



European Securities and
Markets Authority

Final Report

TA on procedural rules for penalties imposed on Third-Country CCPs, TRs and CRAs



Table of Contents

Executive Summary	5
1 Background.....	6
2 General aspects of the feedback to the proposals.....	8
3 Scope.....	10
4 Assessment of specific feedback and final proposals	12
4.1 Right to be heard by the investigation officer	12
4.1.1 Regarding TC-CCPs	12
4.1.2 Regarding TRs.....	14
4.2 File to be submitted by the investigation officer	14
4.2.1 Regarding TC-CCPs	14
4.2.2 Regarding TRs.....	15
4.3 Procedure before ESMA with regard to fines and supervisory measures, including the right to be heard.....	16
4.3.1 Regarding TC-CCPs	16
4.3.2 Regarding TRs.....	18
4.4 Procedure with regard to periodic penalty payments	18
4.4.1 Regarding TC-CCPs	18
4.4.2 Regarding TRs.....	20
4.5 Access to the file	20
4.5.1 Regarding TC-CCPs	20
4.5.2 Regarding TRs.....	21
4.6 Procedure for interim decisions	21
4.6.1 Regarding TC-CCPs	21
4.6.2 Regarding TRs.....	26
4.7 Limitation periods for the imposition of penalties	28
4.7.1 Regarding TC-CCPs	28
4.7.2 Regarding TRs.....	29
4.8 Limitation periods for the enforcement of penalties	30
4.8.1 Regarding TC-CCPs	30
4.8.2 Regarding TRs.....	31
4.9 Collection of fines and periodic penalty payments	31
4.9.1 Regarding TC-CCPs	31

4.9.2	Regarding TRs.....	32
4.10	Calculation of periods, dates and time limits.....	33
4.10.1	Regarding TC-CCPs	33
4.10.2	Regarding TRs.....	33
5	Consistency with the rules of procedure on penalties imposed on CRAs.....	33
6	Annex.....	38

Executive Summary

Reasons for publication

On 24 September 2019, ESMA received a provisional request from the European Commission (the “Commission”) to provide technical advice to assist the Commission in formulating procedural rules for penalties imposed on third-country central counterparties (“TC-CCPs”) and trade repositories (“TRs”) (Annex I). On 20 February 2020, the Commission sent to ESMA a confirmation of this request.

On 13 December 2019¹, ESMA published a consultation paper to seek stakeholders’ input on ESMA’s proposals relating to penalties for TC-CCPs, TRs and credit rating agencies (“CRAs”).

This final report presents ESMA’s technical advice to the EC on the rules of procedure to impose penalties on these supervised entities following the assessment by ESMA of the feedback received on the proposals included in the consultation paper.

Contents

This final report is comprised of five sections and an annex.

Section 1 presents the background. Section 2 summarises succinctly the feedback received to the consultation paper and responds to the more general points raised by respondents. Section 3 concerns the scope of the proposed rules. Section 4 presents the different proposals on the content of the rules of procedure to impose penalties on TC-CCPs and the proposals to amend the TR Commission Delegated Regulation. Section 5 presents the proposals to amend the CRA Commission Delegated Regulation. In particular, Sections 4 and 5 include ESMA’s assessment of the feedback received on the specific proposals that were consulted and the way forward following the assessment of this feedback.

Annex I contains the mandate received from the Commission.

Next Steps

ESMA will submit its advice to the European Commission and will publish it on its website.

¹ <https://www.esma.europa.eu/press-news/esma-news/esma-consults-procedural-rules-impose-penalties-supervised-entities>

1 Background

1. In the course of 2019, the European Market Infrastructure Regulation (EMIR²) was amended by two separate legal acts. Firstly, on 28 May 2019, Regulation 2019/834 (EMIR REFIT³) updated several aspects related to the requirements applicable to TRs. Subsequently, the “2019 CCP Supervision Regulation”, known as EMIR 2.2., was signed into law on 23 October 2019 and published on 12 December 2019⁴. EMIR 2.2 entered into force on 1 January 2020.

2. In this final paper, EMIR as amended by both acts is referred to as "EMIR as amended"⁵. Article 25i(7) of EMIR as amended provides that:

“The Commission shall adopt delegated acts in accordance with Article 82 to specify further the 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 the limitation periods for the imposition and enforcement of penalties”.

3. Moreover, as a result of the amendments in EMIR REFIT, the Commission Delegated Regulation (EU) No 667/2014 supplementing Regulation (EU) No 648/2012 with regard to rules of procedures for penalties imposed on trade repositories by ESMA including rules on the right of defence and temporal provisions⁶ (the “TR Commission Delegated Regulation”) should also be amended.

4. Accordingly, on 24 September 2019, ESMA received a provisional request from the Commission to provide technical advice to assist the latter on the possible content of this delegated act. This request is enclosed in Annex I of this paper. On 20 February 2020, the Commission sent to ESMA a confirmation of this request.

5. ESMA notes that EMIR as amended establishes, inter alia, supervisory competences for ESMA regarding TC-CCPs. Furthermore, a two-tier system for TC-CCPs based on their systemic importance has been introduced. Where a TC-CCP is determined to be systemically important or is likely to become systemically important to the financial stability of the Union or of one or more of its Member States, such TC-CCP will be considered a “Tier 2” third-country CCP (Tier 2 TC-CCP) by ESMA.

6. In this regard, Article 25b(1) of EMIR as amended provides that:

² 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.

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 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. 1-44.

⁵ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0648>

⁶ 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.

“ESMA shall be responsible for carrying out the duties resulting from this Regulation for the supervision on an ongoing basis of the compliance of recognised Tier 2 CCPs with the requirements (...).”

7. A number of Recitals of the 2019 CCP Supervision Regulation are relevant for the definition of the procedural rules applicable to penalties imposed on TC CCPs.
8. Particularly, Recital (43) of the 2019 CCP Supervision Regulation provides that:

“ESMA should have all the powers necessary to supervise recognised third-country CCPs to ensure their ongoing compliance with the requirements of Regulation (EU) No 648/2012”.
9. Recital (47) provides that:

“ESMA should be able to impose periodic penalty payments to compel third-country CCPs to end an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection”.
10. Recital (48) of the 2019 CCP Supervision Regulation further provides that:

“ESMA should be able to impose fines on both Tier 1 and Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of Regulation (EU) No 648/2012 by providing incorrect or misleading information to ESMA. In addition, ESMA should be able to impose fines on Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of the additional requirements applicable to them in that Regulation. [...]”.
11. In addition, Recital (55) provides that:

“In the case of an infringement committed by a Tier 2 CCP, ESMA should be empowered to apply a range of supervisory measures, including requiring a Tier 2 CCP to bring the infringement to an end and, as a last resort, withdrawing the recognition where a Tier 2 CCP has seriously or repeatedly infringed Regulation (EU) No 648/2012. [...]”.
12. Finally, Recital (58) of the 2019 CCP Supervision Regulation indicates the following:

“In order to ensure the effective application of the rules laid down in this Regulation in relation to third-country CCPs, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of [...] the further specification of rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of defence, time limits, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalty payments or fines; and measures to amend Annex IV in order to take account of developments in the financial markets. [...]”
13. In order to deliver its advice to the Commission, ESMA took into account the existing Union regulatory framework in areas where European institutions or agencies have the power to impose fines on market participants.
14. In particular, ESMA has considered the TR Commission Delegated Regulation. In addition, ESMA has considered Regulation (EC) No 1060/2009 of 16 September 2009 on credit

rating agencies (the “CRA Regulation”)⁷ and the Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 (the “CRA Commission Delegated Regulation”)⁸ with regard to the rules of procedure on fines imposed to credit rating agencies (CRAs). ESMA has also considered the relevant experience that it has acquired when operating under the mentioned rules of procedure applicable to TRs and CRAs.

15. This final report includes a section where assessment of general and more high-level feedback to ESMA’s proposals is made as well as specific sections where particular aspects on which ESMA consulted are being discussed.
16. ESMA is including in its final advice to the Commission proposals for draft procedural rules on the imposition of penalties on TC CCPs and proposals to amend the current procedural rules applicable to the imposition of penalties to TRs. In addition, ESMA is also including proposals to amend the current procedural rules applicable to CRAs, in order to align them and make them consistent with the proposed procedural rules applicable to TRs and TC CCPs.
17. Finally, ESMA is advising only on the procedural aspects and is not performing a cost-benefit analysis as ESMA understands that, as part of the approval of EMIR as amended, impact assessments of the different policy choices have already been performed.

