

II

(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2021/731

of 26 January 2021

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on third-country central counterparties or related third parties by the European Securities and Markets Authority

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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 ⁽¹⁾, and in particular Article 25i(7) thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 has been amended by Regulation (EU) 2019/2099 of the European Parliament and of the Council ⁽²⁾. Those amendments have introduced into Regulation (EU) No 648/2012, inter alia, an empowerment for the Commission to specify further the rules of procedure for the exercise by the European Securities and Markets Authority ('ESMA') of the power to impose fines or periodic penalty payments on third-country central counterparties ('third-country CCPs') and related third parties to whom third-country CCPs have outsourced operational functions or activities ('related third parties'). In particular, those rules of procedures should include provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalties.
- (2) Article 41(2) of the Charter of Fundamental Rights of the European Union recognises the right of every person to be heard before any individual measure is taken which would affect him or her adversely, and 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.
- (3) To ensure that the rights of defence of third-country CCPs and related third parties subject to actions by ESMA are respected and to ensure that ESMA takes all relevant facts into account when adopting enforcement decisions, ESMA should hear the third-country CCP or related third parties or any other persons concerned. Third-country CCPs and related third parties should therefore have the right to make written submissions in response to statements of findings issued by the investigation officer and ESMA, including in case of material changes in the

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

⁽²⁾ Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (OJ L 322, 12.12.2019, p. 1).

initial statement of findings. The investigation officer and ESMA should also have the possibility to invite third-country CCPs and related third parties to provide further explanations at an oral hearing where the investigation officer or ESMA consider that some elements of the written submissions made to the investigation officer or to ESMA are not sufficiently clear or detailed, and that further explanation is needed.

- (4) It is important that transparency is ensured between the investigation officer appointed by ESMA in accordance with Article 25i of Regulation (EU) No 648/2012 and ESMA itself. Such transparency requires that the investigation officer's file, in addition to the statement of findings, contains any submissions made by the third-country CCPs or related third parties, the statement of findings on the basis on which those third-country CCPs or related third parties provided their submissions, and the minutes of any oral hearing.
- (5) According to the second subparagraph of Article 25l(1) of Regulation (EU) No 648/2012, ESMA has the possibility to adopt, where urgent action is needed, interim decisions imposing fines or periodic penalty payments without first hearing the persons subject to an investigation or proceedings. To ensure the effectiveness of ESMA's power to adopt interim decisions, the third-country CCPs and related third parties subject to an investigation should not have the right to access the file or to be heard before the investigation officer has submitted the file with his or her findings to ESMA or before ESMA has adopted its interim decision. However, to respect the rights of defence, the third-country CCPs and related third parties should have the right to access the file as soon as the investigation officer has submitted the file with his or her statement of findings to ESMA, and the right to be heard as soon as possible after ESMA has adopted its interim decision.
- (6) For reasons of consistency, limitation periods for the imposition and enforcement of fines or periodic penalty payments should take into account existing Union legislation applicable to the imposition and enforcement of penalties on supervised entities, ESMA's experience in applying such legislation in relation to trade repositories under Regulation (EU) No 648/2012, the fact that third-country CCPs are located outside the Union and the need for ESMA to coordinate with authorities in such third-country jurisdictions in relation to enforcement actions. Limitation periods should be calculated in accordance with existing Union legislation for acts of the Council and the Commission, and in particular with Regulation (EEC, Euratom) No 1182/71 of the Council ⁽³⁾.
- (7) According to Article 25m(5) of Regulation (EU) No 648/2012, the amounts corresponding to the fines and periodic penalty payments collected by ESMA are to be allocated to the general budget of the Union. Fines and periodic penalty payments collected by ESMA should be lodged to interest bearing accounts until they become final. For each decision imposing fines or periodic penalty payments, the amounts collected by ESMA should be lodged to a separate account or subaccount to ensure traceability until that decision becomes final.
- (8) In the interest of the immediate exercise by ESMA of effective supervisory and enforcement powers, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation specifies further the rules of procedure regarding fines and periodic penalty payments to be imposed by the European Securities and Markets Authority (ESMA) on third-country central counterparties (CCPs) or related third parties to whom those CCPs have outsourced operational functions or activities subject to ESMA's investigation and enforcement proceedings, including rules on the right of defence and limitation periods.

⁽³⁾ Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1).

