



Council of the
European Union

Brussels, 28 January 2021
(OR. en)

5732/21

EF 34
ECOFIN 77
DELECT 17

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	26 January 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.:	C(2021) 331 final
Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 26.1.2021 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on third-country central counterparties or related third parties by the European Securities and Markets Authority

Delegations will find attached document C(2021) 331 final.

Encl.: C(2021) 331 final



Brussels, 26.1.2021
C(2021) 331 final

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

of 26.1.2021

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on third-country central counterparties or related third parties by the European Securities and Markets Authority

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2019/2099 amending Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories¹ (European Market Infrastructure Regulation, ‘EMIR’), was published in the Official Journal of the European Union on 12 December 2019².

In relation to third-country CCPs, the main objective of the amendments to EMIR is to ensure a more robust and effective supervision of central counterparties (‘CCPs’) established in third countries offering services to the Union, including an enhanced role and additional tasks for the European Securities and Markets Authority (‘ESMA’). As part thereof, the ‘CCP Supervisory Committee’ is established and will prepare decisions to be taken by ESMA’s Board of Supervisors, and a new ‘Third-country CCP college’ will ensure that all relevant Union stakeholders are properly informed and involved. Moreover, Regulation (EU) 2019/2099 introduces a two-tier system for third-country CCPs, where CCPs that are systemically important for the financial stability of the Union or of one or more of its Member States (‘Tier 2 CCPs’) must comply with EMIR requirements and be subject to ESMA’s supervision. Tier 2 CCPs in third countries with comparable requirements may be deemed to comply with EMIR requirements through compliance with its home rules (‘comparable compliance’). Third-country CCPs that are not systemically important (‘Tier 1 CCPs’) will – as it is the case today – be allowed to offer clearing services in the Union relying on compliance with their home rules declared equivalent under the Commission implementing act, but will be subject to a periodic review of their systemic importance.

Whereas fines may be imposed on both Tier 1 and Tier 2 CCPs where they fail to provide information, or provide incorrect or misleading information, only Tier 2 CCPs can be subject to investigations or on-site inspections, or supervisory measures, and be fined where they do not comply with such measures.

Similarly, periodic penalty payments may be imposed on Tier 1 and Tier 2 CCPs, as well as related third parties to whom such CCPs have outsourced operational functions, services or activities, to compel them to reply to requests for information, and on Tier 2 CCPs to compel them to submit to investigations or on-site inspections, or to end an infringement. As provided in Articles 25j and 25k of EMIR, ESMA is empowered to impose fines on third-country CCPs and periodic penalty payments on third-country CCPs and related third parties. According to Article 25q of EMIR, ESMA may impose supervisory measures on Tier 2 CCPs.

The procedural rules for taking supervisory measures and imposing fines are laid down in Article 25i. Article 25i(7) of EMIR empowers the Commission to adopt delegated acts to specify further the rules of procedures for the power to impose penalties, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcements of penalties.

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.

¹ OJ L 201, 27.7.2012, p. 1.

² OJ L 322, 12.12.2019, p. 1.

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 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 Refit³.

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

Between 28 September and 12 October 2020, the Commission consulted in writing the Expert Group of the European Securities Committee ('EGESC') on the provisional content of this delegated act. The Commission did not receive any comments from the members of the EGESC on its proposed approach.

Stakeholder views

As far as relevant for the rules of procedures for the imposition of penalties imposed by ESMA on third-country CCPs and related third parties, respondents generally agreed with or did not object to ESMA's proposal.

Consultation of third-country authorities

Respondents were of the view that ESMA should consult the third-country authority of the third-country CCP concerned before imposing penalties to avoid conflicting instructions and to respect the principle of international comity and mutual regulatory deference.

One respondents considered that it would not be appropriate to align rules of procedures for third-country CCPs, which are established outside the Union, to the current rules applicable to trade repositories established within the Union.

Right to be heard

Some comments concerned the right to be heard. In particular, respondents argued that not all facts evoked in reply to a statement of findings should have to be supported by evidence and that persons concerned should be able to comment without limitations on new statements of findings (comments should not be limited to new facts or findings). One respondent was of the view that ESMA should not be able to depart from the findings of the investigation officer, as ESMA does not have the power to conduct investigations itself or direct the investigation of the investigation officer. One respondent argued that an oral hearing should be a right, and not at the discretion of the investigation officer or ESMA. One respondent asked for a clarification of the term 'qualified person', asking in particular if submissions and testimony from external experts (including representatives of the third-country authorities) would be allowed at oral hearings.

³ 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.

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

Stakeholders supported the proposal that the file to be submitted by the investigation officer to ESMA should contain not only his or her final statement of findings, but also the initial statement on the basis of which comments had been submitted. One stakeholder however asked for more clarity as to the implications of the limitation of the obligation to include the initial statement of findings only when ‘materially changed’.

