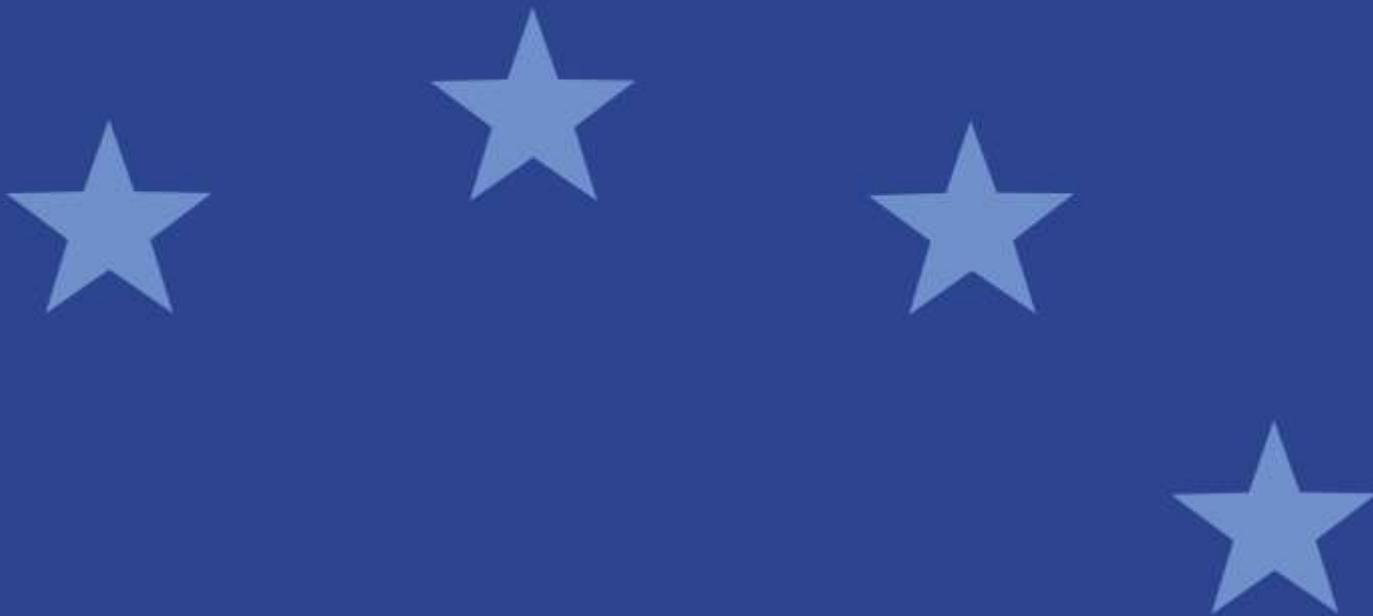




European Securities and  
Markets Authority

# Consultation Report

ESMA's Technical Advice to the Commission on procedural rules to impose fines on Trade  
Repositories







## **Responding to this paper**

ESMA invites comments on all matters in this paper. Comments are most helpful if they:

- Address the advice proposed on the different matters;
- Indicate the specific point to which the comment relates;
- Contain a clear rationale; and
- Describe any alternatives ESMA should consider.

ESMA will consider all comments received by **15 November 2013**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Consultations'.

### **Publication of responses**

All contributions received will be published following the close of the consultation period, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Disclaimer'.

### **Who should read this paper**

Although all interested stakeholders are invited to respond to this consultation paper, it would primarily be of interest to Trade Repositories (TRs), as well as any market participant which intends to apply for registration as a TR under (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.



## Table of Contents

I. Executive Summary	5
II. Introduction	7
III. Procedures to guarantee the rights of defence	8
IV. Procedures regarding access to files	11
V. Documents to be submitted by the investigation officer	12
VI. Limitation period for the imposition of penalties	13
VII. Limitation period for the enforcement of penalties	14
VIII. Methods for the collection of fines or periodic penalty payments	15
Annex I - Formal request for advice	16
Annex II - Commission Delegated Regulation (EU) No 946/2012	22



## **I. Executive Summary**

### **Reasons for publication**

The European Securities and Markets Authority (ESMA) received a formal request on 29 April 2013 from the European Commission (Commission) to provide technical advice to assist the Commission in formulating procedural rules to impose fines and periodic penalty payments to trade repositories (TRs) by delegated act (Annex I).

ESMA has prepared this document in order to consult the interested parties for the purposes of producing the advice. Respondents to this consultation are encouraged to provide the relevant information in support of their arguments or proposals.

### **Contents**

This document sets out ESMA's preferred options for the procedural rules on imposition of fines and periodic penalty payments to TRs and welcomes comments in order to assist in the production of the advice.

