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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2023) 2786 final
Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 3.5.2023 supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the conditions under which compensation, cash equivalent of such compensation or any proceeds that are due pursuant to Article 63(1) of that Regulation are to be passed on to clients and indirect clients and the conditions under which passing on is to be considered proportionate

Delegations will find attached document C(2023) 2786 final.

Encl.: C(2023) 2786 final



EUROPEAN
COMMISSION

Brussels, 3.5.2023
C(2023) 2786 final

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

of 3.5.2023

supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the conditions under which compensation, cash equivalent of such compensation or any proceeds that are due pursuant to Article 63(1) of that Regulation are to be passed on to clients and indirect clients and the conditions under which passing on is to be considered proportionate

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 63(2) of Regulation (EU) No 2021/23 ('the Regulation') empowers the Commission to adopt, following the submission of draft regulatory technical standards by the European Securities and Markets Authority (ESMA), and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010, a delegated act specifying, in a transparent manner, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in Article 63(1) of the Regulation is required, and the conditions under which it is to be considered proportionate.

In accordance with Article 10(1) of Regulation (EU) No 1095/2010 establishing ESMA, the Commission must decide within 3 months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA carried out a public consultation on the draft technical standard submitted to the Commission in accordance with Article 63(2) of the Regulation. A consultation paper was published on ESMA's internet site on 18 November 2021, and the consultation closed on 24 January 2022. ESMA also invited ESMA's Securities and Markets Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1095/2010 to provide advice on the draft technical standard. Together with the draft technical standard, ESMA submitted an explanation of how the outcome of these consultations was taken into account in the development of the final draft technical standard submitted to the Commission.

Together with the draft technical standard and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA submitted its impact assessment, including its analysis of the costs and benefits, for the draft technical standard submitted to the Commission. An analysis is available on the [ESMA website](https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-reports-ccp-resolution-regime)¹.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This delegated act sets out, to the extent allowed by confidentiality of contractual arrangements, the conditions under which the passing on of compensation, cash equivalent of such compensation or any proceeds referred to in Article 63(1) of the Regulation is required, and the conditions under which it is to be considered proportionate.

Article 1 of the draft regulatory technical standard sets out the definitions to be applied for the purpose of this regulatory technical standard.

Article 2 of the draft regulatory technical standard sets out the possible forms of reimbursement.

Article 3 of the draft regulatory technical standard sets out the method of the calculation and the way of distribution of the reimbursement.

¹ <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-reports-ccp-resolution-regime>

Article 4 of the draft regulatory technical standard sets out the types of reimbursement and the methods of delivery.

Article 5 of the draft regulatory technical standard sets out the method and content of the notification of the reimbursement.

Article 6 of the draft regulatory technical standard sets out the provisions related to the entry into force and application of the standard.

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

of 3.5.2023

supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the conditions under which compensation, cash equivalent of such compensation or any proceeds that are due pursuant to Article 63(1) of that Regulation are to be passed on to clients and indirect clients and the conditions under which passing on is to be considered proportionate

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to the Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132, and in particular Article 63(2), third subparagraph, thereof,

Whereas:

- (1) Article 63 of Regulation (EU) 2021/23 states that contractual arrangements allowing clearing members to pass on to their clients the negative consequences of the resolution tools shall also include, on an equivalent and proportionate basis, the right of clients to any recompense or compensation clearing members receive in accordance with Article 27(6) of Regulation 2021/23 or any cash equivalent of such recompense or compensation or any proceeds they have received following a claim made in accordance with Article 62 of Regulation (EU) 2021/23 (“reimbursement”), to the extent that such proceeds are related to client positions and their contributions, and that those provisions shall also apply to the contractual arrangements by clients and indirect clients providing indirect clearing services to their clients.
- (2) To ensure an equivalent and proportionate distribution of the reimbursement, clearing service providers should distribute, in a fair and non-discriminatory manner, the different forms of reimbursement to the clearing service users concerned. The part of the reimbursement received by each clearing service user concerned should be proportionate to the contribution made by such clearing service user to the resolution of the CCP, to which it had indirect access through the clearing service provider concerned and where such contribution results in a payment under Article 27(6) or Article 62 of Regulation (EU) 2021/23 (“qualifying contribution”). For the same reason, clearing service users should receive their reimbursement without any set-off, unless a clearing service user owes an obligation that is due and payable to a clearing service provider that is at the same time under the obligation to pass on reimbursement to that clearing service user. However, in order to prevent such set-off or netting from resulting in an undue reduction of the amounts owed to the clearing service users further down the clearing chain, where the recipient is also a clearing service provider,

the reimbursement to be passed on to its clearing service users should be calculated based on the reimbursement received by the clearing service provider before any deductions or set-off were made.