Periodic penalty payments on related third parties

One respondent argued that it would be inappropriate to impose periodic penalty payments on third parties.

Interim decisions

As to the rules of procedure for interim decisions, pursuant to which ESMA may adopt decisions without first hearing the persons concerned where an urgent action is needed to prevent imminent and significant damage to the financial system, respondents were of the view that the persons concerned should have the right to submit comments before ESMA adopts interim decision. 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 ‘imminent and significant damage’.

Limitation periods

As to the limitation periods, one respondent submitted that an action by ESMA should restart the limitation period only for the infringement concerned and that a unilateral decision by ESMA to vary the amount of the fines or periodic penalty payments should not restart the limitation period. One respondent asked for examples as to how the limitation periods would work in practice.

3. IMPACT ASSESSMENT

According to Article 25i(7) of EMIR, the Commission must specify further the rules of procedure for the imposition of penalties on third-country CCPs by ESMA, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcements 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 25i(7) of EMIR of the delegated act specifying further the rules of procedures for the power to impose penalties, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcements of penalties. A separate impact assessment has not been prepared for several reasons.

First, the key principles of the rules of procedures for the imposition of fines and periodic penalty payments on third-country CCPs and related third parties to which third-country CCPs have outsourced operational functions or activities, including the rights of defence, are laid down in Articles 25i to 25n of EMIR. This delegated act hence only specifies further the rules laid down in EMIR, with regard to 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, including in case of interim decisions by ESMA, the use of documents obtained through access to file, and limitation periods. ESMA advice accordingly covered procedural aspects and it therefore did not perform an assessment of the different policy choices as such an assessment had been performed as part of the adoption of Regulation (EU) 2019/2099 amending EMIR.

Second, this delegated act contains provisions of limited impact on costs for persons subject to investigations or proceedings, as it specifies further the rules of procedures, whereas EMIR sets out the method to calculate penalties and when they can be imposed. ESMA therefore did not perform a cost-benefit analysis. Quantitative data on costs and benefits in respect of rules of procedures are also limited.

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

Consultation of third-country authorities

It would be inappropriate to introduce an obligation on ESMA to consult third-country authorities before imposing penalties through this delegated act. As required by EMIR, the terms of the cooperation between ESMA and third-country authorities are to be laid down in memoranda of understandings. Moreover, EMIR requires ESMA to cooperate with or inform third-country authorities in several specific situations (e.g. with regard to requests for information, investigations and on-site inspections, supervisory measures). EMIR thus requires ESMA to inform third-country authorities of penalties it has imposed. However, the co-legislators did not impose an obligation on ESMA to consult third-country authorities before imposing penalties on third-country CCPs. Such consultation obligation should therefore not be introduced through this delegated act.

Comparison with rules of procedures for penalties imposed on trade repositories

ESMA should not treat persons subject to investigations or proceedings differently depending on whether they are established in the Union or outside it. Taking into account that similar rules apply for the imposition of penalties on third-country CCPs and trade repositories, it is appropriate to draw on ESMA's experience from the rules applicable in respect of trade repositories for the purpose of specifying further the rules of procedures for the imposition of penalties on third-country CCPs.

Right to be heard

The rules of procedures would not prevent persons subject to investigations or proceedings to make comments that are not supported by evidence or to make comments without limitations on new statements of findings. ESMA would have to consider any comment made, although the lack of supporting evidence or the fact that comments have been assessed and considered previously in the same procedure, might affect the impact of such comments. Moreover, although ESMA should not conduct its own investigation, it does have the power to make its own conclusion as to the findings to be made based on the investigation of the investigation officer. As to oral hearings, the right to be heard will be respected by the right to make submissions in writing. The Commission considers that ESMA is proposing a balanced approach where the investigation officer and ESMA may organise oral hearings if necessary to clarify facts or comments, without imposing an obligation on them to organise an oral hearing where such clarifications are not needed, as the organisation of oral hearings otherwise could risk creating an undue burden on ESMA and delays in matters that are of simpler nature. The Commission therefore considers that the rules of procedures proposed by ESMA in this regard would respect the right of defence of the persons concerned and should align with those applicable to trade repositories.

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.

Periodic penalty payments on related third parties

The power to impose periodic penalty payments on related third parties to whom third-country CCPs have outsourced operational functions or activities follows from EMIR. That power should not be limited through the delegated act.

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 the 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 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.