In particular, ESMA's preferred options for the abovementioned procedural rules are in respect of:

- the procedures to guarantee the rights of defence both during and upon completion of investigations, including for any oral hearings;
- the reasonable time limit for written submissions and/or convocation of any oral hearing;
- the procedures regarding access to files by the persons subject to investigations, preservation of legitimate interests of other persons in the protection of their business secrets and protection of confidential information affecting third parties;
- the documents to be submitted by the independent investigation officer (investigation officer) to ESMA's Board of Supervisors (BoS);
- the limitation periods for imposition or enforcement of penalties;
- the methods for the collection of fines or periodic penalty payments.

In order to deliver its advice to the Commission, ESMA took into account the existing regulatory framework of the Union, in particular in areas where European institutions have the right to impose fines on market participants. In addition, ESMA has considered the rules of procedure regarding fines and periodic penalty payments that apply to Credit Rating Agencies (CRAs) pursuant to Regulation (EC) No 1060/2009 of 16 September 2009, as amended, (Regulation 1060/2009) and, in particular, to Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 (Delegated Regulation) (Annex II) and the relevant experience acquired by ESMA when operating under these rules of procedure.

In the present document relevant to TRs, ESMA has considered that it would be desirable to appoint a panel or committee to carry out particular steps of the procedure in order to achieve a more effective process, whilst fully respecting the rights of defence of persons subject to investigation and the principle of collegiality which governs ESMA's operations. The execution of such steps by an appointed panel or committee would ensure that the BoS is able to function properly and perform its duties whilst reserving



for it the adoption of any decision of principle. ESMA has considered that these steps are interim and procedural measures and therefore managerial or administrative in nature. Therefore, ESMA has considered that the particular steps could be delegated under Article 41(1) of the Regulation (EU) No 1095/2010 (ESMA Regulation). In such case, the BoS would retain collective responsibility for the consequences of such steps and the possibility to exercise control. Accordingly, this document sets out certain proposals which ESMA believes could be carried out by such a panel or committee.

ESMA notes that the advice requested is in relation to the requirement at Article 64 (7) of EMIR for the Commission to make further rules of procedure for the exercise of the power by ESMA to impose fines or periodic penalty payments, and accordingly this technical advice does not address the matter of procedures in respect of supervisory measures (under Article 73 of EMIR) unconnected with fines or withdrawals of registration under Article 71 of EMIR which are outside the scope of the empowerment under Article 64(7) of EMIR or the request for technical advice.

In addition, regarding periodic penalty payments imposed by ESMA during the investigation phase (Article 66(1)(b) in relation to Articles 61, 62 and 63 of EMIR), such periodic penalty payments should be subject to a separate, fast procedure distinct from the one applicable for the imposition of fines (the procedure set forth by Articles 64(1) to 64(6) does not apply). This procedure will not be covered by the consultation paper. Periodic penalty payments imposed under Article 66(1)(b) of EMIR by ESMA will be covered by the technical advice to be sent to the Commission, but the practicalities of this procedure still need to be elaborated.

### **Next steps**

ESMA will consider the feedback it received to this consultation and will provide by 31 December 2013 its advice on technical aspects of the future regulation which will be adopted by the Commission in the form of a delegated act in accordance with Article 290 of the TFEU.

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## II. Introduction

1. Pursuant to Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), ESMA is responsible, among other things, for the direct supervision of trade repositories (TRs). With respect to TRs, ESMA must assess and examine their applications for registration and once the registration is granted, must carry out their on-going supervision. When the conditions in EMIR are fulfilled, ESMA may also recognize TRs which are authorised and subject to effective supervision in a third country which (i) has been recognised by the Commission as having an equivalent and enforceable regulatory and supervisory framework and which (ii) has entered into an international agreement with the Union as well as (iii) into cooperation arrangements.
2. Pursuant to Article 65 of EMIR, where ESMA finds, in accordance with Article 64(5) of EMIR that a TR has, intentionally or negligently, committed one of the infringements listed in Annex I of EMIR, it must impose a fine in accordance with the relevant provisions of Article 65.
3. Pursuant to Article 66 of EMIR, ESMA must impose periodic penalty payments in order to compel TRs or other relevant persons to put an end to an infringement or respectively to comply with their obligations in accordance with EMIR.
4. In accordance with Article 64(7) of EMIR the Commission must adopt by means of delegated acts (provided for in Article 290 of the TFEU) further rules of procedure for the exercise by ESMA of its power to impose fines or periodic penalty payments, including provisions on the rights of defence, temporal provisions, and the collection of fines or periodic penalty payments, and must adopt detailed rules on the limitation periods for the imposition and enforcement of penalties.
5. On 29 April 2013 ESMA received a formal request from the Commission to provide technical advice to assist the Commission in formulating a Regulation on the procedural rules to impose fines or periodic penalty payments to TRs by a delegated act. The technical advice does not cover any other type of procedures which are not related to the imposition of fines and periodic penalties (e.g. withdrawal of registration under the conditions specified by Article 71 of EMIR, and those supervisory measures under Article 73 of EMIR which are unconnected with fines). The technical advice is to be delivered to the Commission by 31 December 2013.
6. Finally, ESMA has had regard to the Delegated Regulation, 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. This document is the nearest model for the purposes set out in the empowerment under Article 64(7) of EMIR. ESMA has also had regard to the Charter of Fundamental Rights of the European Union.

