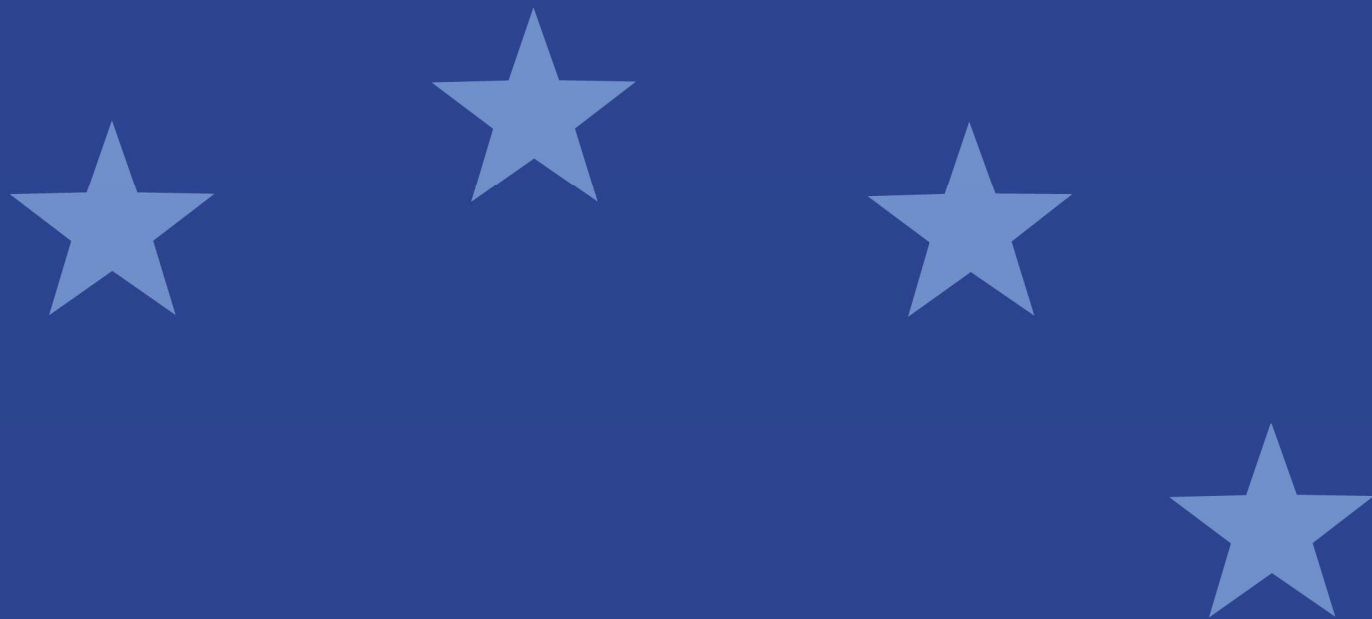




European Securities and
Markets Authority

Final Report

ESMA's Technical Advice to the Commission on procedural rules to impose fines and periodic penalty payments to Trade Repositories





Date: 20 December 2013

ESMA/2013/1965

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I. Executive Summary

Reasons for publication

On 29 of April 2013 ESMA received a formal request from the European Commission (the 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.

In order to deliver its advice to the Commission, ESMA consulted market participants regarding the procedural rules to impose fines and periodic penalty payments to TRs. Respondents to the consultation were encouraged to provide the relevant information in support of their arguments or proposals.

ESMA published the consultation on 18 October 2013. The market participants could provide their comments until 15 November 2013.

In total ESMA received 2 responses to the consultation. The respondents have required confidential treatment for their input. ESMA would like to thank respondents for providing input.

Contents

This document sets out a summary of the responses received by ESMA regarding the procedural rules to impose fines and periodic penalty payments to TRs and includes ESMA's final technical advice to the Commission on the future Regulation on the procedural rules to impose fines and periodic penalty payments to TRs which will be adopted by the Commission in the form of a delegated act.

It is worth noting that all major ESMA proposals were supported by respondents and where comments were received ESMA has considered them carefully.

Next steps

ESMA will follow-up on this work with the Commission towards the adoption of the Commission delegated regulation on procedural rules to impose fines and periodic penalty payments to TRs.



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. Furthermore, ESMA has had regard to the Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 (hereafter the "Delegated Regulation"), with regard to rules of procedure on fines imposed to credit rating agencies by ESMA, 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.
7. ESMA consulted stakeholders from 18 October 2013 to 15 November 2013. A total of 2 responses were received by ESMA.
8. This final report contains a summary of the responses received by ESMA and the rationale for retaining or amending the text of its advice to the Commission following the consultation process.

