



EUROPEAN
COMMISSION

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COMMISSION DELEGATED REGULATION (EU) .../...

of 24.3.2021

amending Delegated Regulations (EU) No 1003/2013 and (EU) 2019/360 as regards the annual supervisory fees charged by the European Securities and Markets Authority to trade repositories for 2021

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 62 of 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),¹ provides that the revenues of the European Securities and Markets Authority (ESMA) consist of fees paid to ESMA in the cases specified in Union legislation, together with contributions from national public authorities, a subsidy from the Union as well as any voluntary contribution from Member States or observers and agreed charges for publications, training, and for any other services provided by ESMA when specifically requested by one or more competent authorities.

ESMA is the supervisor in the Union of trade repositories, which are the infrastructures responsible for the collection and maintenance of the records of derivatives and securities financing transactions. As such, ESMA authorises trade repositories and supervises their compliance with the relevant regulatory requirements. Trade repositories pay to ESMA a one-off registration fee and an annual supervisory fee.

Fees paid to ESMA by trade repositories are calculated using a methodology established in two different Delegated Regulations, one for their derivatives activity² and the other one for their securities financing transactions activity³. These Delegated Regulations were adopted by the Commission following ESMA's technical advice and were based on the principles in Article 72 of the European Market Infrastructure Regulation⁴ (EMIR), and in Article 11 of the Securities Financing Transactions Regulation⁵ (SFTR):

- Fees paid must fully cover ESMA's necessary expenditure relating to the registration, recognition and supervision of trade repositories; and,
- The amount of a fee charged to a trade repository has to be proportionate to the turnover of the trade repository concerned. Furthermore, in the case of EMIR, the co-legislator have included in the amendments introduced through Regulation 2019/834 (EMIR REFIT)⁶ that the amount of the fee charged to a trade repository must cover all reasonable administrative costs incurred by ESMA in relation to its registration and ESMA's supervisory activity.

Since 1 January 2021, the EU's trade repositories landscape has changed significantly. Only two out of the four trade repositories that were based in the United Kingdom before 1 January 2021 have transferred their business to the EU and continue to provide their services in the Union. To do this they have created new entities established in the EU.

These new trade repositories have effectively started their activity in the Union in January 2021. To ensure that they pay a supervisory fee which is proportionate to their actual turnover

¹ OJ L 331, 15.12.2010, p.84.

² Commission Delegated Regulation (EU) No 1003/2013 of 12 July 2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to trade repositories.

³ Commission Delegated Regulation (EU) 2019/360 of 13 December 2018 supplementing Regulation (EU) 2015/2365 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to trade repositories.

⁴ 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.

⁵ Regulation (EU) 2015/2365 of the European Parliament and of the Council on transparency of securities financing transactions and of reuse.

⁶ OJ L 141, 28.5.2019, p. 42–63.

in the EU for this year, the Commission proposes to include a new article in each of the two delegated regulations on fees paid by trade repositories to ESMA, i.e. Delegated Regulation 1003/2013 and Delegated Regulation 2019/360. This new article should provide a specific reference period for the calculation of applicable turnover to be used in the calculation of annual fees paid by trade repositories to ESMA in 2021 to reflect better the changes that the EU's trade repositories landscape is experiencing.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Procedural aspects

In November 2020, ESMA asked the Commission to modify the methodology for the calculation of annual fees paid by trade repositories to ESMA in 2021. ESMA proposed changing the reference period for the calculation of the applicable turnover of trade repositories from 2020 to January to June 2021.

Between 22 December 2020 and 11 January 2021, the Commission consulted by written procedure the Expert Group of the European Securities Committee (EGESC). The EGESC comprises representatives of Member States, the European Central Bank, the Secretariat of the European Parliament's Committee on Economic and Monetary Affairs and ESMA. Members of the EGESC broadly agreed with the proposed approach and no major objection was raised, although a few Member States proposed alternative ideas to address the situation. One Member State raised concerns with regard to the timing of the change of the methodology, which should enter into force in 2021 the same year in which it will apply. However, the consequences of not introducing the proposed changes justify the need for urgently changing the methodology for the calculation of annual fees to be paid by trade repositories in 2021.