### **III. Procedures to guarantee the rights of defence**

7. For its advice on the procedures to guarantee the rights of defence ESMA has taken into consideration Article 23e and Article 36c and Recital 5 of the Regulation 1060/2009, Article 2, Article 3, Article 4 and Recital 3 of the Delegated Regulation, Article 65 and Article 67 of EMIR, Article 41 of the Charter of Fundamental Rights of the European Union.
8. Regarding the procedural rules which would guarantee the rights of defence, ESMA considers that these should cover the right of the person subject to investigation to be heard at different stages of the procedure.
9. One of the stages at which the person subject to investigation has the right to be heard is during and after the completion of the investigation by the investigation officer when Articles 64(1) to 64(6) are applicable.
10. After the completion of the investigation, the investigation officer has to produce a statement of findings.
11. In addition to the comments which the person subject to investigation could submit during the investigation, the person subject to investigation must be given the right to comment on the statement of findings of the investigation officer.
12. The statement of findings must set out the facts and the reasons for which they are liable to constitute one or more of the infringements listed in the Annex I of EMIR, including any aggravating or mitigating factors of these infringements.
13. The statement of findings must set a reasonable time limit within which the person subject to investigation may make its written submissions. The investigation officer should not be obliged to take into account written submissions received after that time limit has expired.
14. In its written submissions, the person subject to 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. It should be able to propose that the investigation officer hears other persons who may corroborate the facts set out in the submissions of the person subject to investigation.
15. The investigation officer may invite a person subject to investigation to attend an oral hearing if the investigation officer considers it is necessary in order to clarify the written submissions of the person subject to investigation. If an oral hearing takes place, the investigation officer must subsequently send the minutes to the person subject to investigation. Persons subject to investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by the investigation officer. Oral hearings should not be held in public.
16. If as a result of the submissions, the investigation officer considers it necessary to make material changes to his/her statement of findings, the investigation officer must provide the person subject to investigation with the revised version of the statement of findings and with the opportunity to make further submissions. If the investigation officer finds this necessary, the investigation officer may invite the person subject to investigation to attend a further oral hearing.

17. ESMA considers that another stage where the right to be heard should be guaranteed is where the complete file of the investigation is submitted to the BoS for deliberation and adoption of a decision.
18. Once the investigation officer has finalised his/her statement of findings, having fully respected the rights of defence of the person subject to investigation, he/she must send the complete file with the findings to the ESMA BoS.
19. At the same time as sending the file to the ESMA BoS, the investigation officer must notify the person subject to investigation of that fact.
20. The investigation officer may not participate in the deliberations of the ESMA BoS or in any other way intervene in its decision-making process.
21. It is proposed that the considerations and actions in paragraphs 22 to 29 below may be taken by ESMA acting by a panel of the BoS appointed under Article 41 (1) of the ESMA Regulation.
22. Where ESMA considers that the file submitted by the investigation officer is not complete or is insufficient to support findings that the facts constitute one or more infringements, it must send it back to the investigation officer with a reasoned request for additional documents, information or other evidence.
23. If ESMA considers that the file is complete it must consider whether or not it is minded to adopt the investigation officer's statement of findings.
24. If ESMA is not minded to adopt any part of the investigation officer's findings because the facts do not constitute one or more infringements, it must recommend to the BoS that the file be closed and the person subject to investigation is notified of the decision of the BoS accordingly.
25. If ESMA is not minded to adopt any part of the investigation officer's findings on the basis that the evidence discloses different infringements, it must appoint a new investigation officer, who must submit to ESMA a new statement of findings while ensuring that the rights of defence of the person subject to investigation have been fully respected in accordance with the above procedure.
26. If ESMA is minded to adopt only part of the investigation officer's findings (because it concludes that, as to the findings of the part not to be adopted, the alleged infringements are not proved) then as to those findings it must recommend to the BoS that the file be closed and the person subject to investigation is notified of the decision of the BoS accordingly. Those findings which it is minded to adopt should be left on the file.
27. In respect of findings of the investigation officer which ESMA is minded to adopt ESMA must inform the person subject to investigation accordingly and set a reasonable time limit in which the person subject to investigation may make further written submissions to the BoS.
28. ESMA should not be obliged to take into account written submissions received after the expiry of the time limit.
29. Although the right to be heard would be already observed when granting the persons concerned the right to make written submissions in response to the statement of findings submitted to ESMA by the investigation officer, ESMA may also invite the person subject to investigation to an oral hearing if it considers that it is necessary in order to clarify the written submissions of the person subject to