2 General aspects of the feedback to the proposals

18. In total, ESMA received six responses to its consultation paper, out of which one was marked as confidential by its submitter. The respondents are one association comprising 37 CCPs from the EMEA and APAC regions, one financial group (comprising a TC-CCP and a TR), two financial groups including TC-CCPs, one TR and one CRA group.
19. Some of the respondents have criticised the fact that ESMA’s proposals for the rules of procedure to impose penalties on TC-CCPs do not foresee the consultation of the TC-CCP’s home supervisor before taking a supervisory action or imposing a penalty. To support their arguments, the respondents have adduced that this would be contrary to the principle of international comity and mutual regulatory deference.
20. In this regard, it should be noted that EMIR as amended defines the relationship between ESMA and the home supervisors of the TC-CCPs. For instance, according to Article 25(7) of EMIR as amended, ESMA shall establish cooperation arrangements with the competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent to EMIR. Moreover, Articles 25f(5), 25g(4), 25h(3), 25m(3), 25p(3) and 25q(3) includes the obligations that ESMA has towards the competent authority supervising the TC-CCP under investigation (for example, pursuant to Article 25h(3) of EMIR as amended, ESMA shall give advanced notice of on-site inspection to the relevant

⁷ Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1.

⁸ Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions, OJ L 282, 16.10.2012, p. 23.

third-country competent authorities where the inspections are to be conducted). There is no provision requiring ESMA to consult them before imposing penalties on TC-CCPs under their respective supervision. Therefore, ESMA's proposals are consistent with the relevant provisions of EMIR as amended and it would not be appropriate to modify, through the proposed rules of procedure, the degree of involvement of the TC-CCP's home supervisor which was decided by the EU co-legislators.

21. As a related matter, one of the respondents considered that since - contrary to TRs - TC-CCPs are entities which are not established in the EU, it would not be appropriate to align the rules of procedure to impose penalties on TC-CCPs with the rules of procedure to impose penalties on TRs, notably when it comes to taking urgent action.
22. Given the similarities between Articles 25i to 25m and Articles 64 to 68 of EMIR as amended, ESMA's proposals aim at aligning, to the extent possible, the two sets of rules of procedure. Only in this way the required consistency between the procedures to impose penalties applicable to TC-CCPs and to TRs can be achieved. In addition, with respect to the adoption of interim decisions, ESMA notes that similarly to Article 67 of EMIR as amended, Article 25l provides that if urgent action is needed in order to prevent significant and imminent damage to the financial system, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking that decision. There are no additional requirements or limitations in the provision applicable to TC-CCPs. Therefore, it would not be justified to treat TC-CCPs and TRs differently.
23. Moreover, one of the respondents said that the consultation paper had little visibility for CRAs because it was published in the "post-trading" section of ESMA's website and not on ESMA's web-section dedicated to CRAs. In this regard, while ESMA acknowledges that it could have published the consultation paper also on the "credit rating agencies" web section to give it further visibility and will bear the respondent's comment in mind for future consultations, ESMA also notes that the consultation paper was published on "ESMA News" web section⁹ and advertised in different media (e.g. LinkedIn and Twitter)¹⁰ and that National competent authorities (NCAs)' and third-parties' websites also echoed the news¹¹. In addition, the news item made explicit reference to "supervised entities" and "CRAs". The respondent (a CRA) was able to find the consultation paper and respond by the deadline.
24. This respondent also argued that ESMA does not have a mandate to provide advice to the EC on amendments to the CRA Commission Delegated Regulation and considers that ESMA has not explained why the proposed amendments are needed. As explained in the consultation paper, ESMA acknowledges that proposing amendments to the CRA Commission Delegated Regulation was not part of the Commission's request for technical advice. However, given the similarities that exist between the TR and the CRA Commission Delegated Regulation and that one of the objective pursued by the Commission is to achieve consistency between the different procedures to impose penalties, ESMA

⁹ <https://www.esma.europa.eu/press-news/esma-news/esma-consults-procedural-rules-impose-penalties-supervised-entities>

¹⁰ See, e.g.: <https://twitter.com/ESMAComms/status/1205430751275167744>

¹¹ See, e.g.: https://www.cnmv.es/DocPortal/DocFaseConsulta/CESR/20200118_en1en.pdf

considers that it is justified to also propose amendments to the current rules of procedure to impose penalties on CRAs.

25. Finally, one of the respondents has reiterated the comments that it already made in response to ESMA's consultation paper on tiering, comparable compliance and fees. These comments were already considered by ESMA within the context of that consultation and are not relevant for the present consultation.

3 Scope

26. ESMA is invited by the Commission to provide technical advice to assist it in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments on TC CCPs, including provisions on the rights of the defence, temporal provisions, the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties.
27. In addition, ESMA is also invited to provide technical advice to assist the Commission in formulating amendments, if and where appropriate, to the TR Commission Delegated Regulation.
28. More generally, ESMA is invited to advise on whether – in light of EMIR's amendments – the TR Commission Delegated Regulation should be amended in order to ensure a degree of consistency in the procedures applicable to TC-CCPs and to TRs, where appropriate.
29. Before proposing rules of procedure for the imposition of penalties on TC-CCPs and amendments to the TR rules, ESMA would like to highlight the following points.
30. First, regarding the scope in terms of entities that would be subject to the rules of procedure in the TC-CCP area, ESMA notes that EMIR as amended uses different terms and refers to different entities across the various relevant articles. For example, it refers to "persons subject to the investigations" in Article 25i, "persons subject to the proceedings" in Article 25l, "CCP concerned" in Article 25i, "persons concerned" in Articles 25i and 25l, "Tier 2 CCP" in Sections I to IV of Annex III and Articles 25g and 25h, "CCPs" in Article 25j, Section V of Annex III and Annex IV, "recognised CCPs" in Article 25f, "related third parties to whom those CCPs have outsourced operational functions (...)" in Articles 25f, 25g and 25h, the "parties involved" in Article 25m, etc. As much as possible, in the proposals that it makes below for the procedural rules, ESMA has tried to align with the wording of EMIR as amended as well as with the wording of the TR Commission Delegated Regulation.
31. Second, ESMA notes that the advice requested is in relation to the requirement of Article 25i(7) of EMIR as amended for the Commission to adopt rules of procedure for the exercise of the power to impose fines or periodic penalty payments by ESMA. Accordingly, this technical advice does not address matters of procedure in respect of the withdrawal of recognitions under Article 25p of EMIR as amended, which are outside the scope of this empowerment and, therefore, of this request for technical advice.
32. Third, supervisory measures (under Article 25q of EMIR as amended) which are unconnected with fines could, in theory, be also considered out of scope. However, this exclusion is in practice meaningless because it is only at the end of the enforcement

procedure that ESMA decides whether to impose a fine and/or another supervisory measure (such as the issuance of a public notice). In addition, ESMA notes that in its request for technical advice, the Commission itself makes reference to supervisory measures. Furthermore, the wording of the TR Commission Delegated Regulation refers to supervisory measures even though the scope of the empowerment under Article 64(7) of EMIR is identical to the one provided in Article 25i(7) of EMIR as amended. ESMA considers that it makes sense to follow the same logic as in the TR Commission Delegated Regulation and, where relevant, to also cover supervisory measures in its proposals.

33. Fourth, the Commission requested ESMA to assess whether the TR Commission Delegated Regulation should be amended in order to ensure a degree of consistency in the procedures applicable to TC-CCPs and to TRs, where appropriate. ESMA's proposals below aim at ensuring this consistency. Nevertheless, because of the similarities that already exist between the rules of procedure applicable respectively to TRs and CRAs, ESMA also considers that it is justified to make proposals for amendments to the CRA Commission Delegated Regulation even though this was not explicitly requested by the Commission.
34. Fifth, ESMA notes that TRs registered by ESMA for the purposes of Article 4 of the Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse (SFTR)¹² and securitisation repositories registered by ESMA for the purposes of Article 5 of Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (STSR)¹³ can also be trade repositories registered with ESMA for the purposes of Article 9 of EMIR as amended. In addition, ESMA notes that Article 9 of SFTR and Article 14 of STSR indicate that the powers conferred on ESMA in accordance with Articles 61 to 68, 73 and 74 of EMIR, in conjunction with its Annex I and II, shall also be exercised with respect to these Regulations. Among these provisions, there is Article 64, devoted to the procedural rules for taking supervisory measures and imposing fines. Therefore, the material scope of the rules of procedure applicable to TRs should be understood as covering also the procedure to impose fines or periodic penalty payments on TRs registered by ESMA for the purposes of Article 4 of the SFTR and securitisation repositories registered by ESMA for the purposes of Article 5 of STSR. However, for the sake of clarity, the Commission might want to consider making this point explicit in the recitals of the TR Commission Delegated Regulation.

