

DECISION OF THE BOARD OF SUPERVISORS

Decision to adopt a supervisory measure taking the form of a public notice and to impose a fine in accordance with Statement of Findings in accordance with Articles 64(5), 65, 67 and 73 of Regulation (EC) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

The Board of Supervisors (“Board”),

Having regard to the Treaty on the Functioning of the European Union (“Treaty”),

Having regard to 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (‘ESMA Regulation’), and in particular Article 43(2) thereof,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (‘EMIR’), in particular Articles 55(4), 64, 65, 67, 73 and 81(2) thereof,

Having regard to Commission Delegated Regulation (EU) No 667/2014 of 13 March 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions (‘Procedural Regulation’), in particular Article 3 thereof,

Whereas:

1. On the basis of the file containing the independent investigation officer's findings, and the Board having considered submissions on behalf of DTCC Derivatives Repository Ltd, the Board finds that the registered trade repository DTCC Derivatives Repository Ltd has committed the infringement listed in Annex I, III (b) of EMIR.
2. Based on the evidence put before it, the Board finds that DTCC Derivatives Repository Ltd negligently committed the infringement listed in Annex I, III (b) of EMIR.
3. Based on the evidence put before it, the Board further finds that the aggravating factors listed in Annex II, I (b), (c) and (d) of EMIR apply in relation to the commission of the said negligent infringement.
4. The Board thus decides to adopt a supervisory measure taking the form of a public notice in accordance with Article 73 of EMIR in addition to the imposition of a fine.
5. The Board decides to impose a fine of €64,000 (being sixty four thousand euro) in respect of the negligent commission of the infringement listed in Annex I, III (b) of EMIR, in accordance with Article 65 of EMIR.

Has adopted this decision:

Article 1

The Board finds that the registered trade repository DTCC Derivatives Repository Ltd has committed the infringement listed in Annex I, III (b) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

Article 2

The Board of Supervisors takes the decision to adopt a supervisory measure taking the form of the following public notice, in accordance with Articles 64(5) and 73 of Regulation ((EC) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories:

Public notice regarding negligent breach by DTCC Derivatives Repository Ltd of its legal obligation to ensure immediate access for regulators to data reported under EMIR

DTCC Derivatives Repository Ltd ('DDRL') is a trade repository registered in the European Union and is part of the DTCC group which includes a number of companies providing post-trading services to the global financial services industry. DDRL was registered by ESMA as a trade repository under Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories ('EMIR') on 7 November 2013. ESMA has responsibilities for the supervision and enforcement of provisions under EMIR concerning DDRL and other trade repositories registered in the EU.

In May 2014, ESMA's supervisory team became aware of delays in providing regulators with access to data reported to DDRL under EMIR. Following further examination, the supervisory team formed the view that there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in EMIR. The matter was accordingly referred to an independent investigation officer (the 'IIO'). The IIO considered the evidence referred to him and conducted further investigations, before submitting his findings to ESMA's Board of Supervisors (the 'ESMA Board').

Based on the findings of the IIO and the evidence put before it, the ESMA Board found on 23 March 2016 that an examination of the facts showed that DDRL had committed the following infringement under EMIR and had done so negligently.

DDRL committed an infringement of EMIR by not allowing regulators and supervisors direct and immediate access to the details of derivatives contracts they need to fulfil their responsibilities and mandates

A) The relevant legal provisions

Article 9(1) of EMIR provides the following requirement:

"counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract".

Article 81(2) and (3) of EMIR provides the following requirement to ensure access for certain regulators and supervisors to the details of derivatives contracts reported to a trade repository under Article 9(1) of EMIR :

2. A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

3. A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

(a) ESMA;

(b) the ESRB;

(c) the competent authority supervising CCPs accessing the trade repository;

(d) the competent authority supervising the trading venues of the reported contracts;

(e) the relevant members of the ESCB;

(f) the relevant authorities of a third country that has entered into an international agreement with the Union as referred to in Article 75;

(g) supervisory authorities appointed under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids;

(h) the relevant Union securities and market authorities;

(i) the relevant authorities of a third country that have entered into a cooperation arrangement with ESMA as referred to in Article 76;

(j) the Agency for the Cooperation of Energy Regulators;

(k) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council”.

In connection with the above requirement to ensure direct and immediate access to data reported to a trade repository, Annex I, III (b) of EMIR provides for the following infringement:

“III. Infringements relating to transparency and the availability of information:

[...]

(b) a trade repository infringes Article 81(2) by not allowing the entities referred to in Article 81(3) direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.”

B) Factual background

In 2013, during the process of its registration as a trade repository under EMIR, DDRL agreed to provide regulators with access to relevant reported data on a T+1 basis, that is, on the first working day after the data was reported to DDRL. The reporting of details of derivatives contracts to trade repositories under EMIR commenced on 12 February 2014. Shortly thereafter it became apparent to ESMA that regulators were experiencing delays in accessing TR data reported to DDRL.