the investigation. If an oral hearing takes place, ESMA should send the minutes reflecting the oral hearing to the person subject to investigation. At an oral hearing, persons subject to investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by the investigation officer. Oral hearings should not be held in public.

30. The actions and decisions of ESMA referred to in paragraphs 31 to 32 must be taken by ESMA acting by its Board of Supervisors.
31. ESMA should consider the written submissions and, if relevant, the minutes of the submissions made at the oral hearing.
32. On the basis of the statement of findings and the written submissions and, if relevant, the minutes of the submissions made at the oral hearing, ESMA must decide whether to:
  - a. close the case;
  - b. impose a fine or a periodic penalty payment relating to a fine on the person subject to investigation;
33. If ESMA introduces a material change to the statement of findings, it must give the person subject to investigation another opportunity to exercise its rights of defence by way of written submissions.
34. If ESMA adopts a decision imposing a penalty on the person subject to investigation, it must notify the person subject to investigation of that decision. In the case of a fine, this notification must be done immediately. The disclosure of the fine to the public should be in line with Article 68 of EMIR.
35. For the purposes of paragraphs 16 and 33, whichever is relevant, a material change must mean either a new infringement being alleged or new facts or legal arguments being made on which the person subject to investigation concerned has not had the opportunity to comment.



#### **IV. Procedures regarding access to files**

36. For its advice on the procedure regarding access to files ESMA has taken into consideration Article 5 of the Delegated Regulation.
37. ESMA considers that, if so requested, it should grant access to the file to the person subject to investigation subject to the limitations set out in Article 64(4) of EMIR.
38. The right of access to the file shall not extend to confidential information or internal preparatory documents of ESMA. Access should be granted following the notification of any statement of findings.
39. When granting access to files, ESMA should clarify the conditions for the access.
40. File documents, to which access has been granted, should be used only for the purposes of judicial or administrative proceedings concerning the application of the provisions of EMIR related to TRs.

## **V. Documents to be submitted by the investigation officer**

41. For its advice on the documents which are to be submitted by the investigation officer ESMA has taken into consideration Article 3 of the Delegated Regulation.
42. ESMA considers that the file referred to in Article 64 of EMIR must contain at least the following documents:
  - a. copy of the statement of findings that has been addressed to the person subject to investigation,
  - b. copy of the written submissions by the person subject to investigation,
  - c. minutes of any oral hearing.

The statement of findings must be accompanied by the evidence on which the findings are based.

## **VI. Limitation period for the imposition of penalties**

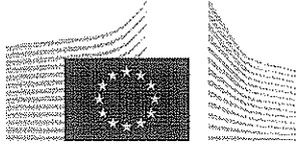
43. For its advice on the limitation period for the imposition of penalties ESMA has taken into consideration Article 6 of the Delegated Regulation.
44. ESMA's powers to impose fines on TRs should be subject to a limitation period of five years.
45. The limitation period for imposition of penalties should begin to run on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, those periods of time should begin to run on the day on which the infringement ceases.
46. Any action taken by ESMA for the purpose of the investigation or proceedings in respect of an infringement of EMIR should interrupt the limitation period for the imposition of fines. That limitation period should be interrupted with effect from the date on which the action is notified to the person subject to the investigation or proceedings.
47. Each interruption should cause the limitation period to start running afresh. However, the limitation period should 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. That period shall be extended by the time during which limitation is suspended.
48. In addition, the limitation period for imposing fines should be suspended for as long as a decision of ESMA is the subject of proceedings pending before the Board of Appeal, in accordance with Article 58 of the ESMA Regulation, and before the Court of Justice of the European Union, in accordance with Article 69 of EMIR.

