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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 26.1.2021 amending Commission Delegated Regulation (EU) No 667/2014 with regard to the content of the file to be submitted by the investigation officer to the European Securities and Markets Authority, the right to be heard with regard to interim decisions and the lodging of fines and periodic penalty payments

Delegations will find attached document C(2021) 339 final.

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Brussels, 26.1.2021
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COMMISSION DELEGATED REGULATION (EU) .../...

of 26.1.2021

amending Commission Delegated Regulation (EU) No 667/2014 with regard to the content of the file to be submitted by the investigation officer to the European Securities and Markets Authority, the right to be heard with regard to interim decisions and the lodging of fines and periodic penalty payments

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The European Securities and Markets authority ('ESMA') is responsible for the registration and supervision of trade repositories in the European Union. The Commission adopted, in March 2014, Delegated Regulation (EU) No 667/2014 with regard to rules of procedure for penalties imposed on trade repositories by the ESMA including rules on the right of defence¹, supplementing Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories² (European Market Infrastructure Regulation, 'EMIR').

Regulation (EU) 2019/834 of 20 May 2019 amending EMIR was published in the Official Journal of the European Union on 28 May 2019³ ('EMIR REFIT'). With regard to the rules of procedures for penalties imposed on trade repositories by the ESMA, EMIR REFIT introduces several changes concerning the rights to access to the file of the persons subject to the investigations (including the limits to such access excluding ESMA's internal preparatory documents and other confidential information), the amount of the fines and periodic payments that ESMA can impose on trade repositories and the right of defence.

In particular, concerning the right of defence, EMIR REFIT gives ESMA the possibility to adopt interim decisions to impose certain supervisory measures on persons subject to proceedings, without hearing them first, when urgent action is needed, in order to prevent significant and imminent damage to the financial system or to the integrity, transparency, efficiency and orderly functioning of financial markets, including to the stability or the correctness of data reported to a trade repository. EMIR REFIT foresees that ESMA hears the person subject to proceedings as soon as possible after the adoption of such interim decisions.

In order to adapt the existing rule of procedures to take into account changes introduced by EMIR REFIT, this proposal amends Delegated Regulation (EU) No 667/2014 on the rules of procedures for penalties imposed on trade repositories by ESMA foreseen in Article 65(7) of EMIR.

The delegated act is to be adopted in accordance with Article 82 of EMIR and Article 290 of the Treaty on the Functioning of the European Union.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Procedural aspects

On 24 September 2019, the Commission asked ESMA for its views ('technical advice') on a Commission delegated act specifying further the rules of procedures for penalties imposed on third-country central counterparties (CCPs) to be adopted in accordance with Article 25i(7) of EMIR. The request for a technical advice also concerned possible changes to the Delegated Regulation (EU) No 667/2014 with regard to rules of procedures for penalties imposed on trade repositories by ESMA including rules on the right of defence and temporal provisions, to take into account amendments to EMIR made through EMIR REFIT.

ESMA conducted a public consultation on its draft technical advice from 13 December 2019 to 18 January 2020. Five respondents to the consultation gave public feedback and one respondent replied on a confidential basis. The non-confidential responses to the consultation

¹ OJ L 179, 19.6.2014, p. 31

² OJ L 201, 27.7.2012, p. 1

³ OJ L 141, 29.5.2019, p. 42

are published on ESMA's website⁴. ESMA adopted its final technical advice on 31 March 2020.

Between 28 September and 12 October 2020, the Commission consulted by written procedure the Expert Group of the European Securities Committee (EGESC) on the provisional content of this delegated act. The EGESC comprises representatives of Member States, the European Central Bank, the Secretariat of the European Parliament's Committee on Economic and Monetary Affairs, and ESMA. The Commission did not receive any comments from the members of the EGESC on its proposed approach.

Stakeholder views

As far as relevant for amending the rules of procedures for penalties imposed by ESMA on trade repositories, respondents generally agreed with or did not object to ESMA's proposal.