It was found that on 21 March 2014 regulators were only able to access certain data reported to DDRL on the second working day after that data had been reported, a delay of one day compared with what had been agreed by DDRL during its registration as a trade repository. By 9 April 2014 this had extended to a delay of 4 working days; had grown at 11 June to 12 days; at the beginning of July to 21 days; at the beginning of August to 36 days; at the beginning of September to 46 days; at the beginning of October to 57 days and peaked at 62 working days on 8 October 2014.

DDRL had begun to post some reports on a T+1 basis by 30 September 2014. By 4 November 2014 it began to post a complete set of regulatory reports on a T+1 basis; that is, current reports were posted on a T+1 basis from that date onward. Reports that had previously been caught by the delays referred to above were not cleared until 15 December 2014.

As of mid-May 2014, there were more than 1 billion reports (1,016,137,094) submitted to DDRL by counterparties and reporting parties. By the end of October 2014, there were already more than 3.6 billion reports (3,667,369,286) submitted to DDRL. More than 2.6 billion reports were affected by DDRL's IT performance, capacity and stability problems, with regulators not having direct and immediate access to those reports.

C) The infringement committed by DDRL

The ESMA Board considered that providing regulators with timely access to the relevant data reported to trade repositories ('TR data') is an important condition for ensuring the stability of the markets in view of the risks inherent in derivative contracts.

The ESMA Board found that the requirement under Article 81(2) of EMIR to provide regulators and supervisors with 'direct and immediate access' to TR data is not satisfied

where access is not available until on or after the second working day after the data is reported to a trade repository.

Accordingly, based on the evidence put before it including particularly the evidence of delays described above, the ESMA Board found that DDRL did not meet the requirement under EMIR to provide regulators with direct and immediate access to TR data. The ESMA Board found that this was the case from 21 March 2014 to 15 December 2014. Thus the ESMA Board found that DDRL had committed the infringement specified at Annex I, III (b) of EMIR.

Based on the evidence put before it, the ESMA Board further found that DDRL had committed the infringement negligently.

The evidence put before the ESMA Board showed, notably, that:

1. There were numerous incidents of technical problems relating to DDRL's TR data processing systems, delays experienced in giving regulators access to reported data in the period from 21 March to 15 December 2014, and failures in notifying certain of those delays to ESMA;
2. When it became clear that it was necessary for DDRL to establish a plan for how to remediate the delays being experienced by regulators, DDRL took some three months to establish an effective remedial plan in circumstances where delays during that period were increasing;
3. DDRL failed to take measures in order to ensure that the commencement in August 2014 of the collateral and valuation reporting under EMIR would have the minimum impact on its remedial efforts.

The ESMA Board concluded that DDRL was negligent in each of the three above respects as, in each case, DDRL failed to take the special care expected of it and to foresee that the consequence of that failure was that regulators would experience delays in accessing TR data. The ESMA Board was satisfied that a person who is normally informed and sufficiently attentive could not have failed to foresee those consequences.

Supervisory measure and fine

Public notice

Based on the provisions of Article 73 of EMIR, the ESMA Board decided that the relevant infringements warranted a supervisory measure in the form of the publication of this public notice in addition to the imposition of a fine.

Fine

Article 65 of EMIR states that the ESMA Board shall impose a fine when it finds that an infringement has been committed negligently. In relation to the calculation of the fine, the Board considered that three aggravating factors referred to in EMIR applied in this case, namely that (1) the infringement was committed for more than six months, (2) the infringement revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, and (3) the infringement had a negative impact on the quality of TR data DDRL maintained. Thus, the fine imposed on DDRL was set at EUR 64,000 in accordance with the stipulations in EMIR as to the calculations of fines.

Article 3

The Board takes the decision to impose a fine of €64,000 (being sixty four thousand euro) in respect of the negligent commission of the infringement listed in Annex I, III (b) of EMIR, in accordance with Articles 64(5) and 65 of Regulation ((EC) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

Article 4

This decision is addressed to DTCC Derivatives Repository Ltd, Broadgate West, One Snowden Street, London EC2A 2DQ, United Kingdom.

Article 5

This decision takes effect upon its notification to the addressee.

The addressee may appeal against this decision to the Board of Appeal of the European Supervisory Authorities in accordance with Article 60 of the ESMA Regulation. The appeal, together with a statement of grounds, shall be filed in writing within 2 months of the date of notification of this decision. The appeal



shall not have suspensive effect but the Board of Appeal may, if it considers that circumstances so require, suspend the application of this decision.

Done at Amsterdam on 23 March 2016

A handwritten signature in blue ink, consisting of a stylized 'S' followed by a vertical line and a horizontal stroke.

Steven Maijoor

Chair

For the Board of Supervisors