## **VII. Limitation period for the enforcement of penalties**

49. For its advice on the limitation period for the enforcement of penalties ESMA has taken into consideration Article 7 of the Delegated Regulation.
50. The power of ESMA to enforce decisions taken pursuant to Article 65 and 66 of EMIR should be subject to a limitation period of five years.
51. The start date for such limitation period should be the day following that on which the decision becomes final.
52. Reasons for the interruption of the limitation period could be:
  - a. a notification by ESMA to the person subject to investigation or other person concerned of a decision varying the original amount of the fine or periodic penalty payment; or
  - b. any action of ESMA or a Member State authority acting at the request of ESMA, with the purpose to enforce payment or payment terms and conditions of the fine or periodic penalty payment.
53. Any interruption should cause the limitation period to start running afresh.
54. The limitation period for enforcement could be suspended if:
  - a. time to pay is allowed;
  - b. enforcement of payment is suspended pursuant to a pending decision of the Board of Appeal, in accordance with Article 58 of the ESMA Regulation, and the Court of Justice of the European Union, in accordance with Article 69 of EMIR.

## VIII. Methods for the collection of fines or periodic penalty payments

55. Regarding the technical advice on the methods for the collection of fines or periodic penalty payments, ESMA is of the view that the rule laid down in Article 8 of the Delegated Regulation could be reflected in the relevant provisions of the new delegated act.
56. **Comments are welcome on all the sections of this CP.** Respondents are invited to clearly highlight the section and provisions to which their comments refer and provide supporting data whenever possible.



EUROPEAN COMMISSION  
Directorate General Internal Market and Services  
FINANCIAL MARKETS

Director

Brussels, 29 April 2013  
DG Markt/G2/MJ/kc (2013) 1075099

Mr Steven Maijoor  
Chair of ESMA  
ESMA  
103, rue de Grenelle  
75007 Paris  
France

**Subject: Request for ESMA technical advice on possible delegated acts concerning the procedural rules to impose fines to trade repositories**

Dear Mr Maijoor,

I am writing with a formal request to ESMA to provide the Commission with technical advice regarding the procedural rules to impose fines to trade repositories.

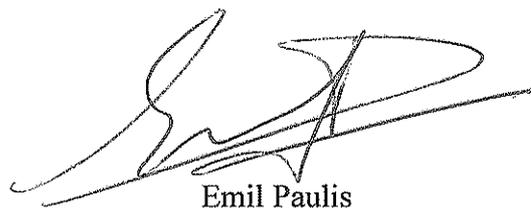
With the entry into force of the Regulation on OTC derivatives, central counterparties and trade repositories (EMIR) last August, ESMA is granted direct supervisory powers over trade repositories, including the power to impose fines and/or periodic penalty payments in accordance with Article 65 and 66 of EMIR.

In accordance with Article 64(7) of EMIR, the Commission shall adopt a Regulation in the form of a delegated act, to specify "*further rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and shall adopt detailed rules on the limitation periods for the imposition and enforcement of penalties*".

Trade repositories have already started applying to ESMA for registration and will be fully operational in 2014. I would be grateful if ESMA could provide the Commission with its technical advice regarding the technical aspects of the Regulation on procedural rules to impose fines to trade repositories at the latest by 31 December 2013.

I attach a formal mandate for the technical advice that we are requesting from ESMA.

Please do not hesitate to contact me if you have any further questions.



Emil Paulis

Enclosures: Formal request to ESMA for technical advice on possible delegated acts concerning the procedural rules to impose fines to trade repositories

Copies: Nadia Calviño

Contact:

Muriel Jakubowicz, Telephone: +32 229 58154, [Muriel.Jakubowicz@ec.europa.eu](mailto:Muriel.Jakubowicz@ec.europa.eu)

## FORMAL REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE PROCEDURAL RULES FOR TAKING SUPERVISORY MEASURES AND IMPOSING FINES ON TRADE REPOSITORIES

With this formal mandate the Commission seeks ESMA's technical advice on possible delegated acts concerning Regulation No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ('EMIR' or the "legislative act"). These delegated acts should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

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

The mandate follows the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "ESMA Regulation"),<sup>1</sup> 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"),<sup>2</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission (the "Framework Agreement")<sup>3</sup>

According to Article 64(7) of the legislative act and with regard to the procedural rules for taking supervisory measures and imposing fines to trade repositories, the Commission shall adopt, by means of delegated acts, further rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defense, temporal provisions, and the collection of fines or periodic penalty payments, and shall adopt detailed rules on the limitation periods for the imposition and enforcement of penalties.

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

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,<sup>4</sup> 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 the legislative act. 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

The Regulation on OTC derivatives, central counterparties and trade repositories (EMIR) entered into force on 16 August 2012.<sup>5</sup> On 19 December 2012, the Commission adopted the regulatory technical standard pursuant to Article 56 of EMIR specifying the details of the

<sup>1</sup> 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, 84 15.12.2010.

<sup>2</sup> Communication of 9.12.2009. COM (2009) 673 final.

<sup>3</sup> OJ L304/47, 20.11.2010, p. 47-62.

<sup>4</sup> Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L191, 17.7.2001, p.45-46.