The main proposal made by ESMA concerns the introduction of a new procedure for the adoption of interim decisions. This procedure should allow ESMA to adopt a supervisory measure without first hearing the persons concerned where urgent action is needed in order to prevent significant and imminent damage to the financial system or to prevent significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including the stability or the correctness of data reported to a trade repository.

While the reasons leading to an interim decision in the case of third-country CCPs and in the case of trade repositories, as well as the type of supervisory action that ESMA can take in both instances, are slightly different, ESMA suggests aligning the procedural rules for the adoption of interim decisions regarding trade repositories with the ones for third-country CCPs.

One respondent argued that ESMA's power to adopt interim decisions without first hearing the persons concerned should not affect the right to be heard by the investigation officer. One respondent proposed that access to file should happen as soon as possible, and before ESMA adopts its interim decision, to allow the persons concerned as much time as possible to prepare the defence. Respondents also requested more clarity as to meaning of 'significant and imminent damage'.

It should be noted that the power of ESMA to adopt interim decisions without hearing the persons concerned is laid down in EMIR. In the interest of preventing imminent and significant damage to financial systems, EMIR lays down an exception to the general rule that persons concerned should be heard before a decision is taken. To ensure the efficiency of the procedure and the effectiveness of ESMA's power to adopt interim decision, the Commission agrees with ESMA that that exception should also apply to the right to be heard by the investigation officer.

The Commission also notes that EMIR requires that ESMA gives the persons concerned the opportunity to be heard as soon as possible after taking the interim decision. In this respect, the Commission agrees with ESMA's proposal to allow access to the file as soon as the investigation officer has submitted his or her findings to ESMA, and potentially before ESMA adopts its interim decision. Access to file at that stage would allow the persons concerned to prepare and submit comments to ESMA sooner than if access to file was to be granted only once ESMA had adopted its interim decision. In order not to undermine the efficiency of the procedure and the effectiveness of ESMA's power to adopt interim decisions, the

⁴ <https://www.esma.europa.eu/press-news/consultations/consultation-ccp-penalties#TODO>

Commission also agrees that such access the file should not suspend ESMA's power to adopt the interim decision.

As to the meaning of 'significant and imminent damage' to financial systems, the Commission underlines that the context in which ESMA may adopt interim decisions is defined by the co-legislators in EMIR. It should not be further defined in the delegated act.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 sets out the following changes to Delegated Regulation (EU) No 667/2014:

- The complete file to be submitted to ESMA by the investigation officer, including his or her statement of findings and a copy of the statement of findings on the basis of which the person subject to investigation has been heard;
- The procedure framing the right to be heard by ESMA in the case of interim decisions;
- In case multiple fines or periodic penalty payments are collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

Article 2 sets out the date of entry into force of the amending delegated regulation.

4. IMPACT ASSESSMENT

According to Article 64(7) of EMIR, the Commission must adopt rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and shall adopt detailed rules on the limitation periods for the imposition and enforcement of penalties.

The Commission has fully considered all representations received, including the technical advice provided by ESMA, the responses to ESMA's public consultation and the feedback from the EGESC. On this basis, the Commission is proposing the adoption under Article 64(7) of EMIR of the delegated act amending the Delegated Regulation (EU) no. 667/2014 on rules of procedure for penalties imposed on trade repositories by the ESMA including rules on the right of defence.

A separate impact assessment has not been prepared for several reasons.

First, the key principles concerning the rules of procedures for penalties imposed by ESMA on trade repositories are laid down in Articles 62 to 68 of EMIR. The assessment of the different policy choices has already been performed by the co-legislators as part of the approval of EMIR and its subsequent amendments by EMIR REFIT.

Second, the amendments to Delegated Regulation (EU) No 667/2014 proposed in this delegated act cover procedural aspects only, specifying further the rules laid down in EMIR. These amendments concern the content of the file to be transmitted by the investigation officer to ESMA, the right to be heard by the investigation officer and by ESMA in case of interim decisions by ESMA, as well as other amendments aiming at aligning these rules of procedures with those applicable in the case of third country CCPs. As such, these amendments are of limited impact on costs for persons subject to investigations or proceedings.

