



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 17 March 2014
(OR. en)**

7832/14

**Interinstitutional File:
2010/0250 (COD)**

**EF 82
ECOFIN 265
DELECT 73**

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	14 March 2014
To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2014) 1537 final
Subject:	COMMISSION DELEGATED REGULATION (EU) No .../.. of 13.3.2014 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

Delegations will find attached document C(2014) 1537 final.

Encl.: C(2014) 1537 final



Brussels, 13.3.2014
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COMMISSION DELEGATED REGULATION (EU) No .../..

of 13.3.2014

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

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

In accordance with 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 (EMIR), the European Securities and Markets Authority (ESMA) is responsible for the registration and supervision of trade repositories and has the power to impose fines and periodic penalty payments to trade repositories infringing EMIR.

Article 64(7) of EMIR provides that "*the Commission shall adopt further rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of 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 rules shall be adopted by means of delegated acts in accordance with Article 82 of EMIR.

This delegated act takes the form of a delegated Regulation and specifies the rules of procedures to be followed by ESMA in the exercise of its power to impose fines or periodic penalty payments, including rights of defence for trade repositories subject to a sanctioning procedure.

This delegated act is in line with Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 concerning the rules of procedure to impose fines to credit rating agencies by ESMA.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 29 April 2013, the Commission sent a request for technical advice to ESMA. ESMA conducted a public consultation from 18 October to 15 November 2013¹. ESMA received two responses, required to be treated as confidential by the respondents. ESMA submitted its advice to the Commission on 20 December 2013² (hereafter Final Report).

Since the key principles for imposing fines and periodic penalty payments to trade repositories are clearly set out in Article 64 to 69 of EMIR (including the method to calculate these penalties and the situations when they should be imposed, as well as the rights of defence) and given the extensive technical advice provided by ESMA, it is not necessary to conduct a separate impact assessment. The provisions included in the delegated act are essentially of procedural nature; they refer to limitation periods, procedures for the right to be heard and access to the file.

In order to deliver its advice to the Commission, ESMA took into account the existing regulatory framework of the Union, in particular in areas where European institutions have

¹ Consultation Paper on ESMA's Technical Advice to the Commission on rules to impose fines and periodic penalty payments to Trade Repositories, ESMA/2013/1292, available at http://www.esma.europa.eu/system/files/2013-1292_cp_on_technical_advice_to_the_commission_re_trade_repositories_financing_procedures.pdf

² Final report ESMA's Technical Advice to the Commission on rules to impose fines to Trade Repositories, ESMA/2013/XX, published at http://www.esma.europa.eu/system/files/2013-1965_-_technical_advice_on_procedural_rules_to_impose_fines_on_trs.pdf

the right to impose fines on market participants. In addition, ESMA considered the rules of procedure regarding fines and periodic penalty payments that apply to credit rating agencies pursuant to Regulation (EC) No 1060/2009 of 16 September 2009, and in particular, to Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 and the relevant experience acquired by ESMA when operating under these rules of procedure.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

As required in Article 64(7) of EMIR, the delegated act (hereafter "the Act") deals with the penalties (fines and periodic penalty payments) that ESMA shall impose on trade repositories pursuant to EMIR (Article 1 of the Act) and with the rights of defence of trade repositories subject to ESMA's enforcement actions.

Article 2, Article 3, and Article 4 of the Act set out the rules concerning the right of the trade repositories to be heard by the investigation officer and by ESMA. The trade repositories have the right to submit comments in writing in response to statements of findings issued by the investigation officer and by ESMA.

Article 5 lays down the rules on access to the file and use of documents by a trade repository to which ESMA has addressed a statement of findings for an alleged infringement of Annex I of EMIR.

Article 6 and Article 7 deal with limitation periods for imposing and enforcing penalties. A limitation period for the purpose of this regulation is the time lapse within which ESMA may impose a fine after an infringement has been committed, or within which ESMA may enforce that fine after it has taken a decision to impose it. As it arises from the common legal tradition of Member States and EU legislation, legal certainty requires, on the one hand, that the possibility to sanction certain behaviour does not remain open endlessly and, on the other hand, that, once that behaviour has been sanctioned, the sanction is executed within a reasonable time period which is often defined by law.

Against this background, the limitation periods for imposing and enforcing penalties on trade repositories have been set to 5 years.

Article 8 sets out the specifics on collection of fines by ESMA as provided for under EMIR.

Article 9 refers to the provisions applicable in order to calculate periods, dates and time limits. There are already EU provisions applicable on this matter to acts of the Commission and the Council, namely, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 on rules applicable to periods, dates and time limits³. Therefore, it is appropriate for reasons of coherency and legal certainty to expressly extend their application to acts adopted by ESMA within the context of EMIR.

4. BUDGETARY IMPLICATIONS OF THE DELEGATED ACT

The amounts that ESMA receives from fines and periodic penalty payments imposed on trade repositories does not constitute its revenues which are defined in article 62 of Regulation 1095/2010 setting up ESMA.