¹² Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, OJ L 337, 23.12.2015, p. 1.

¹³ Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, OJ L 347, 28.12.2017, p. 35.

4 Assessment of specific feedback and final proposals

4.1 Right to be heard by the investigation officer

4.1.1 Regarding TC-CCPs

35. ESMA is invited by the Commission to advise on the procedure regarding the rights of the persons subject to the investigation to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.
36. ESMA has taken into account the similarities between Article 25i and Article 64 of EMIR as amended, as well as with Article 23e of the CRA Regulation. ESMA has also considered Articles 2 of the TR and CRA Commission Delegated Regulations. Furthermore, ESMA has had regard to Recitals (2) and (3) of the TR Commission Delegated Regulation and Recitals (3) and (5) of the CRA Commission Delegated Regulation, as well as, more generally, to Article 41 of the Charter of Fundamental Rights of the European Union¹⁴.
37. In the consultation paper, based on the practice of the investigation officer in previous enforcement cases with respect to TRs and CRAs, ESMA indicated that it did not consider that changes were needed for the procedural rules regarding TC-CCPs compared to the ones currently applicable to TRs and CRAs.
38. In order to guarantee the rights of defence of the person subject to the investigation, this person should have the right to be heard at different stages of the procedure. One of the stages takes place upon the completion of the investigation officer's investigation, when Article 25i of EMIR as amended is applicable. This right to be heard should materialise through granting the person the right to make written comments.
39. In practice, after the investigation is completed, the investigation officer has to produce a statement of findings. The person subject to the investigation must be given the right to comment on the statement of findings of the investigation officer before the latter submits the file with his or her findings to ESMA.
40. The statement of findings must set out the facts and the reasons for which they constitute one or more of the infringements listed in the Annex III of EMIR as amended, including any aggravating or mitigating factors of these infringements.
41. The statement of findings must set a reasonable time limit within which the person subject to the investigation may provide its written submissions. The investigation officer should not be obliged to take into account written submissions received after that time limit has expired. This is justified to ensure that the procedure for the adoption of fines and supervisory measures is not unduly delayed and remains efficient.

¹⁴ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391.

42. In its written submissions, the person subject to the investigation should be allowed to comment on the facts set out in the statement of findings, including to set out all the facts known to it which are relevant to its defence. It must attach any relevant documents as proof of the facts set out. This is justified to ensure that the decision of ESMA in the enforcement proceedings would be ultimately based on facts and evidence and not on unsubstantiated allegations made by the person subject to the investigation, which would be contrary to the applicable principles governing the burden and standard of proof.
43. In addition, the person subject to the investigation should be able to propose that the investigation officer hears other persons who may corroborate the facts set out in its submissions. The investigation officer may also invite the person subject to the investigation to attend an oral hearing if the investigation officer considers it to be necessary in order to clarify the written submissions made by the person subject to the investigation. However, whether to organise an oral hearing remains a decision of the investigation officer because the right to be heard of the person subject to the investigation would have been already ensured by the opportunity given to that person to provide written comments. Where organised, oral hearings should not be held in public.
44. The persons subject to the investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by the investigation officer.
45. The investigation officer should consider whether, as a result of the submissions made by the person subject to the investigation, he/she finds it necessary to amend his/her statement of findings before submitting it to ESMA as part of the complete file. By analogy with Recital (2) of the TR Commission Delegated Regulation, the person subject to the investigation should be given an opportunity to make further submissions in case the amended statement of findings refers to facts which affect the investigation officer's initial findings in a material way and on which it has not yet had the opportunity to comment.
46. ESMA has received comments with regards to the above proposals from half of the respondents.
47. The comments received referred to the TC-CCP's right to an oral hearing, the obligation to provide evidence supporting the facts on which the defence is based, the right to provide comments to the investigation officer's amended statement of findings and the possibility to be assisted by qualified persons during the investigation carried out by the investigation officer.
48. In particular, one of the respondents stated that the person subject to the investigation should always have the right for an oral hearing. Another responded indicated that the person under investigation should always be granted the opportunity to provide comments to the investigation officer's amended statement of findings, irrespective of whether the changes introduced to the statement of findings by the investigation officer are material. It also indicated that, for a TC-CCP, it would not always be practicable to provide supporting evidence to substantiate all the facts that are relevant to its defence. Lastly, one respondent regretted that ESMA's proposals did not explain what the term "qualified person" means within the context of the rules of procedure to impose fines on TC-CCPs and they do not specify whether submissions and testimony from external experts (including representatives of the TC-CCP's home supervisor) would be allowed.

49. In this regard, ESMA notes that, as already explained, the procedural rules under Article 25i of EMIR as amended are very similar to the procedural rules set out in Article 64 of EMIR and Article 23a of the CRA Regulation and, therefore, ESMA's proposals seek alignment with the TR and CRA Commission Delegated Regulations. ESMA has thus decided to maintain its original proposal.

50. The final proposal is included below.

Regarding the procedure applicable to the investigation by the investigation officer and the right to be heard at this stage, ESMA proposes that:

- Upon completion of the investigation and before submitting the file to ESMA, 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. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex III of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements;
- 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;
- 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;
- 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.

4.1.2 Regarding TRs

51. In the consultation paper, ESMA did not propose any amendment to Article 2 of the TR Commission Delegated Regulation.

4.2 File to be submitted by the investigation officer

4.2.1 Regarding TC-CCPs

52. ESMA is invited by the Commission to advise on the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that

ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding TC CCPs.

53. ESMA has taken into account the similarities between Article 25i(2) and Article 64(2) of EMIR as amended, as well as with Article 23e(2) of the CRA Regulation. ESMA has also considered Articles 3 of the TR and CRA Commission Delegated Regulations. Based on its experience, ESMA does not consider that major changes are needed for the procedural rules regarding TC-CCPs compared to the ones currently applicable to TRs and CRAs.
54. The completeness of the file is assessed by ESMA with regard to the list of documents to be included in the file according to the TR and CRA Commission Delegated Regulations. When one of these documents is missing, ESMA should request it to the investigation officer. However, ESMA cannot direct the investigation of the investigation officer who is independent.
55. In the consultation paper, based on the practice of the investigation officer in previous enforcement cases with respect to TRs and CRAs, ESMA proposed that, where relevant, it would make sense to provide for the inclusion of a copy of the statement of findings of the investigation officer, as amended, in the file. Following the receipt of the written submissions of the person subject to the investigation, it may happen that the investigation officer produces an amended version of his/her statement of findings. In such cases, both versions of the statement of findings should be included in the file to be submitted to ESMA.
56. One of the TC-CCP respondents supported the above proposals and two did not provide comments on this point. Moreover, the responses received in relation to question 3 and question 14 of the consultation paper, which referred to similar proposals, were also either in favour or silent in this respect. ESMA has thus decided to maintain them. The final proposal is included below.

ESMA proposes that the complete file to be submitted by the investigation officer to ESMA shall include at least the following documents:

1. copy of the statement of findings (including its amended version, where relevant) addressed to the TC-CCP or the person subject to the investigation;
2. copy of the written submissions by the TC-CCP or the person subject to the investigation;
3. minutes of any oral hearing.

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 a reasoned request for additional documents.

4.2.2 Regarding TRs

57. In the consultation paper, in order to ensure consistency between the rules of procedure applicable under EMIR to penalties imposed on TRs and to those imposed on TC-CCPs, it would make sense to amend the TR Commission Delegated Regulation so that a copy

of the statement of findings of the investigation officer, as amended where this is relevant, is also included in the file submitted by the investigation officer to ESMA.

58. The two comments received on this point were both in favour of the above proposal and therefore it is retained. The final proposal is included below.

ESMA proposes that Article 3(1) of the TR Commission Delegated Regulation is amended so as to refer to a “copy of the statement of findings (including its amended version where relevant)”.