Limitation periods

As regards limitation periods it is the Commission's understanding that in order for an action by ESMA to restart the limitation periods it has to be related to the infringement concerned. As to actions to vary the amount of fines or periodic penalty payments, the Commission considers that that could be seen as a new and independent decision that should restart limitation periods. It should be noted that decisions to impose fines or periodic penalty payments, including decisions to vary such amounts, are subject to the review by the Court of Justice of the European Union. There is therefore no reason to suspect that ESMA would abuse of its power to do so, and it is considered that limitation periods for the impositions of penalties should align with other union rules laying down rules of procedures for the imposition of penalties, in particular other rules laid down in EMIR, and that the limitation periods for the enforcement of penalties should take into account the fact that third-country CCPs are located outside the Union and the need for ESMA to coordinate investigations with authorities in such third-country jurisdictions.

4. BUDGETARY IMPLICATIONS OF THE DELEGATED ACT

Fines and periodic penalty payments collected by ESMA from third-country CCPs and related third parties to which third-country CCPs have outsourced operational functions or activities 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.

5. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 sets out the subject matter of the regulation.

Articles 2 and 3 set out the content of the file to be transmitted by the investigation officer to ESMA, and further specify the rules concerning the right of persons subject to investigations to be heard by the investigation officer and by ESMA before the imposition of fines or supervisory measures.

Article 4 further specifies the rules on the right of persons subject to proceedings to be heard by ESMA before the imposition of periodic penalty payments.

Articles 5 and 6 further specify the rules on the right of persons subject to investigations or proceedings to be heard as soon as possible after the adoption of interim decisions imposing penalties.

Article 7 concerns the right of access to the file by persons to whom a statement of findings has been sent and sets out the rules on the use of documents obtained through access to file.

Article 8 and 9 lay down the limitation period for imposing and enforcing penalties.

Article 10 lays down the rules for the collection of fines.

Article 11 sets out the rules applicable to calculate periods, dates and time limits.

Article 12 sets out the date of entry into force of the delegated regulation.

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

of 26.1.2021

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on third-country central counterparties or related third parties by the European Securities and Markets Authority

(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 25i(7) thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 has been amended by Regulation (EU) 2019/2099 of the European Parliament and of the Council⁶. Those amendments have introduced into Regulation (EU) No 648/2012, *inter alia*, an empowerment for the Commission to specify further the rules of procedure for the exercise by the European Securities and Markets Authority ('ESMA') of the power to impose fines or periodic penalty payments on third-country central counterparties ('third-country CCPs') and related third parties to whom third-country CCPs have outsourced operational functions or activities ('related third parties'). In particular, those rules of procedures should include provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalties.
- (2) Article 41(2) of the Charter of Fundamental Rights of the European Union recognises the right of every person to be heard before any individual measure is taken which would affect him or her adversely, and 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.
- (3) To ensure that the rights of defence of third-country CCPs and related third parties subject to actions by ESMA are respected and to ensure that ESMA takes all relevant facts into account when adopting enforcement decisions, ESMA should hear the third-country CCP or related third parties or any other persons concerned. Third-country CCPs and related third parties should therefore have the right to make written submissions in response to statements of findings issued by the investigation officer and ESMA, including in case of material changes in the initial statement of findings.

⁵ OJ L 201, 27.7.2012, p. 1.

⁶ Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (OJ L 322, 12.12.2019, p. 1).

The investigation officer and ESMA should also have the possibility to invite third-country CCPs and related third parties to provide further explanations at an oral hearing where the investigation officer or ESMA consider that some elements of the written submissions made to the investigation officer or to ESMA are not sufficiently clear or detailed, and that further explanation is needed.

- (4) It is important that transparency is ensured between the investigation officer appointed by ESMA in accordance with Article 25i of Regulation (EU) No 648/2012 and ESMA itself. Such transparency requires that the investigation officer's file, in addition to the statement of findings, contains any submissions made by the third-country CCPs or related third parties, the statement of findings on the basis on which those third-country CCPs or related third parties provided their submissions, and the minutes of any oral hearing.
- (5) According to the second subparagraph of Article 25l(1) of Regulation (EU) No 648/2012, ESMA has the possibility to adopt, where urgent action is needed, interim decisions imposing fines or periodic penalty payments without first hearing the persons subject to an investigation or proceedings. To ensure the effectiveness of ESMA's power to adopt interim decisions, the third-country CCPs and related third parties subject to an investigation should not have the right to access the file or to be heard before the investigation officer has submitted the file with his or her findings to ESMA or before ESMA has adopted its interim decision. However, to respect the rights of defence, the third-country CCPs and related third parties 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.
- (6) For reasons of consistency, limitation periods for the imposition and enforcement of fines or periodic penalty payments should take into account existing Union legislation applicable to the imposition and enforcement of penalties on supervised entities, ESMA's experience in applying such legislation in relation to trade repositories under Regulation (EU) No 648/2012, the fact that third-country CCPs are located outside the Union and the need for ESMA to coordinate with authorities in such third-country jurisdictions in relation to enforcement actions. Limitation periods should be calculated in accordance with existing Union legislation for acts of the Council and the Commission, and in particular with Regulation (EEC, Euratom) No 1182/71 of the Council⁷.
- (7) According to Article 25m(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.
- (8) 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,