<sup>5</sup> Regulation No 648/2012, L201/1 of 27/07/2012.

application for registration as a trade repository.<sup>6</sup> Following its publication in the Official Journal on 23 February 2013 and its entry into force on 15 March 2013, trade repositories can start applying to ESMA for registration. Once registered, trade repositories will be supervised by ESMA.

EMIR grants ESMA direct registration and supervisory powers over trade repositories. In accordance with Articles 64, 65 and 66 of EMIR, ESMA has the power to impose fines and periodic penalty payments on trade repositories that have committed infringements listed in Annex I of the legislative act.

According to Article 64 of EMIR, the Commission shall adopt a delegated act on rules of procedure for taking supervisory measures and imposing fines. This should be adopted in the form of a Regulation. It should specify further rules of procedures for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defense, temporal provisions and the collection of fines or periodic penalty payments. It shall also include detailed rules on the limitation periods for the imposition and enforcement of penalties.

This mandate focuses on the technical aspects of the Regulation on the rules of procedures for the exercise of the power to impose fines or periodic penalty payments and on the rules on limitation periods.

## **1.2 Principles that ESMA should take into account**

ESMA is invited to take account of the following principles:

- It should respect the requirements of the ESMA Regulation, and, to the extent that ESMA takes over the tasks of CESR in accordance with Art 8(1)(1) of the ESMA Regulation, take account of the principles set out in the Lamfalussy Report<sup>7</sup> and those mentioned in the Stockholm Resolution of 23 March 2001<sup>8</sup>.
- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the delegated acts set out in the legislative act. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens for trade repositories.
- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union, in particular in areas where European Institutions or European agencies have the right to impose fines on market participants. For example, ESMA should build upon its previous experience in advising on the rules of procedures that apply to Credit Rating Agencies (CRAs).
- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if

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<sup>6</sup> Delegated Regulation (EU) No 150/2013 of 19 December 2012

<sup>7</sup> Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, chaired by M. Lamfalussy, Brussels, 15 February 2001.

([http://ec.europa.eu/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wise-men\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf))

<sup>8</sup> Results of the Council of Economics and Finance Ministers, 22 March 2001, Stockholm Securities legislation, (<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/105&format=HTML&aged=0&language=EN&guiLanguage=en>).

it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.

- 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.
- 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 with the European Systemic Risk Board on any issues related to systemic risk.
- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feedback statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.
- The technical advice carried out should contain sufficient and detailed explanations for the assessment done and be presented in an easily understandable language respecting current legal terminology at European level.
- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the legislative act, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.
- The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology in the Union.
- ESMA should address to the Commission any question they might have concerning the clarification on the text of the legislative act, which they should consider of relevance to the preparation of its technical advice.

## **2 Procedure**

The Commission is requesting the technical advice of ESMA in view of the preparation of the possible delegated acts to be adopted pursuant to the legislative act and in particular regarding the questions referred to in section 3 of this formal mandate.

The mandate takes into account the ESMA Regulation, the Declaration on Article 290 TFEU and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this 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 the delegated acts relating to the legislative act.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts possible delegated acts, it will notify them 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 Regulation on rules of procedure for the exercise of the power to impose fines or periodic penalty payments and on rules on limitation periods by delegated act, and more specifically on the following aspects:

- ESMA is invited to reflect on procedures to guarantee the rights of the defence both during and upon completion of investigations and advise on a reasonable time limit for submitting written submissions and/or convoke oral hearings.
- ESMA is invited to advise on the procedure for oral hearings, including the convocation of oral hearings as well as the procedure for attending oral hearings, in particular with regard to the qualified persons admitted to oral hearings.
- ESMA is invited to advise on procedures regarding access to the files for the persons subject to the investigations, preserving the legitimate interest of other persons in the protection of their business secrets, as well protecting confidential information affecting third parties.
- ESMA is invited to advise on the documents to be submitted by the investigating officer to ESMA, with a view to ensuring that ESMA is in a position to take into consideration all relevant facts into account when adopting supervisory measures and enforcement decisions on trade repositories.
- 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 reflect on the methods for the collection of fines or periodic penalty payments, including procedures to lodge the fines and/or periodic penalty payments until they become final following the outcome of all possible legal challenges.

### **4. Indicative timetable**

This mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of the legislative act which allows the European Parliament and the Council to object to a delegated act within a period of 3 months, extendible by 3 further months. The delegated act will only enter into force if neither 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.

The deadline set to ESMA to deliver the technical advice is 31 December 2013.

## 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**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

submissions in response to statements of findings issued by ESMA's investigating officer and ESMA's Board of Supervisors.

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

(4) Following the written submissions by the credit rating agency to the investigating officer, the Board of Supervisors will receive a complete file, including those submissions.