4.3 Procedure before ESMA with regard to fines and supervisory measures, including the right to be heard

4.3.1 Regarding TC-CCPs

59. ESMA is invited by the Commission to advise on the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the rights to be heard of the persons subject to the investigation, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
60. ESMA has taken into account the similarities between Articles 25i(5), 25i(6) and Articles 64(5), 64(6) of EMIR as amended, as well as with Articles 23e(5) and 23e(6) of the CRA Regulation. ESMA has also considered Articles 3 of the TR and CRA Commission Delegated Regulations. Furthermore, ESMA had regard to Recitals (2) and (3) of the TR Commission Delegated Regulation and Recitals (3), (4) and (5) of the CRA Commission Delegated Regulation, as well as, more generally, to Article 41 of the Charter of Fundamental Rights of the European Union.
61. In the consultation paper, based on ESMA’s practice in previous enforcement cases with respect to TRs and CRAs, ESMA did not consider that changes were needed for the procedural rules regarding TC CCPs compared to the ones currently applicable to TRs and CRAs.
62. Another stage where ESMA has to guarantee the rights of defence of the person subject to the investigation through its right to be heard is before ESMA, once the investigation officer has submitted it the complete file. This right to be heard should take place by granting the person the right to make further written comments.
63. Once ESMA has considered that the file submitted by the investigation officer is complete, it must consider whether or not it agrees with the investigation officer’s statement of findings.
64. If ESMA does not agree with the findings of the investigation officer because none of the facts described in the statement of findings constitute an infringement, it must close the file. It is worth reminding here that it is not for ESMA to investigate the matter itself or direct the investigation of the investigation officer.

65. ESMA may agree with the findings of the investigation officer in whole or in part.
66. If ESMA does not agree with the findings of the investigation officer because it does not agree with the legal qualification of the facts or with the assessment made by the investigation officer of the existence of negligence or intent or of the aggravating or mitigating circumstances applicable to one or more infringements, it must adopt its own statement of findings and submit it to the persons subject to the investigation setting a reasonable time limit within which those persons may make written submissions.
67. The person subject to the investigation should be notified accordingly of the above decision(s) taken by ESMA.
68. In respect of findings of the investigation officer which ESMA agrees to adopt, ESMA must set a reasonable time limit within which the person subject to the investigation may make written submissions to ESMA.
69. ESMA should not be obliged to take into account written submissions received after the expiry of the specified time limit. This is justified to ensure that the procedure for the adoption of fines and supervisory measures is not unduly delayed and remains efficient.
70. Although the right to be heard would already be considered to have been observed where the persons concerned are granted the right to make written submissions, ESMA reserves the right to also invite the persons subject to the investigation to an oral hearing if it considers that it is necessary in order to clarify the written submissions made by those persons.
71. If an oral hearing takes place, the persons subject to the investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings should not be held in public.
72. In general, there has been a wide support to the above proposals. ESMA has received comments related to the right to an oral hearing, which according to one of the respondents, should be afforded to the TC-CCP based on the findings of the investigation officer. Another comment concerned the possibility for ESMA to depart from the findings of the independent officer and adopt its own statement of findings, which was considered by the respondent to be incompatible with the fact that ESMA cannot investigate the matter itself or direct the investigation of the investigation officer.
73. Regarding those comments, as already explained, the procedural rules under Article 25i of EMIR as amended are very similar to the procedural rules set out in Article 64 of EMIR and Article 23a of the CRA Regulation and, therefore, the above proposals seek alignment with the TR and CRA Commission Delegated Regulations. ESMA has thus decided to maintain its original proposal.
74. The final proposal is included below.

Regarding the procedure before ESMA with regards to fines and supervisory measures, including the right to be heard, ESMA proposes that:

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement

with the meaning of Annex III 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.

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.

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 25j and 25q 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.

If 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 has adopted a decision imposing a fine in accordance with Article 25j, it shall notify immediately that decision to the person subject to investigation.

4.3.2 Regarding TRs

75. In the consultation paper, ESMA did not propose any amendment to Article 3 of the TR Commission Delegated Regulation.

4.4 Procedure with regard to periodic penalty payments

4.4.1 Regarding TC-CCPs

76. ESMA is invited by the Commission to advise on the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the rights to be heard of the persons subject to the investigation, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.

77. In the consultation paper, ESMA noted that it is key that periodic penalty payments that would be imposed by ESMA, for example, during the investigation phase to compel a Tier

2 TC-CCP to submit to an investigation or an inspection (Article 25k in relation to Articles 25g or 25h of EMIR as amended), could be adopted by ESMA within a short timeframe. Such periodic penalty payments should be subject to a fast-track procedure distinct from the one applicable for the adoption of supervisory measures and the imposition of fines. The procedural rules set forth in Article 25i of EMIR as amended does not apply and, therefore, the investigation officer is not involved in the adoption of the periodic penalty payment.

78. ESMA has also considered the persons which could be subject to period penalty payment in accordance with Article 25k of EMIR as amended. These include Tier 2 TC-CCPs as well as the persons referred to in Article 25f(1) of EMIR as amended, i.e. recognized TC-CCPs and related third parties to whom those CCPs have outsourced operational functions or activities, where they have been requested to provide information by decision.
79. In addition, ESMA has taken into account the similarities between Article 25k and Article 66 of EMIR as amended, as well as with Article 36b of the CRA Regulation. It has also considered Articles 4 of the TR and CRA Commission Delegated Regulations.
80. ESMA has not yet imposed any periodic penalty payments (neither on TRs nor on CRAs). It does not have relevant experience in this respect and would therefore advise to set up rules for the adoption of periodic penalty payments on TC-CCPs, which are similar to the current ones applicable to TRs and CRAs.
81. The above proposals were supported by one of the TC-CCPs that responded to the consultation. Two other TC-CCPs made side comments on this point. In particular, one of them indicated that ESMA's power to impose periodic penalty payments on any related third parties to whom TC-CCPs have outsourced operational functions or activities in order to compel them to supply complete information which has been requested by a decision would be impractical or inappropriate and the other one reiterated that before imposing a fine or periodic penalty payments on a TC-CCP, ESMA should first consult with the home regulator of the concerned TC-CCP.
82. With regards to the first comment, ESMA notes that the power to impose periodic penalty payments on any related third parties to whom TC-CCPs have outsourced operational functions or activities is enshrined in Article 25k of EMIR as amended. As regards the second comment, ESMA stresses that, as already explained, the relationship between ESMA and the home supervisors of TC-CCPs is governed by EMIR as amended, which does not require ESMA to consult them before imposing a fine or periodic penalty payments. Therefore, ESMA's proposals are consistent with the relevant provisions of EMIR as amended and they should be maintained.
83. The final proposal is included below.

Regarding the procedure for the imposition of periodic penalty payments, ESMA proposes that:

Before making a decision imposing a periodic penalty payment according to 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 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 TC-CCP or person concerned 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 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.

4.4.2 Regarding TRs

84. ESMA did not propose any amendment to Article 4 of the TR Commission Delegated Regulation.

4.5 Access to the file

4.5.1 Regarding TC-CCPs

85. ESMA is invited by the Commission to advise on the procedure regarding the rights to access to the file of the persons subject to the investigation, including the limits to such access to protect other persons' business secrets, ESMA's internal preparatory documents and other confidential information.

86. ESMA has taken into account the similarities between Articles 25i(4), 25l(2), 64(4) and 67(2) of EMIR as amended, as well as with Articles 23e(4), 25(2), 36c(2) of the CRA Regulation. It has also taken into consideration Articles 5 of the TR and CRA Commission Delegated Regulations.

87. In the consultation paper, based on ESMA's practice in previous enforcement cases with respect to TRs and CRAs, ESMA did not consider that changes would be needed and saw merits in having similar rules for the TC-CCPs.

88. ESMA has received full support from one of the TC-CCP respondents on this point. The other three TC-CCP respondents did not provide specific comments in this respect with regards to the above proposals, hence ESMA maintains them.

89. The final proposal is included below.

Regarding the access to the file by TC-CCPs, ESMA proposes that:

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.

File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

4.5.2 Regarding TRs

90. ESMA is invited by the Commission to advise on whether – in light of the amendments in EMIR to the procedure regarding the rights to access to the file of the persons subject to the investigation, including the limits to such access to protect other persons' business secrets, ESMA's internal preparatory documents and other confidential information – the TR Commission Delegated Regulation should be amended.

91. ESMA has taken into account the revised drafting of Article 64(4) of EMIR as a result of the amendments in EMIR REFIT¹⁵. ESMA considers that this amendment does not require any change in the corresponding provisions on access to the file, which are provided by Article 5 of the TR Commission Delegated Regulation.

92. Therefore, in the consultation paper, ESMA did not propose any amendment to Article 5 of the TR Commission Delegated Regulation.