*Article 2***Right to be heard by the investigation officer**

1. Upon completion of the investigation and before submitting the file to ESMA pursuant to Article 3(1), the investigation officer shall inform the person subject to investigation in writing stating his or her findings and shall provide that person 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 (EU) No 648/2012, including any aggravating or mitigating factors of those 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 investigation 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 investigation officer hear other persons who may corroborate the facts set out in the submissions of the person subject to investigation.
4. The investigation officer may also invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers, or by other qualified persons admitted by the investigation officer. Oral hearings shall not be held in public.

*Article 3***Right to be heard by ESMA with regard to fines and supervisory measures**

1. The complete file to be submitted by the investigation officer to ESMA shall include the following documents:
 - (a) the statement of findings and a copy of the statement of findings addressed to the person subject to the investigation;
 - (b) copy of the written submissions by the person subject to the investigation;
 - (c) the minutes of any oral hearing.
2. Where ESMA considers that the file submitted by the investigation officer is not complete, it shall send back the file to the investigation officer with reasoned request for additional documents.
3. Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings appear not to constitute an infringement listed in Annex III to Regulation (EU) No 648/2012, it shall decide to close the investigation and notify that decision to the persons subject to investigation.
4. Where ESMA does not agree with the findings of the investigation officer it shall submit a new statement of findings to the persons subject to investigation.

The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit.

ESMA may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

5. Where ESMA agrees with all or some of the findings of the investigation officer it shall inform the persons subject to investigation accordingly. Such communication shall set a reasonable time limit within which the person subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit.

ESMA may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

6. Where ESMA decides that one or more of the infringements listed in Annex III to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and adopts a decision imposing a fine in accordance with Article 25j) of that Regulation, it shall immediately notify that decision to the person subject to investigation.

Article 4

Right to be heard by ESMA with regard to periodic penalty payments

Before making a decision imposing a periodic penalty payment in accordance with Article 25k) of Regulation (EU) No 648/2012, ESMA shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a periodic penalty payment and the amount of the periodic penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person subject to proceedings may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

Once the person subject to proceedings has complied with the relevant decision referred to in Article 25k(1) of Regulation (EU) No 648/2012, a periodic penalty payment can no longer be imposed.

The decision imposing a periodic penalty payment shall indicate the legal basis and the reasons for the decision, the amount and the starting date of the periodic penalty payment.

ESMA may also invite the person subject to proceedings to attend an oral hearing. The persons subject to proceedings may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

Article 5

Right to be heard by ESMA with regard to interim decisions imposing fines

1. By way of derogation from Articles 2 and 3 of this Regulation, the procedure set out in this Article shall apply where ESMA adopts interim decisions imposing fines pursuant to the second subparagraph of Article 25l(1) of Regulation (EU) No 648/2012 without first hearing the persons subject to investigations.

2. The investigation officer shall submit the file with his or her findings to ESMA and immediately inform the person subject to investigation of his or her findings but shall not provide that person with the opportunity to make submissions. The statement of findings of the investigation officer shall set out the facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements.

Where so requested, the investigation officer shall grant access to the file to the person subject to investigation.

3. Where ESMA considers that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement listed in Annex III to Regulation (EU) No 648/2012, it shall decide to close the investigation and notify that decision to the person subject to investigation.

4. Where ESMA decides that one or more of the infringements listed in Annex III to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and adopts an interim decision imposing fines in accordance with the second subparagraph of Article 25l(1) of that Regulation, ESMA shall immediately notify that interim decision to that person.

ESMA shall set a reasonable time limit within which a person subject to investigation may make written submissions on the interim decision. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit.

Where so requested, ESMA shall grant access to the file to the persons subject to the investigation.

ESMA may invite the persons subject to investigation to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

5. ESMA shall hear the person subject to the investigation and take a final decision as soon as possible after the adoption of the interim decision.

Where ESMA considers, based on the complete file and after having heard the persons subject to investigation, that one or more of the infringements listed in Annex III to Regulation (EU) No 648/2012 has been committed by the person subject to investigation it shall adopt a confirmatory decision imposing fines in accordance with Article 25j of that Regulation. ESMA shall immediately notify that decision to the persons subject to investigation.

Where ESMA adopts a final decision that does not confirm the interim decision, the interim decision shall be deemed to be repealed.

Article 6

Right to be heard by ESMA with regard to interim decisions imposing periodic penalty payments

1. By way of derogation from Article 4, the procedure set out in this Article shall apply where ESMA adopts interim decisions imposing periodic penalty payments pursuant to the second subparagraph of Article 25l(1) of Regulation (EU) No 648/2012 without first hearing the person subject to proceedings.