- (3) Reimbursements should be allocated in a fair and non-discriminatory manner to all clearing service users that have made a qualifying contribution and to the own accounts of the clearing service provider where such clearing service provider have also made a qualifying contribution. To further avoid discrimination or unfair treatments, clearing service providers should not apply any subordination clauses, nor any ranking when distributing such reimbursements.
- (4) Market conditions during a resolution phase are likely to be very stressed. It is therefore necessary to provide clearing service users with transparency and to reassure them that the financial assets and instruments intended for the distribution of the reimbursement are protected in the event of a default of their clearing service provider. Clearing service providers should therefore, when receiving reimbursement on behalf of a clearing service user, hold such reimbursement on a separate and segregated account.
- (5) The range of financial assets or financial instruments that may be used to compensate clearing members, clients and indirect clients is very wide and different assets and instruments bear different risks. To ensure the fair and equal distribution of the reimbursement, clearing service providers should divide the different types of financial assets and financial instruments that they have received as a reimbursement equally between each of the clearing service users and their own accounts. Such division should be proportional to the qualifying contribution made by those clearing service users to the resolution of the CCP to which they have indirect access through those clearing service providers, or by clearing service providers in that resolution procedure.
- (6) It is necessary to account for the operational specificities and obstacles associated with some types of financial assets and financial instruments. It is also necessary to ensure to the maximum extent that the clearing service user receives a fair reimbursement where the clearing service user is not able to receive a certain type of financial asset or financial instrument or would prefer not to receive a certain type of financial asset or financial instrument for other reasons. The clearing service provider should therefore, upon the request of the clearing service user and to the extent possible, transfer the asset or instrument concerned to another recipient appointed by the clearing service user. Where that is not possible, the clearing service provider should, sell the relevant assets or instruments in the market to a third party at the prevailing market price and subsequently transfer the proceeds of the sale to the clearing service user.
- (7) To ensure transparency and traceability, clearing service providers should inform their clearing service users, to the best of their possibilities, about any decision taken in the resolution process to compensate for qualifying contributions made. Such information should provide, to the extent possible, the scope of the decision to contribute to the resolution under Regulation (EU) 2021/23, the composition of the reimbursement and the calculation of the reimbursement including how the clearing service provider has calculated the clearing service user's reimbursement. For the same reason and to ensure that clearing service users understand the relationship between the contribution they have made and the reimbursement they have received, clearing service providers should inform clearing service users, where possible and without breaching any

confidentiality restrictions, of the overall distribution and composition of the reimbursement.

- (8) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (9) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation, the following definitions apply:

- 1. ‘clearing service provider’ means a clearing member as defined in Article 2, point (14) of Regulation (EU) No 648/2012 of the European Parliament and of the Council³, a client as defined in Article 2, point (15), of Regulation (EU) No 648/2012, an indirect client, a second indirect client or a third indirect client as defined in Article 1, point (b),(d) or (e) of Commission Delegated Regulation (EU) 2017/2154⁴, that provides clearing services, directly or indirectly, in the Union;
- 2. ‘clearing service user’ means a client as defined in Article 2, point (15), of Regulation (EU) No 648/2012, or an indirect client, a second indirect client or a third indirect client as defined in Article 1, point (b),(d) or (e) of Commission Delegated Regulation (EU) 2017/2154, that uses clearing services provided by a clearing service provider;
- 3. ‘reimbursement’ means the recompense or compensation clearing members receive in accordance with Article 27(6) of Regulation (EU) 2021/23, including instruments of ownership, debt instruments or instruments recognising a claim on the CCP’s future profits, or any cash equivalent of such recompense or compensation or any proceeds they receive following a claim made in accordance with Article 62 of Regulation (EU) 2021/23 including where any of these amounts, referred to under those articles, are passed on to a clearing service user;
- 4. ‘qualifying contribution’ means the contribution, made via a clearing member of the CCP, under the conditions set out in Article 63 of Regulation (EU) 2021/23, by a clearing service user to the CCP in resolution to which it has indirect access through a clearing service provider and where the contribution made, via the clearing member of the CCP, in the resolution procedure, has resulted in a reimbursement.

² 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

³ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

⁴ Commission Delegated Regulation (EU) 2017/2154 of 22 September 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements (OJ L 304, 21.11.2017, p. 6).

Article 2

Form of the reimbursement

The reimbursement credited or awarded to a clearing service provider and passed on to a clearing service user may take the form of cash, financial instruments, instruments of ownership, debt instruments or instruments recognising a claim on the CCP's future profit.