4.6 Procedure for interim decisions

4.6.1 Regarding TC-CCPs

93. ESMA is invited by the Commission to advise on the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the rights to be heard by ESMA of the persons subject to the investigation as soon as possible after the adoption of such interim decisions.

94. In the consultation paper, ESMA noted that, even though Article 25(1), second paragraph, of the CRA Regulation provides for the adoption of interim measures in cases where urgent action is needed, there is no procedure laid down in the CRA Commission Delegated Regulation regarding the adoption of such kind of measures. ESMA likewise notes that no

¹⁵ <https://eur-lex.europa.eu/eli/reg/2019/2099/oj>

procedure for interim decisions yet exists in the TR Commission Delegated Regulation because the possibility to adopt interim decisions was not foreseen in EMIR until the amendments in EMIR REFIT.

95. The second subparagraph of Article 25l (1) of EMIR as amended provides that, where urgent action is needed in order to prevent significant and imminent damage to the financial system, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision. In line with Article 25l(1), this interim decision can be a decision to impose a fine or a periodic penalty payment.
96. ESMA considers that the rules of procedure should specify two stages. The first stage would lead to the adoption of an interim decision which would be adopted without the opportunity for the person concerned to submit comments on ESMA's findings. The second stage would lead to the adoption of a decision on whether to confirm the interim decision (i.e. a confirmatory decision); during this second stage, the person concerned must have the right to provide written comments on the interim decision before a confirmatory decision is adopted.
97. The second subparagraph of Article 25l(1) of EMIR as amended refers to ESMA in general, without excluding that this could also cover the investigation by the investigation officer. In light of the objective pursued by the second subparagraph of Article 25l(1) of EMIR as amended, which is to ensure that an interim decision could be adopted as soon as possible to avoid significant and imminent damage to the financial system, ESMA considers that it is justified that the exception to the right to provide comments on the findings before they are adopted should also cover the findings of the investigation officer. In order to ensure the rights of defence of the person concerned, it would be sufficient to provide that person with the opportunity to submit comments before the decision-making body of ESMA during the second phase, i.e. before the adoption of the confirmatory decision.
98. Finally, the specific procedure for the adoption of interim decisions should be clearly limited to cases where it is established that there is a risk of significant and imminent damage to the financial system.
99. ESMA has received comments regarding the procedure for interim decision from most of the respondents (three of them being TC-CCPs) to the consultation. The majority of the comments were related to the person subject to investigation's right to be heard (before the investigation officer and ESMA) and the right to access the file.
100. According to three respondents, the person subject to investigation should have the opportunity to submit written comments to ESMA in both stages of the procedure and not only during the Confirmatory decision phase. Moreover, according to some of the respondents, the person subject to investigation should be allowed to make submissions to the investigation officer and should have access to the file as soon as the investigation officer has issued her/his findings. In addition, one of the TC-CCP respondents stated that sanctions should only be imposed when a confirmatory decision is taken.
101. First, with regards to the first set of comments, ESMA notes that the wording of Article 25l(1) and Article 67(1) of EMIR and the wording of Article 25(1) of the CRA Regulation is

clear on this point: the right to be heard before ESMA takes a decision does not apply at the interim stage when urgent action is needed in order to prevent significant imminent damage to the financial system. In such cases, ESMA adopts an interim decision and only gives the person concerned the opportunity to be heard after taking that decision.

102. Second, with regards to the second set of comments, ESMA notes that Articles 25I (1) and 67(1) of EMIR as amended refer to ESMA in general, without excluding that this could also cover the investigation by the investigation officer. As already noted in the consultation paper and restated above, in light of the objective pursued by those articles, which is to ensure that an interim decision could be adopted as soon as possible to avoid significant and imminent damage to the financial system, ESMA considers that in order to ensure the efficiency of the process and the effectiveness of the interim decision, it is justified the right to be heard does not apply before the investigation officer during the Interim phase.
103. Moreover, with regards to the right to have access to the file during the procedure for the adoption of interim decisions when urgent action is needed, ESMA notes that having access to the file at an early stage would allow the persons subject to the investigation to acquaint themselves with the evidence. On the one hand, this would be useful for the persons subject to investigation to prepare their defence and be ready when they would be offered the opportunity, during the second stage of the procedure, to express their views on ESMA's interim decision. On the other hand, granting access to the file once the investigation officer has informed the person(s) subject to investigation of his / her findings would not undermine the efficiency and effectiveness of the process of adoption of the interim decision. The procedure for the adoption of the interim decision by ESMA will not be suspended while the request for access to the file is processed by the investigation officer. ESMA has thus decided to amend the original proposal by referring to the fact that, if so requested, the person(s) subject to the investigation would be granted access to the file as soon as the investigation officer has informed them of his / her findings.
104. Finally, ESMA also notes that pursuant to Article 25I(1) of EMIR, the interim decision can be a decision to impose a fine or a periodic penalty payment. The proposals made in the consultation paper were thus consistent with the relevant provisions of EMIR as amended and the objectives pursued by those provisions.
105. More generally, ESMA has also received comments regarding the concepts of "significant and imminent damage" and "cogent and consistent evidence" used in the proposals and the lack of standards to define those terms.
106. In this regard, ESMA notes that "significant and imminent damage" is the wording used by the co-legislators in Article 25I of EMIR as amended (as well as in Article 67 of EMIR and Article 25 of the CRA Regulation) and therefore cannot be changed. However, ESMA understands the concerns regarding how to define the concept of "cogent and consistent evidence" and, therefore, has decided to partially amend the proposal by not referring to it anymore.
107. The final proposal is included below.

Regarding the procedure for the adoption of interim decisions imposing fines when urgent action is needed, ESMA proposes that:

Where an urgent action by ESMA is needed in order to prevent significant and imminent damage to the financial system, the specific procedure for the adoption of an interim decision is applied.

The investigation officer shall submit the file to ESMA, including his / her statement of findings.

The investigation officer shall inform the person subject to investigation of his/her findings but shall not provide that person with the opportunity to make submissions.

If so requested, the investigation officer shall grant access to the file to the person subject to investigation who has been informed about his / her findings. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

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 of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements.

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement with the meaning of Annex III 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.

Where ESMA agrees with all or some of the findings of the investigation officer, it shall adopt an interim decision based on those findings.

If 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 has adopted an interim decision imposing a fine in accordance with Article 25j, it shall notify immediately that interim decision to the person subject to investigation.

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.

If so requested, ESMA shall grant access to the file to the parties to whom it has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to whom the interim decision has been notified 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.

If 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 confirmatory decision imposing a fine in accordance with Article 25j, it shall notify immediately that decision to the persons subject to investigation.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed.

Regarding the procedure for the adoption of interim decisions imposing periodic penalty payments when urgent action is needed, ESMA proposes that:

Where an urgent action by ESMA is needed in order to prevent significant and imminent damage to the financial system, the specific procedure for the imposition of periodic penalty payments by interim decision is applied.

Where ESMA considers that there are reasons justifying the urgent imposition of a periodic penalty payment, it shall adopt an interim decision, without providing the person subject to the proceedings with the opportunity to make submissions before its adoption.

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.

ESMA shall notify immediately that interim decision to the person concerned 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 for deciding on the periodic penalty payment.

If so requested, ESMA shall grant access to the file to the parties to whom ESMA has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

ESMA may also invite the person subject to the proceedings to whom the interim decision has been notified 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.

If ESMA decides to adopt a confirmatory decision imposing a periodic penalty payment in accordance with Article 25k, it shall notify immediately that decision to the person concerned.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed.

Once the TC CCP or person concerned 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.

