FESE Response to the ESMA Consultation Paper on DRSP Fees

Brussels, 4th January 2021

Introductory remarks

FESE fully agrees with the objectives of the ESAs review to reduce supervisory fragmentation and costs and ensure the same quality and reliability of data across the EU. Whilst we acknowledge the intention of ESMA to centralise the authorisation and supervision of DRSPs, there are some fundamental issues with the proposed fee framework that we would like to underline.

In particular, FESE is concerned about the counterproductive effects of the scheme proposed by ESMA with regards to the ultimate goals of MiFID II and MiFIR to increase transparency, competence, and integrity of the markets.

In our view, the fees proposed by ESMA are remarkably high when compared to most of the fees currently levied by NCAs as presented on pages 12 and 13 of the consultation paper and seem disproportionate from a financial perspective as most DRSPs are hardly break-even businesses. This reality is a consequence of the registration of most DRSPs under the rationale of providing their clients with tools to comply with MiFID II and MiFIR obligations easily and effectively, despite being clear that the related business model was not associated with positive financial results. It should be noted that in many cases NCAs prompted players to register as DRSP, with the notable costs of investment and assignment of resources.

DRSPs enjoy very low margins, if any, and most of them operate at the break-even point. Thus the fees envisaged by ESMA pose two critical risks to the viability of the DRSPs business model:

- Firstly, they do not take into account the low margins feature of the DRS activities; application of the proposed fees would irretrievably force the closing of a number of DRSPs across Europe, thus undermining competition and contributing to the increase in the concentration of services.
- Secondly, the unpredictability of fees on a year-on-year basis as laid out in the consultation paper adds difficulty for the financial planning of DRSP businesses, which is paramount given the financial weakness of DRSPs.

Furthermore, given the interlinkage between supervisory fees and the determination of such direct supervision by ESMA, we would like to highlight some concerns around the criteria to identify ARMs and APAs subject to authorisation and supervision by an NCA from January 2022:

- First, ESMA's direct supervision would only be halted if none of the proposed criteria are met; the application of these criteria, although relatively straightforward, in practice forces supervision by ESMA insofar the scope of said criteria is broad and the supervision would be triggered by the fulfilment of only one of them.

- Second, we believe that multiple quantitative and qualitative criteria for derogation create a complex and impactful process. In this sense, conditions set to verify that one DRSP meets all requirements are overly circumstantiated (e.g., ARM or APA being part of a group of financial market participants operating cross border) creating added complexity at the time of evaluation.

- Third, the lack of defined thresholds on the number of trade reports or transactions for the derogation criteria is another concern, especially given the fact that said thresholds could be changed on a year-on-year basis. This uncertainty adds serious difficulties to the financial planning of DRSP providers.

In a scenario where the scheme elaborated by ESMA was applicable it is very likely that many DRSPs would not be able to face the imposed requirements, and ultimately opted for closing business down, drawing competence away from the financial landscape in the EU, undermining market integrity and transparency and the objectives of the CMU, even more especially given the additional challenges posed by Brexit for the upcoming years.

In essence, FESE understands that the revision of the fees and derogation criteria proposed by ESMA needs careful and deep assessment to understand the implications it will have on the industry and to determine the most proportionate and adequate framework for DRSP providers. FESE is fully committed to working closely with ESMA in ascertaining the best actions for the capital markets ecosystem.

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Q1. Do you agree with the proposed approach for DRSP fees? Please elaborate in detail the reasons for your answer.

The level of fees levied on each DRSP should be very carefully assessed against the risks an excessive level of fees could imply. From a financial perspective, most DRSPs are hardly break-even businesses and thus any supervisory fees disproportionate to DRSPs profits would become a difficult to overcome hurdle for many of them which could potentially prompt a number, still unknown, of DRSPs to close business down. This would consequently move the ESMA fees even higher for the DRSPs that are able to remain active.

Another relevant concern stemming from the proposed approach is the unpredictability of the precise amount of supervisory fees to be levied each year on each DRSP, which makes financial planning very difficult and adds up to the financial viability of DRSPs. The unpredictability of each year fees level is due to the proposed methodology for the determination of the supervisory fees, which combines three elements that are unknown ex-ante and subject to changes:

- ESMA annual budget for DRSP supervision: This item is not related to the specific activity of a given DRSP nor is impacted by DRSP activity. Thus, any change in supervisory fees could not be explained by the activity inherent to the DRSP remit.
- Number of DRSP supervised by ESMA: It can change from one year to another and, considering the above, it is likely that the number of DRSPs decreases over time. Such a reduction would increase fee pressure on the remaining DRSPs. This item is not influenced by DRSP activity, and thus any change in supervisory fees could not be explained by the activity inherent to DRSP remit.
- The weighting of each DRSP revenues over the total turnover for a given DRS: Although more linked to the DRSP activity than the other criteria, the share of turnover that the revenues of one DRSP represent over the total amount is also detached from the individual DRSP activity and escapes its reasonable area of influence.

Q2. Do you agree with the proposed application fee for ARMs and APAs? Please elaborate on the reasons for your answer.

