

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**"),¹ 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**"),² and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**")³

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.

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,⁴ 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 2012.⁵ On 19 December 2012, the Commission adopted the regulatory technical standard pursuant to Article 56 of EMIR specifying the details of the

¹ 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.

² Communication of 9.12.2009. COM (2009) 673 final.

³ OJ L304/47, 20.11.2010, p. 47-62.

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

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

application for registration as a trade repository.⁶ 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 Report⁷ and those mentioned in the Stockholm Resolution of 23 March 2001⁸.
- 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

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

⁷ 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)

⁸ 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.