4.6.2 Regarding TRs

108. ESMA is invited to advise on the procedure for interim decisions to impose fines or periodic penalty payments on TRs, adopted by ESMA 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, and the procedure to guarantee rights to be heard by ESMA of the persons subject to the investigation as soon as possible after the adoption of such interim decisions.
109. As already explained above, no procedure for interim decisions exists yet in the TR Commission Delegated Regulation because interim decisions were not foreseen for TRs in EMIR until the amendments in EMIR REFIT. EMIR as amended now provides for interim decisions in both areas of TC-CCPs and TRs. ESMA considers that it makes sense to align as much as possible the procedural rules for the adoption of interim decisions in the area of TC CCPs with those applicable in the area of TRs.
110. However, ESMA also notes that Article 67(1), second paragraph, of EMIR as amended diverges to some extent from Article 25l(1), second paragraph, of EMIR as amended. In particular, in the case of TC CCPs the procedure for the adoption of interim decisions is applicable where “urgent action is needed in order to prevent significant and imminent damage to the financial system”, whereas in the case of TRs it is applicable 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”.
111. In addition, ESMA notes that regarding TC-CCPs, Articles 25l(1) of EMIR as amended provide that the procedure for interim decisions applies to decisions regarding the adoption of fines and periodic penalty payments, whereas regarding TRs, Article 67(1), second paragraph, of EMIR as amended provides that the procedure for interim decisions applies to decisions referred to in points (a), (c) and (d) of Article 73(1) of EMIR as amended (i.e. to decisions imposing supervisory measures other than fines) where urgent action is needed. Therefore, the procedure for the adoption of interim decisions applicable to TRs where urgent action is needed does not cover fines and periodic penalty payments.
112. Except for the amendments which are justified to incorporate the above-mentioned differences, ESMA proposed in the consultation paper to align the procedural rules for the adoption of interim decisions regarding TRs with the ones for TC-CCPs.

113. ESMA has received comments regarding the procedure for interim decision from most of the respondents (two of them being TRs) to the consultation. For all the reasons explained above regarding TC-CCPs, ESMA has decided to partially amend the original proposal.
114. The final proposal is included below.

Regarding the procedure for the adoption of interim decisions when urgent action is needed, ESMA proposes that:

Where an urgent action by ESMA 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 TR, the specific procedure for the adoption of an interim decision is applied.

The investigation officer shall submit the file to ESMA, including his / her statement of findings.

The investigation officer shall inform the person subject to investigation of his/her findings but shall not provide that person with the opportunity to make submissions.

If so requested, the investigation officer shall grant access to the file to the person subject to investigation who has been informed about his / her findings. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

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 of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements.

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer 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 the investigation.

Where ESMA agrees with all or some of the findings of the investigation officer, it shall adopt an interim decision based on those findings.

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 adopts an interim decision imposing a supervisory measure in accordance with points (a), (c) and (d) of Article 73(1), it shall notify immediately that interim decision to the person subject to investigation.

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.

If so requested, ESMA shall grant access to the file to the parties to whom it has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to whom the interim decision has been notified 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.

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 the investigation and adopts a confirmatory decision imposing a supervisory measure in accordance with points (a), (c) and (d) of Article 73(1), it shall notify immediately that decision to the person subject to the investigation.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed.

4.7 Limitation periods for the imposition of penalties

4.7.1 Regarding TC-CCPs

115. ESMA is invited by the Commission to advise on the limitation periods for the imposition of penalties.
116. In the consultation paper, ESMA took into account the similarities between Article 25m and Article 68 of EMIR as amended, as well as with Article 36d of the CRA Regulation. It has also taken into consideration Article 6 of the TR and CRA Commission Delegated Regulations.
117. Based on its experience in previous enforcement cases, ESMA does not consider that changes to the existing rules are needed. ESMA therefore advises to adopt similar rules regarding the limitation periods for the imposition of penalties imposed on TC-CCPs.
118. The feedback to the above proposals was overall in favour but two respondents sought clarification as regards which ESMA actions can interrupt the limitation period and about the meaning of the expression “start running afresh”. In addition, one of the respondents expressed the view that only actions which are attributable to the TC-CCPs should interrupt the limitation periods. In this regard, ESMA notes one of the objectives pursued by the Commission (as indicated in its mandate to ESMA) is to achieve consistency between the different procedures to impose penalties. The above proposals are based on the rules on

the limitation periods for the imposition of penalties laid down in the TR and CRA Commission Delegated Regulations, hence ESMA decided to maintain them. The final proposal is included below.

Regarding the limitation periods for the imposition of penalties on TC-CCPs, ESMA proposes that:

The powers conferred on ESMA to impose fines and periodic penalty payments on TC-CCPs and other persons subject to investigation shall be subject to a limitation period of five years.

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.

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 TC-CCP or the person subject to the investigation in respect of an infringement of Regulation (EU) No 648/2012.

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.

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 25n of Regulation (EU) No 648/2012.

4.7.2 Regarding TRs

119. In the consultation paper, ESMA did not propose any amendment to Article 6 of the TR Commission Delegated Regulation.

4.8 Limitation periods for the enforcement of penalties

4.8.1 Regarding TC-CCPs

120. ESMA is invited by the Commission to advise on the limitation periods for the enforcement of penalties.
121. In the consultation paper, ESMA took into account the similarities between Article 25m and Article 68 of EMIR as amended, as well as with Article 36d of the CRA Regulation. It had also taken into consideration Articles 7 of the TR and CRA Commission Delegated Regulations. ESMA did not consider that major changes were needed and aims at ensuring consistency between the rules applicable to TC-CCPs and the ones applicable to TRs under EMIR as amended.
122. ESMA therefore saw merits in having the same rules, with limited adjustments which are justified by the fact that the enforcement of penalties imposed on TC-CCPs will take place in third countries. A reference to the third-country authority is thus needed. In addition, having in mind potential uncertainties and delays that could derive from the fact that the enforcement of the penalties imposed on TC-CCPs would be governed by the rules of civil procedure in force in a third country (as provided by Article 25m of EMIR as amended), it is advised to extend the limitation period to 8 years rather than the 5 years currently applicable in case of enforcement of penalties imposed on TRs in a Member State.
123. ESMA has only received feedback about the above proposals from two of the respondents to the consultation. One of the respondents fully agreed with the above proposals. The other stated that to the extent that it is a unilateral decision from ESMA, a notification of a decision varying the original amount of the fine or periodic penalty payment should not interrupt the limitation period.
124. In this regard, ESMA notes one of the objectives pursued by the Commission is to achieve consistency between the different procedures to impose penalties. ESMA does not see any reason why the circumstances under which the limitation periods for the enforcement of penalties shall be interrupted should be different for TC-CCPs than for TRs and CRAs. ESMA has thus decided to retain the above proposals. The final proposal is included below.

Regarding the limitation periods for the enforcement of penalties imposed on TC-CCPs, ESMA proposes that:

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.

The eight-year period referred to in paragraph 1 shall start to run on the day following that on which the decision becomes final.

The limitation period for the enforcement of penalties shall be interrupted by:

(a) a notification by ESMA to the TC-CCPs or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;

(b) any action of ESMA, of the authority of a Member State or of the authority of the third country concerned acting at the request of ESMA, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.

Each interruption shall cause the limitation period to start running afresh.

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 25n of Regulation (EU) No 648/2012.

4.8.2 Regarding TRs

125. In the consultation paper, ESMA did not propose any amendment to Article 7 of the TR Commission Delegated Regulation.

4.9 Collection of fines and periodic penalty payments

4.9.1 Regarding TC-CCPs

126. ESMA is invited by the Commission to reflect on the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

127. In the consultation paper, ESMA took into account the similarities between Article 25m and Article 68 of EMIR as amended, as well as with Article 36d of the CRA Regulation. ESMA had also taken into consideration Articles 8 of the TR and CRA Commission

Delegated Regulations. Based on its experience, ESMA does not consider that major changes are needed. The only change which would make sense on the basis of ESMA's practice in previous enforcement cases with respect to CRAs and TRs would be to specify that in cases where multiple decisions imposing fines or periodic penalty payments are adopted in parallel, the respective amounts collected by ESMA shall be lodged to different accounts (or subaccounts).

128. In addition, ESMA notes that the reference to "DG MARKT" which is included in Articles 8 of the TR and CRA Commission Delegated Regulations should be updated to a reference to "DG FISMA".
129. ESMA has only received feedback about the above proposals from one participant and it was to support them. Therefore, the final proposal is included below.

Regarding the fines and periodic penalty payments collected from TC-CCPs, ESMA proposes that:

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. In case of multiple fines and periodic penalty payments collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

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/she 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 FISMA on the amounts of fines and periodic penalty payments imposed and their status.

4.9.2 Regarding TRs

130. In the consultation paper, in order to ensure consistency between the rules of procedure applicable under EMIR to penalties imposed on TRs and those imposed on TC-CCPs, ESMA indicated that it would make sense to amend the TR Commission Delegated Regulation so that it would also specify that in cases where multiple decisions imposing fines or periodic penalty payments are adopted in parallel, the respective amounts collected by ESMA shall be lodged to different accounts (or subaccounts).
131. The reference to "DG MARKT" should also be updated, for example, to a reference to "the relevant DG of the Commission in charge of financial matters".
132. ESMA has only received feedback about the above proposals from one participant and it was to support them. Therefore, the final proposal is included below.