The Commission has closely followed ESMA's technical advice. Nevertheless, this section presents the policy choices considered by the Commission.

Content of file to be submitted by the investigation officer to ESMA

In the interest of transparency, the investigation officer should always be required to include in the file submitted to ESMA, not only the final statement of findings but also the initial statement, on the basis of which the persons concerned have submitted comments. The obligation should apply irrespective of the significance of the differences between the two statements.

Interim decisions

The power on ESMA to adopt interim decisions without hearing the persons concerned is laid down in EMIR. In the interest of preventing imminent and significant damage to financial systems, EMIR lays down an exception to the general rule that persons concerned should be heard before a decision is taken. To ensure the efficiency of the procedure and the effectiveness of ESMA's power to adopt interim decision, the Commission agrees with ESMA that that exception should apply to the right to be heard by the investigation officer.

EMIR requires that ESMA gives the persons concerned the opportunity to be heard as soon as possible after taking the interim decision. In this respect, the Commission agrees with ESMA's proposal to allow access to the file as soon as the investigation officer has submitted his or her findings to ESMA, and potentially before ESMA adopts its interim decision. Access to file at that stage would allow the persons concerned to prepare and submit comments to ESMA sooner than if access to file was to be granted only once ESMA had adopted its decision. In order not to undermine the efficiency of the procedure and the effectiveness of ESMA's power to adopt interim decisions, the Commission also agrees that such access the file should not suspend ESMA's power to adopt the interim decision.

As to the meaning of 'significant and imminent damage' to financial systems, the context in which ESMA may adopt interim decisions is defined by the co-legislators in EMIR. It should not be further defined in the delegated act.

5. BUDGETARY IMPLICATIONS OF THE DELEGATED ACT

Fines and periodic penalty payments collected by ESMA from trade repositories do not constitute ESMA's revenues as defined in Article 62 of Regulation 1095/2010. Fines and periodic penalty payments collected by ESMA should be transferred to the Commission and entered in the Union budget under general revenue.

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

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories⁵, and in particular Article 64(7) thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 has been amended by Regulation (EU) 2019/834 of the European Parliament and of the Council⁶. Those amendments concerned, inter alia, the definition of financial counterparties, the right of access to the investigation file by persons subject an investigation, the fines to be paid by a trade repository that has, intentionally or negligently, committed one of the infringements listed in Annex I to Regulation (EU) No 648/2012, and the right of persons that may be subject to a periodic penalty payment to be heard.
- (2) Commission Delegated Regulation (EU) No 667/2014⁷ was adopted on the basis of Article 64(7) of Regulation (EU) No 648/2012 and deals with the rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority ('ESMA'), including rules on the right of defence. Since the amendments introduced by Regulation (EU) 2019/834 into Regulation (EU) No 648/2012 concern those rules of procedure, it is necessary to ensure that those amendments are also reflected in Delegated Regulation (EU) No 667/2014.
- (3) It is important that transparency is ensured between the investigation officer appointed by ESMA in accordance with Article 64 of Regulation (EU) No 648/2012 and ESMA itself. Such transparency requires that the investigation officer's file contains the submissions made by persons subject to the investigation and the statement of findings on the basis on which those persons provided their submissions.

⁵ OJ L 201, 27.7.2012, p. 1.

⁶ Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

⁷ Commission Delegated Regulation (EU) No 667/2014 of 13 March 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority including rules on the right of defence and temporal provisions (OJ L 179, 19.6.2014, p. 31).