Furthermore, this Delegated Act has been published for public feedback following the Better Regulation Guidelines from 9 February 2021 to 9 March 2021. The Commission did not receive any feedback to its proposed draft Delegated Act.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 establishes the annual supervisory fee for 2021 to be paid by trade repositories for their EMIR activity.

Article 2 establishes the annual supervisory fee for 2021 to be paid by trade repositories for their SFTR activity.

Article 3 provides the date of the entry into force of the Act.

4. IMPACT ASSESSMENT

The objective of the proposed changes is to allocate fees between individual trade repositories in such a way that it ensures the principle of proportionality enshrined in EMIR and SFTR while enabling ESMA to ensure recovering all its costs related to the supervision of trade repositories. The following three alternatives have been considered as possible solutions:

- (1) To add the applicable turnover generated by the new Union trade repositories with the applicable turnover of the UK-based trade repositories within the same groups;
- (2) To change the reference period of the applicable turnover from January-December 2020 to January-June 2021;

- (3) No amendment to the existing rules to rely on Article 3(2) of Delegated Regulation 1003/2013 and Article 2(4) of Delegated Regulation 2019/360 that allow ESMA to extrapolate the applicable turnover based on the values calculated for the number of months during which the trade repository operated in year (n-1) to the whole year (n-1), where the trade repository was not operational for the full year.

The first option poses challenges as it does not properly reflect the principle of proportionality in the cases where only a part or none of the UK trade repository activity is transferred to the EU while other activity remains in the UK. Indeed, the addition of the data of Union trade repositories with the data from their UK subsidiaries could amount to higher volumes than the real activity of the new Union trade repositories. Furthermore, Union trade repositories might raise concerns about providing information to ESMA, as a European supervisory authority, about the revenues of their UK subsidiaries which are located in a third-country since 1 January 2021. It is also unclear whether this approach would be fully consistent with the current wording of the provisions. Due to these issues, this option would not provide sufficient proportionality and was therefore rejected.

The third option also presents challenges regarding the principle of proportionality. If the transfer of business from UK trade repositories to newly registered Union trade repositories only took place on 1 January 2021, an extrapolation based on the (non-existing or low) turnover of 2020 will not provide an appropriate estimation of activity for 2021. In the described scenario, to fully recover ESMA's supervisory fees, Union trade repositories active in the EU before 1 January 2021 would have to be charged in a non-proportionate way and would end up paying almost the total annual supervisory fee in 2021, even though they may not cause the total of ESMA's supervisory costs in 2021. In practice, considering ESMA's draft budget for 2021⁷, which indicates estimated fee from trade repositories of more than EUR 3.6 million, absent any amendment to Delegated Regulations 1003/2013 and 2019/360 the two new trade repositories would pay a total annual fee of EUR 60 000 each (including their derivatives and securities financing transaction activity); the remaining EUR 3.5 million would have to be paid by the two Union trade repositories active before 1 January 2021. Otherwise, ESMA's estimated budget for supervision of trade repositories would have to be significantly reduced, which would likely have a longer term impact beyond 2021 and would pose a risk of inadequate supervision due to shortage in supervisory resources.

Hence, this option also has considerable shortcomings for the described scenario in terms of proportionality and appropriate supervision of trade repositories.

Finally, the second option does not have the same drawbacks as options 1, and 3. It is chosen for the following reasons:

- (i) It relies on the current year's data which reflect the real market share after Brexit;
- (ii) It reflects the new distribution of clients post-Brexit where trade repositories may not have a successor in the EU and their clients will have to migrate to other Union trade repositories;
- (iii) The approach of relying on January – June data was used in the trade repositories regimes under EMIR and SFTR when they first entered into application and there was therefore no data from year (n-1) to base estimations on (2014 for EMIR, 2020 for SFTR). As such, the rationale for this approach has a precedent.