Regarding the fines and periodic penalty payments collected from TRs, ESMA proposes to amend Article 8 of the TR Commission Delegated Regulation in order to refer for example to “the relevant DG of the Commission in charge of financial matters” rather than “DG MARKT” and to add:

In case of multiple fines and periodic penalty payments collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

4.10 Calculation of periods, dates and time limits

4.10.1 Regarding TC-CCPs

133. ESMA is invited by the Commission to advise on the calculation of periods, dates and time limits to be laid down in the delegated act.
134. In the consultation paper, ESMA referred to Article 9 of the TR Commission Delegated Regulation. This article is consistent with Article 9 of the CRA Commission Delegated Regulation.
135. ESMA is of the view that the rule laid down in Article 9 of the TR and CRA Commission Delegated Regulations could be taken up in the relevant provision of the new delegated act on TC-CCPs. There is no reason why not to follow the same approach and it is appropriate to apply rules that already exist within the Union legislation, namely Regulation (EEC, Euratom) No 1182/71.
136. ESMA has only received feedback from one participant. The respondent agreed with the above proposal.
137. The final proposal is included below.

ESMA proposes that Regulation (EEC, Euratom) No 1182/71 shall apply to periods of time, dates and time limits.

4.10.2 Regarding TRs

138. ESMA did not propose any amendment to Article 9 of the TR Commission Delegated Regulation.

5 Consistency with the rules of procedure on penalties imposed on CRAs

139. Because of the similarities which exist between the TR and the CRA Commission Delegated Regulations, in the consultation paper ESMA indicated that it considers justified to propose amendments to the CRA Commission Delegated Regulation on the points

where it considers that amendments are needed with regard to the TR one. ESMA acknowledged that this was not included in the Commission's request for technical advice, but nevertheless advises the Commission to ensure this alignment of the rules of procedure.

140. As already explained in Section 2, as a general comment, one of the respondent (a CRA) argued that ESMA does not have a mandate to provide advice to the EC on amendments to the CRA Commission Delegated Regulation and considers that ESMA has not explained why the proposed amendments are needed.

141. As explained in the consultation paper, ESMA considers that while it is not part of the Commission's request for technical advice, in order to ensure consistency between the rules of procedures to impose fines on CRAs, TRs and TC-CCPs, it is justified to also propose amendments to the CRA Commission Delegated Regulation.

142. The assessment of the specific proposals is indicated below.

143. First, in order to ensure consistency, it would make sense to amend the CRA Commission Delegated Regulation so that, where relevant, a copy of the statement of findings of the investigation officer, as amended, is included in the file submitted by the investigation officer to ESMA.

144. ESMA has not received any feedback about the above proposal.

145. The final proposal is included below.

ESMA proposes that Article 3(1) of the CRA Commission Delegated Regulation is amended so as to refer to a "copy of the statement of findings (including its amended version where relevant)".

146. Second, it would make sense to align the CRA Commission Delegated Regulation with the rules of procedure for the collection of fines and periodic penalty payments proposed by ESMA regarding TC-CCPs and TRs, in particular so that it would be specified that in cases where multiple decisions imposing fines or periodic penalty payments are adopted in parallel, the respective amounts collected by ESMA shall be lodged to different accounts (or subaccounts).

147. ESMA has not received any comments opposing the above proposal.

148. The final proposal is included below.

Regarding the fines and periodic penalty payments collected from CRAs, ESMA proposes to amend Article 8 of the CRA Commission Delegated Regulation in order for example to refer to "the relevant DG of the Commission in charge of financial matters" rather than "DG MARKET" and to add:

In case of multiple fines and periodic penalty payments collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

149. Third, ESMA notes that the CRA Commission Delegated Regulation does not include any rules of procedure regarding the adoption of interim decisions, although the CRA Regulation provides for the possibility of adopting such decision in its Article 25(1), second paragraph, of the CRA Regulation when urgent action is needed.
150. According to the CRA Regulation, the procedure for the adoption of interim decisions is available for the urgent adoption of the supervisory measures listed in Article 24(1) of the CRA Regulation. However, Article 36c of the CRA Regulation does not contemplate this possibility for the adoption of fines and periodic penalty payments. The CRA Regulation is thus very similar to EMIR as amended regarding the interim decisions on TRs.
151. The difference between TRs and CRAs lies in the conditions under which an urgent action is needed: i.e. for TRs, interim decisions can be taken “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” whereas for CRAs, they are taken “in order to prevent significant and imminent damage to the financial system”, which is also the drafting used by the legislators in Article 25l of EMIR as amended regarding the interim measures for TC-CCPs.
152. ESMA has received comments from one CRA.
153. According to the respondent, Article 25 of the CRA Regulation is outside the scope of the Commission’s empowerment to adopt delegated acts. In this regard, ESMA notes that according to Article 23e(7) of the CRA Regulation, the Commission shall adopt further rules of procedure for the exercise of the power to impose fines or periodic penalty payments, which shall include provisions on the rights of defence. The possibility to restrict the right to be heard when urgent action is needed to prevent significant and imminent damage to the financial system is a corollary of ESMA’s powers to impose penalties when one or more of the infringements listed in Annex III of Regulation (EC) No 1060/2009 has been committed and constitutes the only circumstance under which ESMA can limit the right to be heard of the person(s) subject to the proceedings. Therefore, in ESMA’s views, the scope in which the Commission is empowered to adopt delegated acts pursuant to Article 23e(7) of the CRA Regulation also covers Article 25 of the CRA Regulation.
154. In addition, the respondent argued that Article 25 of the CRA Regulation only limits the right of the CRA to be heard by ESMA’s Board of Supervisors and not the right to be heard during the investigation officer’s investigation. In this regard, ESMA notes that Article 25(1) refers to the adoption of interim decisions by ESMA’s Board of Supervision (the decision-making body of ESMA) under Article 24(1). However, it also notes that the decisions of ESMA’s Board of Supervisors under Article 24(1) are taken on the basis of the file containing the investigation officer’s findings. Therefore, in order to preserve the effectiveness of the interim decision-making mechanism, it is considered that Article 25(1) of the CRA Regulation should be understood as also covering the right to be heard before the investigation officer.
155. The CRA respondent did not provide comments regarding the concepts of “significant and imminent damage” and “cogent and consistent evidence” used in the proposals. However, in order to ensure consistency between the different sets of rules of procedure,

as explained above regarding TC-CCPs, ESMA has decided to partially amend the original proposal.

156. In addition, as explained above regarding TC-CCPs, ESMA has decided to partially amend the original proposal by referring to the fact that, if so requested, the person(s) subject to the investigation would be granted access to the file as soon as the investigation officer has informed them of his / her findings.

157. The final proposal is included below.

Regarding the procedure for the adoption of interim decisions when urgent action is needed, ESMA proposes that:

Where an urgent action by ESMA is needed in order to prevent significant and imminent damage to the financial system, the specific procedure for the adoption of an interim decision is applied.

The investigation officer shall submit the file to ESMA, including his / her statement of findings.

The investigation officer shall inform the person subject to investigation of his/her findings but shall not provide that person with the opportunity to make submissions.

If so requested, the investigation officer shall grant access to the file to the person subject to investigation who has been informed about his / her findings. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EC) No 1060/2009.

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 of Regulation (EC) No 1060/2009, including any aggravating or mitigating factors of those infringements.

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement with the meaning of in Annex III of Regulation (EC) No 1060/2009, it shall decide to close the case and it shall notify that decision to the persons subject to the investigation.

Where ESMA agrees with all or some of the findings of the investigation officer, it shall adopt an interim decision based on those findings.

If ESMA decides that one or more of the infringements listed in in Annex III of Regulation (EC) No 1060/2009 has been committed by a person subject to investigation and adopts an interim decision imposing a supervisory measure in accordance with Article 24(1), it shall notify immediately that interim decision to the person subject to investigation.

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.

If so requested, ESMA shall grant access to the file to the parties to whom it has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EC) No 1060/2009.

ESMA may also invite the persons subject to investigation to whom the interim decision has been notified 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.

If ESMA decides that one or more of the infringements listed in Annex III of Regulation (EC) No 1060/2009 has been committed by a person subject to the investigation and adopts a confirmatory decision imposing a supervisory measure in accordance with Article 24(1), it shall notify immediately that decision to the person subject to the investigation.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed.