III. Analysis of the responses to the consultation

9. The respondents broadly agreed with the proposed procedural rules to impose fines and periodic penalty payments to TRs.
10. Several comments were made regarding the interpretation or implementation of certain provisions of EMIR. While ESMA agrees that in some cases there may be need for further clarification, ESMA is of the view that this cannot be done through the present technical advice as its objective is to deal with specific procedural matters.
11. In addition, ESMA notes that part of those comments or questions stem from insufficient understanding of the relevant provisions of EMIR and therefore are not directly relevant to the technical advice.
12. One of the respondents expressed concerns about possible actions by the person under investigation in case of procedural irregularities during the procedure of adoption by ESMA of the fine. While ESMA is determined to avoid any procedural irregularities, there is of course the possibility for the person under investigation to challenge procedural irregularities at different stages of the procedure, especially when they affect his/her rights of defence. However, ESMA does not consider that any amendment of the technical advice is required in this respect.
13. One of the respondents expressed concerns that the technical advice proposes a new phase in the procedure (between the completion of the investigation and the finalization of the statement of findings) which is not included in EMIR. ESMA does not share these concerns and considers the relevant paragraphs of the technical advice to be sufficiently clear in this respect.
14. Other comments require the clarification of the term “written submissions”. ESMA considers that it is clear that written submissions of the person under investigation should include comments of such person on the statement of findings but for avoidance of doubt it has included in the technical advice an express wording to this extent.
15. One of the participants has expressed concerns regarding the confidentiality of the information obtained by the person invited to an oral hearing. ESMA considers that such concerns are unfounded given that the person invited to the hearing (and not ESMA) will provide the information.
16. Part of the comments received express disagreement with ESMA’s choice of procedural rules concerning reasonable time limit for further written submissions on the findings of the investigation officer which ESMA is minded to adopt. ESMA is of the view that the reference to “reasonable time limit” is the best way to cover situations with different complexity and to apply correctly the principle of proportionality.
17. The last part of the comments received concern the choice of ESMA regarding limitation periods. ESMA notes that the objections made are not sufficiently justified. Furthermore, ESMA reminds that it has tried to keep consistency between the procedural rules regarding the imposition of fines and periodic penalty payments concerning TRs and those concerning CRAs.

Finally, the text was amended regarding material changes to the statement of findings to reflect the possibility that material changes could also follow from further investigation by the investigation officer.





ANNEX I – ESMA’s final technical advice on procedural rules to impose fines and periodic penalty payments to TRs



ESMA's Final Technical Advice on procedural rules to impose fines and periodic penalty payments to Trade Repositories



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I. Background

1. 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 is to be delivered to the Commission by 31 December 2013. ESMA consulted stakeholders from 18 October 2013 to 15 November 2013.
2. 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, (hereafter “Regulation 1060/2009”) and, in particular, to Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 (hereafter “Delegated Regulation”) and the relevant experience acquired by ESMA when operating under these rules of procedure.
3. In the present technical advice 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 ESMA’s Board of Supervisors (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. Consequently, ESMA has considered that the particular steps could be delegated under Article 41(1) of the Regulation (EU) No 1095/2010 (hereafter the “ESMA Regulation”). In such case, the BoS would retain collective responsibility for the consequences of such steps and the possibility to exercise control. Accordingly the technical advice sets out certain proposals which ESMA believes could be carried out by such a panel or committee.
4. 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.
5. 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). As a result, procedural rules regarding periodic penalty payments imposed under Article 66(1)(b) of EMIR by ESMA are covered by the present technical advice.

II. Procedures to guarantee the rights of defence

6. 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.

7. 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.
8. 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.
9. After the completion of the investigation, the investigation officer has to produce a statement of findings.
10. 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.
11. 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.
12. 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.
13. 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.
14. The investigation officer may invite the person subject to investigation to attend an oral hearing if the investigation officer considers it is necessary in order to clarify the written submissions including the comments 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.
15. If as a result of the submissions and or any further investigation, where necessary, 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.
16. 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.