- (4) According to the second subparagraph of Article 67(1) of Regulation (EU) No 648/2012, ESMA has the possibility to adopt, where urgent action is needed, interim decisions without first hearing the persons subject to an investigation or proceedings. To ensure the effectiveness of ESMA's power to adopt interim decisions, persons subject to an investigation should not have the right to access the file or to be heard before the investigation officer submits the file with his or her findings to ESMA or before ESMA adopts its interim decision. However, to respect the rights of defence, persons subject to an investigation should have the right to access the file as soon as the investigation officer has submitted the file with his or her statement of findings to ESMA and the right to be heard as soon as possible after ESMA has adopted its interim decision.
- (5) According to Article 68(5) of Regulation (EU) No 648/2012, the amounts corresponding to the fines and periodic penalty payments collected by ESMA are to be allocated to the general budget of the Union. Fines and periodic penalty payments collected by ESMA should be lodged to interest bearing accounts until they become final. For each decision imposing fines or periodic penalty payments, the amounts collected by ESMA should be lodged to a separate account or subaccount to ensure traceability until that decision becomes final.
- (6) Delegated Regulation (EU) No 667/2014 should be amended accordingly.
- (7) In the interest of the immediate exercise by ESMA of effective supervisory and enforcement powers, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) No 667/2014 is amended as follows:

- (1) in Article 3, paragraph 1 is replaced by the following:

‘1. The complete file to be submitted by the investigation officer to ESMA shall include the following documents:

 - (a) the statement of findings and a copy of the statement of findings addressed to the person subject to the investigation;
 - (b) a copy of the written submissions by the person subject to the investigation;
 - (c) the minutes of any oral hearing.’;
- (2) the following Article 3a is inserted:

Article 3a

Right to be heard by ESMA with regard to interim decisions on supervisory measures

1. By way of derogation from Articles 2 and 3, the procedure set out in this Article shall apply where ESMA adopts interim decisions pursuant to the second subparagraph of Article 67(1) of Regulation (EU) No 648/2012.
2. The investigation officer shall submit the file with his or her findings to ESMA and immediately inform the person subject to investigation of his or her findings but shall not provide that person with the opportunity to make

submissions. The statement of findings of the investigation officer shall set out the facts liable to constitute one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements.

Where so requested, the investigation officer shall grant access to the file to the person subject to investigation.

3. Where ESMA considers that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement listed in Annex I to Regulation (EU) No 648/2012, it shall decide to close the investigation and notify that decision to the person subject to investigation.

4. Where ESMA decides that one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and adopts an interim decision imposing supervisory measures as laid down in Article 73(1), points (a), (c) and (d), of Regulation (EU) No 648/2012, ESMA shall immediately notify that interim decision to that person.

ESMA shall set a reasonable time limit within which the persons subject to investigation may make written submissions on the interim decision. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit.

Where so requested, ESMA shall grant access to the file to the persons subject to the investigation.

ESMA may invite the persons subject to investigation to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

5. ESMA shall hear the person subject to the investigation and take a final decision as soon as possible after the adoption of the interim decision.

Where ESMA considers, based on the complete file and after having heard the persons subject to investigation, that one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012 has been committed by the person subject to investigation, it shall adopt a confirmatory decision imposing one or more of the supervisory measures laid down in Article 73(1), points (a), (c) and (d), of Regulation (EU) No 648/2012. ESMA shall immediately notify the person concerned of that decision.

Where ESMA adopts a final decision that does not confirm the interim decision, the interim decision shall be deemed to be repealed.’;

(3) Article 8 is amended as follows:

(a) the first subparagraph is replaced by the following:

‘The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest-bearing account opened by the accounting officer of ESMA until such time as they become final. In case multiple fines or periodic penalty payments are collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts. Amounts paid shall not be entered into ESMA's budget or recorded as budgetary amounts.’;

(b) the third subparagraph is replaced by the following:

‘ESMA’s Accounting Officer shall report on a regular basis to the Authorising Officer of Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission on the amounts of fines and periodic penalty payments imposed and their status.’.

Article 2

This Regulation shall enter into force on the 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, 26.1.2021

For the Commission
The President
Ursula VON DER LEYEN