³ OJ L 124, 8.6.1971, p.1

Conversely, as provided under Article 68(5) of EMIR, the amounts that ESMA collects from fines and periodic penalty payments shall become part of the general revenue of the Union.

Therefore, this proposal is budgetary neutral, as it will not imply an increase of the overall amount of the EU budget. Possible additional revenue from fines and periodic payments is, all else the same, offset by a matching decrease of the GNI-based own resource.

COMMISSION DELEGATED REGULATION (EU) No .../..

of 13.3.2014

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

(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 repositories⁴, and in particular Article 64(7) thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 empowers the Commission to lay down rules of procedure for the exercise of the power to impose fines or periodic penalty payments by the European Securities and Markets Authority (ESMA) upon trade repositories and persons involved in trade repositories. In the application of this Regulation, account should be taken of ESMA's organisational rules laid down in Regulation (EU) No 1095/2010⁵, including, in particular, the delegation of certain clearly defined tasks and decisions to internal committees or panels in accordance with Article 41 of Regulation (EU) No 1095/2010, whilst fully respecting the rights of defence of persons subject to investigation and the principle of collegiality that governs ESMA's operations.
- (2) The right to be heard is recognised in the Charter of Fundamental Rights. In order to respect the rights of defence of trade repositories and of other persons subject to action by the European Securities and Markets Authority (ESMA) and to ensure that it takes all relevant facts into account when adopting enforcement decisions, ESMA should hear the trade repositories or any other persons concerned. Persons subject to the investigations should therefore be granted the right to make written submissions in response to statements of findings issued by the investigation officer and ESMA, including in case of material change in the initial statement of findings.

⁴ OJ L 201, 27.7.2012, p.1.

⁵ 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) Following the written submissions by the trade repository to the investigation officer, the complete file, including those submissions, should be submitted to ESMA. However, it may occur that some elements of the written submissions that the trade repository made to the investigation officer or to ESMA, are not sufficiently clear or detailed, and that they need to be further explained by the trade repository. Should the investigation officer or ESMA consider that this is the case, the trade repository or the persons subject to investigation may be invited to attend an oral hearing to clarify those elements.
- (4) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy is recognised in the Charter of Fundamental Rights of the European Union. Articles 64(5) and 67 of Regulation (EU) No 648/2012 establish that, persons subject to ESMA proceedings, are entitled to have access to ESMA's file, subject to the legitimate interest of other persons to protect their business secrets and their personal data. The right of access to the file should not extend to confidential information.
- (5) Council Regulation (EC) No 1/2003⁶ lays down detailed rules on limitation periods for when the Commission has to fine an undertaking under Article 101 or 102 of the Treaty on the Functioning of the European Union. Legislation in force in Member States also provides for rules on limitation periods either specifically relating to securities, or generally in their general administrative laws. It is therefore appropriate to base rules on limitations periods on common features that have been extracted from those national rules and from Union legislation.
- (6) Regulation (EU) No 648/2012 and this Regulation refer to time periods and dates. This is the case, for instance, when establishing limitation periods for the imposition and enforcement of penalties. To enable those periods to be correctly calculated, it is appropriate to apply rules which already exist within Union legislation for acts of the Council and the Commission as provided for in Regulation (EEC, Euratom) No 1182/71 of the Council⁷ for acts of the Council and the Commission.
- (7) Article 68(4) of Regulation (EU) No 648/2012 provides that penalties imposed by ESMA pursuant to Articles 65 and 66 of that Regulation shall be enforceable, and that enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The corresponding amounts shall be allocated to the general budget of the Union.
- (8) In the interest of the immediate exercise of effective supervisory and enforcement activity, this Regulation should enter into force as a matter of urgency,

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p.1).

⁷ Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p.1).

HAS ADOPTED THIS REGULATION:

Article 1
Subject matter

This Regulation lays down rules of procedure regarding fines and periodic penalty payments to be imposed by the European Securities and Markets Authority (ESMA) on trade repositories or other persons that are subject to ESMA's investigation and enforcement proceedings, including rules on the right of defence and limitation periods.

Article 2
Right to be heard by the investigation officer

1. Upon completion of the investigation and before submitting the file to ESMA pursuant to Article 3(1), the investigation officer shall inform the person subject to investigation in writing stating its findings and shall provide that person with the opportunity to make written submissions pursuant to paragraph 3. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex I of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements.
2. The statement of findings shall set a reasonable time limit within which the person subject to investigation may make its written submissions. The investigation officer shall not be obliged to take into account written submissions received after that time limit has expired.
3. In its written submissions, the person subject to investigation may set out all the facts known to it which are relevant to its defence. It shall attach any relevant documents as proof of the facts set out. It may propose that the investigation officer hear other persons who may corroborate the facts set out in the submissions of the person subject to investigation.
4. The investigation officer may also invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by the investigation officer. Oral hearings shall not be held in public.