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies <sup>(1)</sup>, as amended by Regulation (EU) No 513/2011 <sup>(2)</sup>, and in particular Article 23e(7) thereof,

(5) However, it may occur that some elements of the written submissions that the credit rating agency made to the investigating officer or, the case being, to the Board of Supervisors, are not sufficiently clear or detailed, and that they need to be further explained by the credit rating agency. Should the investigating officer or, the case being, the Board of Supervisors, consider that this is the case, ESMA may convoke an oral hearing for the credit rating agency to clarify those elements.

Whereas:

(1) The Commission has been empowered to adopt rules of procedure for the exercise of the power to impose fines or periodic penalty payments by the European Securities and Markets Authority (ESMA) upon credit rating agencies and persons involved in rating activities. Those rules are to be adopted via delegated act and they should include provisions on rights of defence, temporal provisions, provisions on the collection of fines or periodic penalty payments, as well as detailed provisions on the limitation periods for the imposition and enforcement of fines and periodic penalty payments.

(6) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy is recognised in point (b) of Article 41(2) of the Charter of Fundamental Rights of the European Union. Articles 23e(4), 25(2) and Article 36c(2) of Regulation (EC) No 1060/2009 establish that, safeguard rights of defence of persons subject to the ESMA proceedings, they shall be entitled to have access to ESMA's file, subject to the legitimate interest of other persons in protecting their business secrets and of their personal data. The right of access to the file should not extend to confidential information.

(2) This delegated act specifies rules of procedures to be followed by ESMA when imposing fines and penalty payments as part of its direct supervisory power over credit rating agencies. It is important that such rules of procedure to be followed by an EU regulatory agency are directly applicable and do not require further implementation in national law. Therefore, it is appropriate that the Commission adopts these rules by means of an EU Regulation. Furthermore the objective of having uniform rules on rights of defence for credit rating agencies can only be achieved via Regulation.

(7) Council Regulation (EC) No 1/2003 <sup>(3)</sup> lays down detailed rules on limitation periods for when the Commission has to fine an undertaking under Article 101 or 102 of the Treaty on the Functioning of the European Union. Legislation in force in Member States also provides for rules on limitation periods either specifically within the securities field, or generally in their general administrative laws. Common features have been extracted from those national rules and from Union legislation and are mainly reflected in Articles 6 and 7 of this Regulation.

(3) The right to be heard is recognised in point (a) of Article 41(2) of the Charter of Fundamental Rights. In order to respect the rights of defence of credit rating agencies and of other persons subject to action by the European Securities and Markets Authority (ESMA) and to ensure that it takes all relevant facts into account when adopting enforcement decisions, ESMA should hear the credit rating agencies or any other persons concerned. The right to be heard should take place by granting the persons concerned the right to make written

(8) Regulation (EC) No 1060/2009 and this Regulation refer to time periods and dates. This is the case, for instance, for the registration process of credit rating agencies, or when establishing limitation periods for the imposition and enforcement of penalties. To enable those periods to be correctly calculated, it is appropriate to apply rules

<sup>(1)</sup> OJ L 302, 17.11.2009, p. 1.

<sup>(2)</sup> OJ L 145, 31.5.2011, p. 30.

<sup>(3)</sup> OJ L 1, 4.1.2003, p. 1.

which already exist within Union legislation, namely, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits <sup>(1)</sup> for acts of the Council and the Commission.

- (9) Article 36d of Regulation (EC) No 1060/2009 provides that penalties imposed by ESMA pursuant to Articles 36a and 36b of that Regulation shall be enforceable, and that enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The corresponding amounts shall be allocated to the general budget of the EU.
- (10) In the interest of an immediate exercise of effective supervisory and enforcement activity, this Regulation should enter into force on the third day following that of its publication,

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Subject matter

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

#### Article 2

##### Right to be heard by the investigating officer

1. Upon completion of his/her investigations and before submitting the file to ESMA's Board of Supervisors pursuant to Article 3(1), the investigating officer shall inform the person subject to investigation in writing of his/her findings and shall provide it with the opportunity to make written submissions pursuant to paragraph 3. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009, including any aggravating or mitigating factors of these infringements.
2. The statement of findings shall set a reasonable time limit within which the person subject to investigation may make its written submissions. The investigating officer shall not be obliged to take into account written submissions received after that time limit has expired.
3. In its written submissions, the person subject to investigation may set out all the facts known to it which are relevant to its defence. It shall attach any relevant documents as proof of the facts set out. It may propose that the investigating officer hear other persons who may corroborate the facts set out in the submissions of the person subject to investigation.
4. The investigating 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 investigating officer. Oral hearings shall not be held in public.