Article 3

Distribution of the reimbursement

1. Clearing service providers shall, in a fair and non-discriminatory manner, distribute the relevant reimbursement among all clearing service users that have made a qualifying contribution, including clearing service users that are no longer clearing service users of the clearing service provider receiving the reimbursement, proportionally to the qualifying contribution made by each of those clearing service users.
2. Clearing service providers shall calculate the reimbursement to be distributed in a transparent manner and inform each clearing service user separately in accordance with Article 5(2), point (c).
3. Clearing service providers shall allocate the reimbursement to their own accounts and to the accounts of their clearing service users that made a qualifying contribution on the basis of a calculation of the qualifying contribution made and shall not discriminate between different recipients, nor rank them. Clearing service providers shall not allocate any part of the reimbursement to their own account before having allocated to the accounts of their clearing service users that made a qualifying contribution the part of the reimbursement to which those clearing service users are entitled.
4. Clearing service providers may apply deductions from or set-off towards the reimbursement where a clearing service user owes an obligation that is due and payable to a clearing service provider that is under the obligation, in accordance with Article 63 of Regulation (EU) 2021/23, to pass on reimbursement to that same clearing service user.

However, where the recipient is also a clearing service provider, the reimbursement to be passed on to its clearing service users shall be calculated based on the reimbursement that was to be received by the clearing service provider before any deductions or set-off as referred to in the first subparagraph were made.

5. A clearing service provider shall hold the reimbursement received pursuant to Article 27(6) or 62 of Regulation (EU) 2021/23 on a separate and segregated account until all reimbursements due are fully distributed.

Article 4

Type of reimbursement and delivery

1. Where the reimbursement consists of different types of financial assets or financial instruments, irrespective of whether those assets or financial instruments take the form of cash, instruments of ownership, debt instruments, or any other instruments recognising a claim on the future profits of the CCP in resolution, clearing service providers shall break that reimbursement down by type of assets or instruments. Each

clearing service provider shall subsequently allocate and distribute the reimbursement to each of its clearing service users and to its own account, where entitled to reimbursement, proportionally to the qualifying contribution made and in the same proportion of each type of financial assets or financial instruments.

2. A clearing service provider that, due to settlement restrictions or due to another impediment to the transfer of some assets or instruments, is unable to distribute the reimbursement to a clearing service user, that made a qualifying contribution, in the form required by paragraph 1, shall notify the clearing service user concerned thereof without delay.
3. Where the settlement restriction or impediment referred to in paragraph 2 cannot be remedied within three working days from the receipt by the clearing service user of the notification referred to in that paragraph, the clearing service provider shall request the clearing service user to appoint an alternative recipient for the relevant assets or instruments within five working days. A clearing service user may also request the clearing service provider to distribute the financial assets or financial instruments to an alternative recipient. Where an alternative recipient has been appointed by the clearing service user, the clearing service provider shall transfer the financial assets or financial instruments to that alternative recipient to the extent possible and at a reasonable cost for the clearing service user.
4. Where a transfer to an alternative recipient under paragraph 3 is not possible, the clearing service provider shall inform the clearing service user concerned thereof in writing within three working days of the appointment of the alternative recipient, stating the reason for that impossibility. In that case, the clearing service provider shall sell the assets or instruments concerned to a third party on an established securities market at the prevailing market price and transfer the proceeds of the sale, net of any reasonable costs of sale, to the clearing service user.

Article 5

Reimbursement information

1. Clearing service providers shall notify, in writing, the clearing service users that have made a qualifying contribution of any reimbursement they are entitled to.
2. The notification referred to in paragraph 1 shall contain all of the following information:
 - (a) where applicable, a copy of the decision by the resolution authority that the clearing member is entitled to the payment of the difference referred to in Article 62 of Regulation (EU) 2021/23;
 - (b) where applicable, a copy of the decision of the resolution authority requiring the CCP to provide compensation to the clearing members that have incurred excess losses as referred to in Article 27(6), first subparagraph, of Regulation (EU) 2021/23, together with an explanation of how that amount is deducted from any entitlement to the payment of the difference referred to in Article 62 of Regulation (EU) 2021/23;
 - (c) clear and precise information on the reimbursement that is to be distributed to the clearing service user and on the methodology used to calculate such reimbursement;

- (d) clear and precise information on the reimbursement received by the clearing service provider before any set-off or other deductions were made in accordance with Article 3(4) of this Regulation;
- (e) clear and precise information on the form in which the reimbursement has been provided to the clearing service provider, distinguishing between cash and financial instruments and between each of the different forms of financial instruments, including instruments of ownership, debt instruments or instruments recognising a claim on the future profits of the CCP, and information on the composition of the reimbursement for the clearing service user;
- (f) subject to any confidentiality restrictions, general details on the overall distribution of the reimbursement between the clearing service users of the clearing service provider and the own accounts of the clearing service provider;
- (g) any calculation of interest or any other relevant factor affecting the reimbursement.

Article 6

Entry into force

This Regulation shall enter into force on the twentieth 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, 3.5.2023

For the Commission
The President
Ursula VON DER LEYEN