17. 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.
18. 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.
19. The investigation officer may not participate in the deliberations of the ESMA BoS or in any other way intervene in its decision-making process.
20. The considerations and actions in paragraphs 21 to 28 below constitute measures of management or administration. As such, they are expected to be made or taken by ESMA acting by a panel appointed under Article 41 (1) of the ESMA Regulation.¹
21. Where the ESMA panel 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.
22. If the ESMA panel considers that the file is complete it must consider whether or not it is minded to adopt the investigation officer's statement of findings.
23. If the ESMA panel 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 that the person subject to investigation is notified of the decision of the BoS accordingly.
24. If the ESMA panel 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.
25. If the ESMA panel 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 is 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. In any case, the BoS will have access to all findings.
26. In respect of findings of the investigation officer which the ESMA panel is minded to adopt, it 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.
27. The ESMA panel should not be obliged to take into account written submissions received after the expiry of the time limit.

¹ Paragraphs 21 to 28 assume delegation to a panel by the BoS. When the BoS does not exercise this option, the considerations and actions in paragraphs 21 to 28 are made or taken by the BoS itself.

28. 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, the ESMA panel may also invite the person subject to investigation to an oral hearing before the panel 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, the ESMA panel 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.
29. The ESMA BoS should consider the written submissions and, if relevant, the additional information provided during the oral hearing as reflected in the minutes.
30. 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, the ESMA BoS 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;
31. If a material change is introduced to the statement of findings, the person subject to investigation must be given another opportunity to exercise its rights of defence by way of written submissions.
32. If the ESMA BoS 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.
33. For the purposes of paragraphs 15 and 31, 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.

III. Procedures regarding access to files

34. For its advice on the procedure regarding access to files ESMA has taken into consideration Article 5 of the Delegated Regulation.
35. 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.
36. 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.
37. When granting access to files, ESMA should clarify the conditions for the access.
38. 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.

IV. Documents to be submitted by the investigation officer



39. 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.

40. 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.

V. Limitation period for the imposition of penalties

41. For its advice on the limitation period for the imposition of penalties ESMA has taken into consideration Article 6 of the Delegated Regulation.

42. ESMA's powers to impose fines on TRs should be subject to a limitation period of five years.

43. 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.

44. 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.

45. 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.

46. 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.

VI. Limitation period for the enforcement of penalties

47. For its advice on the limitation period for the enforcement of penalties ESMA has taken into consideration Article 7 of the Delegated Regulation.

48. 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.



49. The start date for such limitation period should be the day following that on which the decision becomes final.

50. 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.

51. Any interruption should cause the limitation period to start running afresh.

52. 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.

VII. Methods for the collection of fines or periodic penalty payments

53. 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.

VIII. Periodic penalty payments imposed during the investigation phase

54. The imposition of periodic penalty payments under Article 66(1)(b) in relation to Article 61, 62 and 63 of EMIR should be subject to a separate, fast procedure distinct from the one applicable for the imposition of fines and the periodic penalty payments related to fines.

55. Where a decision pursuant to Articles 61, 62 or 63 of EMIR has been notified to a person referred to in Article 61(1) of EMIR and when the required action has not been taken by the person in compliance with the decision, ESMA officials involved in the supervisory activity should specify the failure to comply with ESMA's decision and the resulting obstacles to supervisory activity in the form of a statement of findings.

56. ESMA officials must notify the statement of findings to the person referred to in Article 61(1) of EMIR and set a reasonable time limit within which the person may make its written submissions containing its comments on the findings.



57. The actions and decisions of ESMA referred to in paragraphs 58 to 62 below constitute measures of management or administration. As such, they are expected to be taken by ESMA acting by a panel appointed under Article 41 (1) of the ESMA Regulation.²
58. ESMA officials should submit, where they still consider necessary for the investigation, the statement of findings together with any written submissions to the ESMA panel.
59. The ESMA panel should not be obliged to take into account written submissions received after the expiry of the time limit.
60. On the basis of the statement of findings and the written submissions the ESMA panel must decide whether the person referred to in Article 61(1) of EMIR has not complied with ESMA's decision pursuant to Articles 61, 62 or 63 of EMIR and, therefore, whether a decision imposing a periodic penalty payment under Article 66(1)(b) of EMIR must be adopted.
61. The decision imposing a periodic penalty payment must indicate the legal basis and reasons for the decision, the amount of the periodic penalty payment, the starting date for the imposition of the periodic penalty payment and the period for which it is imposed.
62. The decision of the ESMA panel should also indicate the right to appeal before ESMA's Board of Appeal and to have it reviewed by the Court of Justice of the European Union in accordance with Article 60 and 62 of ESMA Regulation.

² Paragraphs 58 to 62 assume delegation to a panel by the BoS. When the BoS does not exercise this option, the actions and decisions in paragraphs 58 to 62 are taken by the BoS itself.