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 specifies further the rules of procedure regarding fines and periodic penalty payments to be imposed by the European Securities and Markets Authority (ESMA) on third-country central counterparties (CCPs) or related third parties to whom those CCPs have outsourced operational functions or activities 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 his or her 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 III to 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 by 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 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) copy of the written submissions by the person subject to the investigation;
 - (c) the 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 listed in Annex III to

Regulation (EU) No 648/2012, it shall decide to close the investigation and 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.

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 by 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.

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 by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

6. Where ESMA decides that one or more of the infringements listed in Annex III to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and adopts a decision imposing a fine in accordance with Article 25j of that Regulation, it shall immediately notify 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 in accordance with Article 25k 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 periodic penalty payment and the amount of the periodic penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person subject to proceedings 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 person subject to proceedings has complied with the relevant decision referred to in Article 25k(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 proceedings to attend an oral hearing. The persons subject to proceedings may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

Article 5

Right to be heard by ESMA with regard to interim decisions imposing fines

1. By way of derogation from Articles 2 and 3 of this Regulation, the procedure set out in this Article shall apply where ESMA adopts interim decisions imposing fines pursuant to the second subparagraph of Article 25l(1) of Regulation (EU) No 648/2012 without first hearing the persons subject to investigations.

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 III 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 III 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 III to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and adopts an interim decision imposing fines in accordance with the second subparagraph of Article 25l(1) of that Regulation, ESMA shall immediately notify that interim decision to that person.

ESMA shall set a reasonable time limit within which a person 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 III to Regulation (EU) No 648/2012 has been committed by the person subject to investigation it shall adopt a confirmatory decision imposing fines in accordance with Article 25j of that Regulation. ESMA shall immediately notify that decision to the persons subject to investigation.

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

Article 6

Right to be heard by ESMA with regard to interim decisions imposing periodic penalty payments

1. By way of derogation from Article 4, the procedure set out in this Article shall apply where ESMA adopts interim decisions imposing periodic penalty payments pursuant to the second subparagraph of Article 25l(1) of Regulation (EU) No 648/2012 without first hearing the person subject to proceedings.

2. The interim 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.

Once the person subject to proceedings has complied with the relevant decision referred to in the second subparagraph of Article 25k(1) of Regulation (EU) No 648/2012, an interim decision imposing periodic penalty payment can no longer be adopted.

ESMA shall immediately notify the interim decision to the person subject to proceedings and shall set a time limit within which that person may make written submissions. 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 person subject to proceedings.

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

3. Where ESMA considers, on the basis of the complete file and after having heard the person subject to proceedings, that the grounds for imposing periodic penalty payments were present at the time of the adoption of the interim decision, ESMA shall adopt a confirmatory decision imposing periodic penalty payments in accordance with Article 25k of Regulation (EU) No 648/2012. ESMA shall immediately notify that decision to the person subject to proceedings.

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

Article 7

Access to the file and use of documents

1. Where 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 of this Article shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

Article 8

Limitation periods for the imposition of penalties

1. The powers conferred on ESMA to impose fines and periodic penalty payments on third-country CCPs and related third parties to which the third-country CCPs has outsourced operational functions or activities shall be subject to a limitation period of five years.

2. The limitation period referred to in paragraph 1 shall start on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, that limitation period shall start 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 listed in Annex III to 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 person subject to investigation or proceedings in respect of an infringement listed in Annex III to Regulation (EU) No 648/2012.

4. Each interruption shall cause the limitation period to recommence. 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 60 of Regulation (EU) No 1095/2010, and before the Court of Justice of the European Union, in accordance with Article 25n of Regulation (EU) No 648/2012.

Article 9

Limitation periods for the enforcement of penalties

1. The power of ESMA to enforce decisions taken pursuant to Articles 25j and 25k of Regulation (EU) No 648/2012 shall be subject to a limitation period of eight years.

2. The eight-year period referred to in paragraph 1 shall start 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 person subject to proceedings of a decision varying the original amount of the fine or periodic penalty payment;
- (b) any action of ESMA or an authority of third country 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 recommence.

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 60 of Regulation (EU) No 1095/2010, and the Court of Justice of the European Union, in accordance with Article 25n of Regulation (EU) No 648/2012.

Article 10

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 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 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 or she shall transfer those amounts plus any interest accruing to the European Commission. These amounts shall be entered in the Union budget under general revenue.

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 11

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 12

Entry into force

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