2. The interim decision imposing a periodic penalty payment shall indicate the legal basis and the reasons for the decision, the amount and the starting date of the periodic penalty payment.

Once the person subject to proceedings has complied with the relevant decision referred to in the second subparagraph of Article 25k(1) of Regulation (EU) No 648/2012, an interim decision imposing periodic penalty payment can no longer be adopted.

ESMA shall immediately notify the interim decision to the person subject to proceedings and shall set a time limit within which that person may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit.

Where so requested, ESMA shall grant access to the file to the person subject to proceedings.

ESMA may also invite the person subject to proceedings to attend an oral hearing. The person subject to proceedings may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

3. Where ESMA considers, on the basis of the complete file and after having heard the person subject to proceedings, that the grounds for imposing periodic penalty payments were present at the time of the adoption of the interim decision, ESMA shall adopt a confirmatory decision imposing periodic penalty payments in accordance with Article 25k of Regulation (EU) No 648/2012. ESMA shall immediately notify that decision to the person subject to proceedings.

Where ESMA adopts a decision that does not confirm the interim decision, the interim decision shall be deemed to be repealed.

*Article 7***Access to the file and use of documents**

1. Where so requested, ESMA shall grant access to the file to the parties to whom the investigation officer or ESMA has sent a statement of findings. Access shall be granted following the notification of any statement of findings.
2. File documents accessed pursuant to paragraph 1 of this Article shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

*Article 8***Limitation periods for the imposition of penalties**

1. The powers conferred on ESMA to impose fines and periodic penalty payments on third-country CCPs and related third parties to which the third-country CCPs has outsourced operational functions or activities shall be subject to a limitation period of 5 years.
2. The limitation period referred to in paragraph 1 shall start on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, that limitation period shall start on the day on which the infringement ceases.
3. Any action taken by ESMA for the purpose of the investigation or proceedings in respect of an infringement listed in Annex III to Regulation (EU) No 648/2012 shall interrupt the limitation period for the imposition of fines and periodic penalty payments. That limitation period shall be interrupted with effect from the date on which the action is notified to the person subject to investigation or proceedings in respect of an infringement listed in Annex III to Regulation (EU) No 648/2012.
4. Each interruption shall cause the limitation period to recommence. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without ESMA having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.
5. The limitation period for imposing fines and periodic penalty payments shall be suspended for as long as the decision of ESMA is the subject of proceedings pending before the Board of Appeal, in accordance with Article 60 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽⁴⁾, and before the Court of Justice of the European Union, in accordance with Article 25n of Regulation (EU) No 648/2012.

*Article 9***Limitation periods for the enforcement of penalties**

1. The power of ESMA to enforce decisions taken pursuant to Articles 25j and 25k of Regulation (EU) No 648/2012 shall be subject to a limitation period of 8 years.
2. The 8-year period referred to in paragraph 1 shall start 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 person subject to proceedings of a decision varying the original amount of the fine or periodic penalty payment;
 - (b) any action of ESMA or an authority of third country acting at the request of ESMA, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.

⁽⁴⁾ 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 (OJ L 331, 15.12.2010, p. 84).

4. Each interruption shall cause the limitation period to recommence.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
 - (a) time to pay is allowed;
 - (b) enforcement of payment is suspended pursuant to a pending decision of ESMA Board of Appeal, in accordance with Article 60 of Regulation (EU) No 1095/2010, and the Court of Justice of the European Union, in accordance with Article 25n of Regulation (EU) No 648/2012.

Article 10

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 they become final. In case multiple fines or periodic penalty payments are collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts. Amounts paid shall not be entered in ESMA's budget or recorded as budgetary amounts.

Once ESMA's Accounting Officer has established that the fines or periodic penalty payments have become final following the outcome of all possible legal challenges he or she shall transfer those amounts plus any interest accruing to the European Commission. These amounts shall be entered in the Union budget under general revenue.

ESMA's Accounting Officer shall report on a regular basis to the Authorising Officer of Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission on the amounts of fines and periodic penalty payments imposed and their status.

Article 11

Calculation of periods, dates and time limits

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

Article 12

Entry into force

This Regulation shall enter into force on the 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, 26 January 2021.

For the Commission
The President
Ursula VON DER LEYEN