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P. 54, [ESMA 2021 Annual Work Programme](#)

5. BUDGETARY IMPLICATIONS OF THE DELEGATED ACT

According to Article 62 of ESMA Regulation, Article 72 of EMIR and Article 11 of SFTR, fees paid to ESMA by Union trade repositories are part of ESMA's budget and should be set at a level that should allow ESMA to cover fully its necessary expenditure relating to the registration and supervision of trade repositories.

However, the proposed amendments to delegated regulations 1003/2013 and 2019/360 should not have any budgetary implication for ESMA nor undue effect on trade repositories. As explained above, these amendments will allow for the distribution of fees among Union trade repositories in a way proportionate to their turnover.

The proposed amendments will not impact the subsidy from the Union, entered in the General Budget of the European Union (Commission Section), that ESMA receives as part of its revenues in accordance with Article 62(1)(b) of Regulation (EU) No 1095/2010.

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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 repositories⁸, and in particular Article 72(3) thereof,

Having regard to Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012⁹, and in particular Article 11(2) thereof,

Whereas:

- (1) Fees paid to ESMA by trade repositories are calculated using a methodology established in Delegated Regulations (EU) No 1003/2013 and (EU) 2019/360. The reference period for the applicable turnover in those Delegated Regulations is the year previous to the year in which the revenues are paid.
- (2) On 1 February 2020, the United Kingdom withdrew from the European Union and from the European Atomic Energy Community. In accordance with the transition period set out in Article 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, the Union law ceased to apply to and in the United Kingdom from 31 December 2020.
- (3) Two trade repositories established in the United Kingdom transferred part of their services and activities to the Union in order to be able to continue providing their services and activities to counterparties established in the Union. That has significantly changed the number of trade repositories active in the Union.
- (4) The new Union trade repositories have effectively started their activity in the Union in January 2021, their level of activity in 2020 being almost non-existent. Their annual supervisory fee for 2021 would thus be negligible, although their activities are likely to be significant. To ensure that they pay a fee which is proportionate to their actual turnover in the Union, their annual supervisory fee for 2021 should be calculated on the basis of their applicable turnover during the first half of 2021.
- (5) In order to allow ESMA to charge fees to trade repositories in 2021 in a proportionate manner while covering all its cost related to their supervision, it is necessary to change

⁸ OJ L 201, 27.7.2012, p.1.

⁹ OJ L 337, 23.12.2015, p.1.

the reference period for the calculation of annual fees paid by trade repositories to ESMA in 2021. Since the relevant trade repositories are registered with ESMA under both Regulations (EU) No 648/2012 and (EU) 2015/2365, the amendments to that reference period should be made at the same time.

- (6) Delegated Regulations (EU) No 1003/2013 and (EU) 2019/360 should therefore be amended accordingly.
- (7) In order to immediately facilitate effective and efficient supervisory and enforcement activity, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) No 1003/2013

The following Article 15a is inserted in Delegated Regulation (EU) No 1003/2013:

‘Article 15a

Annual supervisory fee for 2021 for trade repositories registered as of 31 December 2020

- 1. Trade repositories already registered with ESMA as of 31 December 2020 shall be charged an annual supervisory fee for 2021 calculated in accordance with Article 7. However, for the purposes of Article 7(2)(c), the applicable turnover of trade repositories shall be calculated in accordance with paragraph 2.
- 2. For the purposes of paragraph 1, the applicable turnover of a trade repository shall be the sum of one third of each of the following:
 - (a) the revenues generated from the core functions of centrally collecting and maintaining records of derivatives of the trade repository during the period from 1 January 2021 to 30 June 2021, divided by the total revenues generated from the core functions of centrally collecting and maintaining records of derivatives of all registered trade repositories during the period from 1 January 2021 to 30 June 2021;
 - (b) the number of trades reported to the trade repository during the period from 1 January 2021 to 30 June 2021, divided by the total number of trades reported to all registered trade repositories during the period from 1 January 2021 to 30 June 2021;
 - (c) the number of recorded outstanding trades on 30 June 2021, divided by the total number of recorded outstanding trades on 30 June 2021 in all registered trade repositories.
- 3. The amount of the annual supervisory fee referred to in paragraph 1 shall be reduced by any amount already paid by the trade repository pursuant to Article 11(1) before [PO please insert the date of the entry into force of this Regulation].

