursuant to Article 38o of Regulation (EU) No 600/2014.

3. ESMA shall ensure that the costs to be reimbursed to national competent authorities fulfil the following conditions:
 - (a) they should be previously agreed between ESMA and the NCA;
 - (b) they should be proportionate to the turnover of the relevant DRSP; and
 - (c) they should not be greater than the total amount of supervisory fees paid by the relevant DRSP.
4. Any delegation of tasks by ESMA to national competent authorities shall be determined on an independent basis, may be revoked at any time and shall not impact the amount of fees charged to a particular DRSP.

Article 9

Transitional provision for 2022

1. For the purposes of the calculation of the annual supervisory fee applicable to DRSPs under ESMA supervision for the year 2022, ESMA shall collect a fixed fee, based on the following calculations:
 - (a) EUR 350 000 for APAs that published transactions which accounted for more than 10% of the total number of published transactions of all authorised APAs, either for equity or non-equity instruments, in the first 6 months of 2021, as reported by the competent authority concerned;
 - (b) EUR 50 000 for APAs that published transactions which accounted for less than 10% of the total number of published transactions of all authorised APAs, either for equity or non-equity instruments, in the first 6 months of 2021, as reported by the competent authority concerned;
 - (c) EUR 650 000 for ARMs that submitted transaction reports to the relevant competent authority which accounted for more than 10% of the total number of transaction reports submitted to competent authorities by all authorised ARMs in the first 6 months of 2021, as reported by the competent authority concerned;
 - (d) EUR 50 000 for ARMs that submitted transaction reports to the relevant competent authority which accounted for less than 10% of the total number of transaction reports submitted to competent authorities by all authorised ARMs in the first 6 months of 2021, as reported by the competent authority concerned.
2. ESMA shall provide the APAs and ARMs concerned with an invoice specifying the full amount of the fees for 2022 as soon as practically possible after this Regulation has started to apply, and at the latest thirty days before the final payment date.

Article 10

Transitional provision for 2023

1. DRSPs supervised by ESMA as of 1 January 2023 shall be charged an annual supervisory fee for 2023 calculated in accordance with Article 3. However, for the purposes of Article 4(2), the applicable turnover of DRSPs shall be calculated in accordance with paragraph 2.

2. For the purposes of paragraph 1, the applicable turnover of a DRSP shall be the sum of:
- (a) the DRSP's revenues generated from the core functions of the provision of ARM or APA services in the first 6 months of 2022 and
 - (b) the DRSP's revenues generated from ancillary services to ARM or APA activities in the first 6 months of 2022,

divided by the sum of:

- (c) the total revenues of all authorised ARMs or APAs generated from core functions of provision of ARM or APA services in the first 6 months of 2022 and
- (d) the total revenues generated from ancillary services to ARM or APA activities of all ARMs or APAs in the first 6 months of 2022.

DRSPs shall, by 30 September 2022, inform ESMA about the amount of revenues generated from the core functions of the provision of ARM or APA services in the first 6 months of 2022 and about the amount of the revenues from ancillary services to ARM or APA activities in the first 6 months of 2022.

3. As soon as the audited accounts for the year 2022 become available, the DRSPs referred to in paragraph 1 shall immediately report those audited accounts to ESMA in accordance with Article 4(1).
4. ESMA shall calculate whether there is any difference between the annual supervisory fee for 2023 paid by the DRSP in accordance with paragraph 2 and the annual supervisory fee due for 2023 calculated on the basis of the audited accounts received in accordance with paragraph 3.
5. ESMA shall provide the DRSPs a first invoice specifying the amount of the supervisory fee for 2023 as referred to in paragraph 2 at the latest thirty days before the final payment date.

When the information referred to in paragraph 3 is available for all DRSPs, ESMA shall provide the DRSPs a second invoice specifying the final amount of the supervisory fee for 2023 based on the calculation referred to in paragraph 4. ESMA shall provide the DRSPs that invoice at the latest thirty days before the final payment date.

Article 11

Entry into force and date of application

This Regulation shall enter into force and apply on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10.3.2022

For the Commission

The President

Ursula VON DER LEYEN