Article 3
Right to be heard by ESMA with regard to fines and supervisory measures

1. The complete file to be submitted by the investigation officer to ESMA shall include at least the following documents:
 - copy of the statement of findings addressed to the trade repository or the person subject to the investigation;
 - copy of the written submissions by the trade repository or the person subject to the investigation;

- minutes of any oral hearing.
- 2. Where ESMA considers that the file submitted by the investigation officer is not complete, it shall send back the file to the investigation officer with reasoned request for additional documents.
- 3. Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings appear not to constitute an infringement with the meaning of Annex I of Regulation (EU) No 648/2012, it shall decide to close the case and it shall notify that decision to the persons subject to investigation.
- 4. Where ESMA does not agree with the findings of the investigation officer it shall submit a new statement of findings to the persons subject to investigation.

The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Article 65 and 73 of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

- 5. Where ESMA agrees with all or some of the findings of the investigation officer it shall inform the persons subject to investigation accordingly. Such communication shall set a reasonable time limit within which the person subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Article 65 and 73 of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

- 6. If 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 has adopted a decision imposing a fine in accordance with Article 65, it shall notify immediately that decision to the person subject to investigation.

Article 4

Right to be heard by ESMA with regard to periodic penalty payments

Before making a decision imposing a periodic penalty payment according to Article 66 of Regulation (EU) No 648/2012, ESMA shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a penalty

payment and the amount of the penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person concerned may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

Once the trade repository or person concerned has complied with the relevant decision referred to in Article 66(1) of Regulation (EU) No 648/2012, a periodic penalty payment can no longer be imposed.

The decision imposing a periodic penalty payment shall indicate the legal basis and the reasons for the decision, the amount and the starting date of the periodic penalty payment.

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

Article 5

Access to the file and use of documents

1. If so requested, ESMA shall grant access to the file to the parties to whom the investigation officer or ESMA has sent a statement of findings. Access shall be granted following the notification of any statement of findings.
2. File documents accessed pursuant to paragraph 1 shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) 648/2012.

Article 6

Limitation periods for the imposition of penalties

1. The powers conferred on ESMA to impose fines and periodic penalty payments on trade repositories shall be subject to a limitation period of five years.
2. The limitation period referred to in paragraph 1 shall begin to run on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, that limitation period shall begin to run on the day on which the infringement ceases.
3. Any action taken by ESMA for the purpose of the investigation or proceedings in respect of an infringement of Regulation (EU) No 648/2012 shall interrupt the limitation period for the imposition of fines and periodic penalty payments. That limitation period shall be interrupted with effect from the date on which the action is notified to the trade repository or the person subject to the investigation or proceedings in respect of an infringement of Regulation (EU) No 648/2012.
4. Each interruption shall cause the limitation period to start running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without ESMA having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

5. The limitation period for imposing fines and periodic penalty payments shall be suspended for as long as the decision of ESMA is the subject of proceedings pending before the Board of Appeal, in accordance with Article 58 of Regulation (EU) No 1095/2010, and before the Court of Justice of the European Union, in accordance with Article 69 of Regulation (EU) No 648/2012.

Article 7

Limitation periods for the enforcement of penalties

1. The power of ESMA to enforce decisions taken pursuant to Articles 65 and 66 of Regulation (EU) 648/2012 shall be subject to a limitation period of five years.
2. The five-year period referred to in paragraph 1 shall start to run on the day following that on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted by:
 - (a) a notification by ESMA to the trade repository or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;
 - (b) any action of ESMA or a Member State authority acting at the request of ESMA, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.
4. Each interruption shall cause the limitation period to start running afresh.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
 - (a) time to pay is allowed;
 - (b) enforcement of payment is suspended pursuant to a pending decision of ESMA Board of Appeal, in accordance with Article 58 of Regulation (EU) No 1095/2010, and the Court of Justice of the European Union, in accordance with Article 69 of Regulation (EU) No 648/2012.

Article 8

Collection of fines and periodic penalty payments

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. Such amounts shall not be entered in ESMA's budget or recorded as budgetary amounts.

Once ESMA's Accounting Officer has established that the fines or periodic penalty payments have become final following the outcome of all possible legal challenges he shall transfer those amounts plus any interest accruing to the Commission. These amounts shall then be entered in the Union budget under general revenue.

ESMA's Accounting Officer shall report on a regular basis to the Authorising Officer of DG MARKT on the amounts of fines and periodic penalty payments imposed and their status.

Article 9
Calculation of periods, dates and time limits

Regulation (EEC, Euratom) No 1182/71 shall apply to periods of time, dates and time limits set out in this Regulation.

Article 10

This Regulation shall enter into force 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, 13.3.2014

For the Commission
The President
José Manuel BARROSO