#### Article 3

##### Right to be heard by ESMA's Board of Supervisors with regard to fines and supervisory measures

1. The complete file to be submitted by the investigating officer to ESMA's Board of Supervisors shall include at least the following documents:
  - copy of the statement of findings that he addressed to the credit rating agency,
  - copy of the written submissions by the credit rating agency,
  - minutes of any oral hearing.
2. Where ESMA's Board of Supervisors considers that the file submitted by the investigating officer is not complete, it shall send back the file to the investigating officer with reasoned request for additional documents.
3. Where ESMA's Board of Supervisors considers, on the basis of a complete file, that the facts, described in the statement of findings, appear not to disclose any possible infringement of the ones listed in Annex III to Regulation (EC) No 1060/2009, it shall take a decision to close the case and it shall notify such a decision to the persons subject to investigation.
4. Where ESMA's Board of Supervisors does not agree with the findings of the investigating officer it shall submit a new statement of findings to the persons subject to investigation.

The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions. ESMA's Board of Supervisors 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 Articles 24 and 36a of Regulation (EC) No 1060/2009.

ESMA's Board of Supervisors 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's Board of Supervisors. Oral hearings shall not be held in public.

5. Where ESMA's Board of Supervisors agrees with the findings of the investigating 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's Board of Supervisors 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 Articles 24 and 36a of Regulation (EC) No 1060/2009.

<sup>(1)</sup> OJ L 124, 8.6.1971, p. 1.

ESMA's Board of Supervisors 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's Board of Supervisors. Oral hearings shall not be held in public.

6. If ESMA's Board of Supervisors has decided that one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 36a, it shall notify immediately such decision to the person subject to investigation.

#### Article 4

##### **Right to be heard by ESMA's Board of Supervisors with regard to periodic penalty payments**

Before taking a decision imposing a periodic penalty payment according to Article 36b(1) of Regulation (EC) No 1060/2009, the Board of Supervisors 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. The Board of Supervisor 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 credit rating agency or person concerned has complied with the relevant decision referred to in paragraphs (a) to (d) of Article 36b(1) of Regulation (EC) No 1060/2009, a periodic penalty payment can no longer be imposed.

ESMA's Board of Supervisors 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's Board of Supervisors. Oral hearings shall not be held in public.

#### Article 5

##### **Access to the file and use of documents**

1. If so requested, ESMA shall grant access to the file to the parties to whom the investigating officer or the Board of Supervisors has sent a statement of findings. Access shall be granted following the notification of any statement of findings.

2. File documents accessed pursuant to this Article shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EC) No 1060/2009.

#### Article 6

##### **Limitation periods for the imposition of penalties**

1. ESMA's powers to impose fines on credit rating agencies shall be subject to the following limitation periods:

(a) three years in the case of infringements for which the minimum basic amount of the fine foreseen in Article 36a(2) of Regulation (EC) No 1060/2009 is EUR 50 000 or less.

(b) five years in the case of all other infringements.

2. The periods of time 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, those periods of time shall begin to run on the day on which the infringement ceases.

3. Any action taken by ESMA for the purpose of the investigating or proceedings in respect of an infringement of Regulation (EC) No 1060/2009 shall interrupt the limitation period for the imposition of fines. That limitation period shall be interrupted with effect from the date on which the action is notified to the credit rating agency or the person subject to the investigating or proceedings.

4. Each interruption shall cause the limitation period to start running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without ESMA having imposed a fine. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

5. The limitation period for imposing fines 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 of the European Parliament and of the Council<sup>(1)</sup>, and before the Court of Justice of the European Union, in accordance with Article 36e of Regulation (EC) No 1060/2009.

#### Article 7

##### **Limitation periods for the enforcement of penalties**

1. The power of ESMA to enforce decisions taken pursuant to Articles 36a and 36b of Regulation (EC) No 1060/2009 shall be subject to a limitation period of five years.

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

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

(a) a notification by ESMA to the credit rating agency or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;

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

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

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

(a) time to pay is allowed;

<sup>(1)</sup> OJ L 331, 15.12.2010, p. 84.

(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 36e of Regulation (EC) No 1060/2009.

*Article 8*

**Collection of fines and periodic penalty payments**

The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest bearing account opened by the accounting officer of ESMA until such time as they become final. In the meantime such amounts shall not be entered in ESMA's budget or recorded as budgetary amounts.

Once ESMA's Accounting Officer has established that the fines and/or periodic penalty payments have become final following the outcome of all possible legal challenges he shall transfer

these amounts plus any interest accruing to the Commission. These amounts shall then be entered in the EU budget under general revenue.

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

*Article 9*

**Calculation of periods, dates and time limits**

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

*Article 10*

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 July 2012.

*For the Commission*  
*The President*  
José Manuel BARROSO

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