6 Annex

6.1 Annex I Commission mandate to provide technical advice

PROVISIONAL REQUEST TO THE EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA) FOR TECHNICAL ADVICE ON A POSSIBLE DELEGATED ACT CONCERNING PROCEDURAL RULES FOR PENALTIES IMPOSED ON THIRD-COUNTRY CENTRAL COUNTERPARTIES AND ON POSSIBLE AMENDMENTS TO THE DELEGATED ACT CONCERNING PROCEDURAL RULES FOR PENALTIES IMPOSED ON TRADE REPOSITORIES

With this provisional mandate the Commission seeks the technical advice of European Securities and Markets Authority (ESMA) on a possible delegated act concerning the European Market Infrastructure Regulation (EMIR¹) as amended by the 2019 CCP Supervision Regulation² ("**EMIR as amended**"). Delegated acts should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The provisional nature of the mandate stems from the fact that EMIR as amended has not yet entered into force. The Council and the European Parliament have approved the political agreement on the text of the 2019 CCP Supervision Regulation, but the text is still subject to legal revision and translation prior to its publication in the EU Official Journal.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudge the Commission's final decision.

The mandate follows EMIR (Article 82), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),³ and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").⁴

According to Article 25f(7) of EMIR as amended, with regard to the procedural rules for taking supervisory measures and imposing fines on third-country CCPs, the Commission shall adopt delegated acts to specify further the 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 the limitation periods for the imposition and enforcement of penalties.

Moreover, as a result of the amendments in EMIR REFIT⁵, the Commission's Delegated Regulation (EU) No 667/2014 supplementing Regulation (EU) No 648/2012 with regard to rules of procedures for penalties imposed on trade repositories by ESMA including rules on the right of defence and temporal provisions¹⁶, may have to be amended.

The European Parliament and the Council shall be duly informed about this mandate.

¹ 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.

² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0438+0+DOC+PDF+V0//EN>

³ Communication of 9.12.2009. COM (2009) 673 final.

⁴ OJ L 304, 20.11.2010, p. 47.

⁵ <https://eur-lex.europa.eu/eli/reg/2019/834/oj>

¹⁶ OJ L 179, 19.6.2014, p. 31.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee,¹⁷ the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 82 of EMIR. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context

1.1 Scope

On 13 June 2017, the Commission published its proposal to amend EMIR as regards the procedures and authorities involved for the authorisation of central counterparties ('CCPs') and requirements for the recognition of third-country CCPs. On 13 March 2019, the European Parliament and the Council reached a political agreement on a compromise text, which was formally endorsed by the two institutions on 18 April 2019 and 20 March 2019, respectively. Publication in the Official Journal is expected by Q3 2019. The text will enter into force on the twentieth day following its publication.

EMIR as amended will strengthen the framework for the supervision of Union and third-country CCPs that provide clearing services to EU clearing members or trading venues. This is to address the increasing concentration of risk in these infrastructures and the significant proportion of financial instruments denominated in Union currencies that are cleared outside the Union, including as a result of the expected withdrawal of the UK from the Union. The objective of EMIR as amended is to reinforce the overall stability of the Union's financial system.

EMIR as amended will give the European Securities and Markets Authority (ESMA) direct recognition and supervisory powers over third-country CCPs. According to Articles 25f, 25g and 25h ESMA will have the power to impose fines and periodic penalty payments on such CCPs that have committed infringements listed in Annex III of EMIR as amended.

According to Article 25f of EMIR as amended, with regard to the procedural rules for taking supervisory measures and imposing fines on third-country CCPs, 'the Commission shall adopt delegated acts in accordance with Article 82 to specify further the 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 the limitation periods for the imposition and enforcement of penalties'.

¹⁷ Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p.45.

An earlier amendment to EMIR (EMIR REFIT) has been published in the Official Journal on 28 May 2019. The text will enter into force on the twentieth day following its publication. Those amendments introduce changes to the rules of procedure for taking supervisory measures and imposing fines, including the rights of the defence, in Articles 64, 65 and 67 in relation to ESMA's power to impose fines and periodic penalty payments on trade repositories. These amendments should be reflected, as appropriate, in Commission Delegated Regulation (EU) No 667/2014 on the rules of procedure for penalties imposed on trade repositories by ESMA including rules on the right of defence and temporal provisions.

This provisional mandate focuses on the technical aspects of the rules of procedure for the exercise of the power to impose fines or periodic penalty payments on third-country CCPs and on trade repositories, as well as of the rules on the limitation periods with respect to third-country CCPs.

1.2 Principles that ESMA should take into account

On the working approach, ESMA is invited to take account of the following principles:

1. The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of EMIR as amended. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens.
2. The technical advice should take account of the rule-of-law principle, which requires appropriate rights of defence for persons that are subject to ESMA's supervision. At the same time, it should ensure a high level of investor protection, which is a guiding principle of EU financial regulation and requires a strong supervisor with the power to carry out supervision and ensuring compliance with EMIR in an effective and efficient way.
3. When preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
4. In accordance with the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**")¹⁸, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.
5. ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.

¹⁸ 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), OJ L 331, 15.12.2010, p. 84.

6. In accordance with the ESMA Regulation, ESMA should, where relevant, involve the European Banking Authority and the European Insurance and Occupational Pensions Authority in order to ensure cross-sectoral consistency. It should also cooperate, where relevant, with the European Systemic Risk Board on any issues related to systemic risk.
7. In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner, and take into account the resulting opinions in its advice. ESMA should provide a detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to its technical advice. The technical advice should justify ESMA's choices vis-à-vis the main arguments raised during the consultation.
8. ESMA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. ESMA should provide the Commission with a description of the problem, the objectives of the technical advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The cost-benefit analysis should justify ESMA's choices vis-à-vis the main considered options.
9. ESMA's technical advice should not take the form of a legal text. However, ESMA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.
10. ESMA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
 1. the relevant provisions of EMIR, as amended;
 2. the corresponding recitals, or;
 3. the relevant Commission's request included in this mandate.
11. ESMA should address to the Commission any question to clarify the text of EMIR as amended that ESMA considers of relevance to the preparation of its technical advice.

2 Procedure

The Commission is requesting ESMA's technical advice in view of the preparation of a delegated act to be adopted pursuant to EMIR, as amended, and in particular regarding the questions referred to in section 3 of this provisional mandate.

The mandate takes into account EMIR (Article 82), the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this provisional mandate. The technical advice received on the basis of this provisional mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to EMIR, as amended.

The Commission has duly informed the European Parliament and the Council about this provisional mandate. As soon as the Commission adopts a delegated act, it will notify it simultaneously to the European Parliament and the Council.

3 ESMA is invited to provide technical advice on the following issues

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments on third-country CCPs, 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 enforcement of penalties, and more specifically on the following aspects:

- ESMA is invited to advise on the procedure regarding the persons' subject to the investigations rights to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.

- ESMA is invited to advise on the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding third-country CCPs.

- ESMA is invited to advise on the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.

- ESMA is invited to advise on the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.

- ESMA is invited to advise on the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.

- ESMA is invited to advise on the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information.
- ESMA is invited to advise on the limitation periods for the imposition of penalties.
- ESMA is invited to advise on the limitation periods for the enforcement of penalties.
- ESMA is invited to advise on the calculation of periods, dates and time limits to be laid down in the delegated act.
- ESMA is invited to reflect on the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

ESMA is also invited to provide technical advice to assist the Commission in formulating amendments, if and where appropriate, to the Commission Delegated Regulation (EU) No 667/2014 on the rules of procedure for penalties imposed on trade repositories by ESMA including rules on the rights of defence and temporal provisions, and more specifically on the following aspects:

- ESMA is invited to advise on the procedure for interim decisions to impose fines or periodic penalty payments on trade repositories, adopted by ESMA 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, and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.
- ESMA is invited to advise on whether – in light of the amendments to the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information – the Commission Delegated Regulation should be amended.
- ESMA is invited to advice on whether – in light of EMIR's amendments– the Commission Delegated Regulation should be amended in order to ensure a degree of consistency in the procedures applicable to third-country CCPs and to trade repositories where appropriate.

4. Indicative timetable

This provisional mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of EMIR that allows the European Parliament and the Council to object to a delegated act within a period of three months, extendible by three further months. Delegated acts will only enter into force if neither the European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.



In order for EMIR as amended to be fully operational and for ESMA to be able to impose fines or periodic penalty payments on third-country CCPs, it is important to start working on this issue in due time.

The deadline set to ESMA to deliver the technical advice is therefore Q1 2020.