The proposed level of fees seems disproportionate compared with the fees that NCAs currently charge for this purpose (see examples on pages 12 and 13 of the consultation paper). The intended high level of fees proposed for application and authorisation of DRSP (i.e, EUR 100,000 and EUR 50,000 for the first and second services respectively) makes it very unlikely that new players arise in this market unless they have an outstanding size prior to their entry into activity.
We believe this proposal could potentially lead to a decrease in the number of players in the DRSP arena. A marked decrease in competition that would deviate from the MiFID II/MiFIR spirit as well as from that of the regulatory framework for financial services since MiFID I.

Q3. Do you agree with the proposed authorisation fee for ARMs and APAs? Please elaborate on the reasons for your answer.

See our answer to the previous question.

Q4. Do you agree with the reduced additional application and authorisation fee for each additional DRSP type in the case of a simultaneous application? Please elaborate on the reasons for your answer.

Yes, as it comes as a sort of incentive for industry players to widen and enrich the offering of data reporting services, adding to the competitiveness and choice for potential clients as it is the case with the rest of MiFID-regulated fields. However, any reductions for the

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application or authorisation for additional services would be non-significant if the level of the fees is set as high as proposed in the consultation paper as it would impose a strong entry barrier for most of DRSP candidates.

Q5. Do you agree with the proposed application and authorisation fee for CTP? Please elaborate on the reasons for your answer.

N/A

Q6. Do you agree with the proposed approach to calculate first-year fees for DRSPs authorised by ESMA under MiFIR? Please elaborate on the reasons for your answer.

An approach for fee calculation proportional to the time between authorisation and the end of the year seems reasonable. However, there is a concern beyond this approach regarding the level of fees, which seems disproportionate when compared with the financial results of most DRSPs.

Q7. Do you agree with the proposed approach for the calculation of annual fees? Please elaborate on the reasons for your response.

From a theoretical perspective, the proposed approach seems reasonable. However, it seems to obviate the financial reality of most DRSP businesses and provides for a level of fees high enough to put at significant risk the already weak financial viability of most DRSP.

Q8. Do you agree with the use of revenues for the purposes of calculation of the applicable turnover? Please elaborate on the reasons for your response.

We do not agree. The consultation paper proposes DRSP turnover as a parameter to allocate supervisory fees. DRSPs operate typically at very low margins and the turnover could show a distorted picture of the relevance or financial capacity of a DRSP. When comparing different DRSPs, a higher turnover does not necessarily imply a better financial situation or higher profits. If the proportional allocation of fees is to be kept, a reference to the operating profit, EBIT or EBITDA would seem fairer.

Q9. With regards to the revenues, do you agree with including both revenues from core and ancillary services? How complex is to identify and report the revenues from ancillary services attributable to each data reporting service separately? Please elaborate on the reasons for your response.

We do not agree. We believe that only the core services parameter should be considered. It would prove difficult to provide with a clear-cut delineation of what is considered as ancillary services to core data reporting services.

Q10. In those cases, where ancillary services cannot be directly allocated to each data reporting service, do you agree with allocating them in accordance with the revenues from the respective core services? Please elaborate on the reasons for your response.

As explained in our answer to Q9, we believe that only the core services parameter should be considered and revenues from ancillary services should be excluded.

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

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We do not agree. The proposed minimum level supervisory fee (EUR 30,000 per year per service) is in itself a much higher figure than most of the fees currently levied by NCAs and does not take into account the financial situation of a DRSP. As a result, such fees could end up being an impediment for DRSPs to keep servicing their clients, which would be a paradox in itself. This goes even further when considering that such amount of fees is only a floor and from the consultation paper it can be easily ascertained that final fees will be higher than the minimum for most of the DRSPs, on top of which an additional portion of fees will be assigned for ESMA to recover the costs incurred during the preparatory works.

Q12. Do you agree with the proposed level of minimum supervisory fees in case more than one data reporting service is provided? Please elaborate on the reasons for your response.

We do not agree. See our answer to the previous question.

Q13. Do you agree with the approach for determining the fees in 2022 for already authorised DRSPs? Are there any difficulties in identifying the revenues from data reporting services provided in 2020? Please elaborate on the reasons for your response.

N/A

Q14. Do you agree with the proposed approach for the supervisory fees related to preparatory work? Please elaborate

We do not agree. The consultation paper states that costs incurred for the preparatory works will amount up to around EUR 4.2 million and those proposed to be recovered through additional fees levied from DRSPs in the first three years of supervision (EUR 1.4 million in 2022, 2022, and 2024 respectively). We would appreciate that ESMA reconsiders this approach and discards the shift of this amount onto DRSPS, for two main reasons:

- The additional fees, so far unpredictable, will add to the financial viability and risk of DRSPs, as explained above.
- Preparatory works are inherent to the task assigned to ESMA; without those preparatory works, ESMA could not undertake direct supervision nor, as a consequence, impose supervisory fees. We believe that the preparatory cost should not be passed onto the DRSPs.

Q15. Do you agree with the proposal for the payment conditions by DRSPs of the fees for application, authorisation or extension of authorisation under MIFIR? Please elaborate on the reasons for your answer.

N/A

Q16. Do you agree with the proposal to not reimburse DRSPs in case they decide to withdraw their application for authorisation or extension of authorisation before authorisation is granted? Please elaborate on the reasons for your response.

N/A

Q17. Do you agree with the proposal that DRSPs pay their annual fees by 31 March of the year for which the fees are due? Please elaborate on the reasons for your response.

N/A

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Q18. Do you agree with the proposal for the timing of payment of the 2022 fees? Please elaborate on the reasons for your response

N/A

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