Where the amount already paid by a trade repository pursuant to Article 11(1) before [PO please insert the date of the entry into force of this Regulation] is higher than the annual supervisory fee calculated in accordance with paragraph 1, ESMA shall reimburse the difference to the trade repository.
- 4. By way of derogation from Article 11(1), the annual supervisory fee for 2021 for the trade repositories referred to in paragraph 1 shall be due on 31 October 2021.

5. ESMA shall send the invoice for the annual supervisory fee for 2021 to the trade repositories referred to in paragraph 1 at least 30 days before the payment date.
6. When the audited accounts for 2021 become available, trade repositories referred to in paragraph 1 shall report to ESMA the indicators referred to in Article 3(1) for 2021.

Trade repositories shall be charged any difference between the annual supervisory fee for 2021 actually paid and the annual supervisory fee that would have been due for 2021 if the calculation of the applicable turnover had been based on the indicators reported pursuant to the first subparagraph.

ESMA shall send the invoice for any additional payment pursuant to the second subparagraph at least 30 days before the respective payment date.'

Article 2

Amendment to Delegated Regulation (EU) 2019/360

The following Article 15a is inserted in Delegated Regulation (EU) 2019/360:

'Article 15a

Annual supervisory fee for 2021 for trade repositories registered as of 31 December 2020

1. Trade repositories already registered with ESMA as of 31 December 2020 shall be charged an annual supervisory fee for 2021 calculated in accordance with Article 6. However, for the purposes of Article 6(2)(b) the applicable turnover of trade repositories shall be calculated in accordance with paragraph 2.
2. For the purposes of paragraph 1, the applicable turnover of the trade repository shall be the sum of:
 - the revenues generated from the core functions of centrally collecting and maintaining records of SFTs during the period from 1 January 2021 to 30 June 2021 and
 - the applicable revenues from ancillary services of the trade repository in accordance with paragraphs 1 and 2 of Article 2 during the period from 1 January 2021 to 30 June 2021

divided by the sum of:

- the total revenues generated from the core functions of centrally collecting and maintaining records of SFTs during the period from 1 January 2021 to 30 June 2021 of all registered trade repositories and
 - the applicable revenues from ancillary services in accordance with paragraphs 1 and 2 of Article 2 during the period from 1 January 2021 to 30 June 2021 of all registered trade repositories.
3. The amount of the annual supervisory fee referred to in paragraph 1 shall be reduced by any amount already paid by the trade repository pursuant to Article 10(1) before [PO please insert the date of the entry into force of this Regulation].

Where the amount already paid by a trade repository pursuant to Article 10(1) before [PO please insert the date of the entry into force of this Regulation] is higher than the annual supervisory fee calculated in accordance with paragraph 1, ESMA shall reimburse the difference to the trade repository.

4. By way of derogation from Article 10(1), the annual supervisory fee for 2021 for the trade repositories referred to in paragraph 1 shall be due on 31 October 2021.
5. ESMA shall send the invoice for the annual supervisory fee for 2021 to the trade repositories referred to in paragraph 1 at least 30 days before the payment date.
6. When the audited accounts for 2021 become available, trade repositories referred to in paragraph 1 shall report to ESMA the indicators referred to in Article 2(3) for 2021.

Trade repositories shall be charged any difference between the annual supervisory fee for 2021 actually paid and the annual supervisory fee that would have been due for 2021 if the calculation of the applicable turnover had been based on the indicators reported pursuant to the first subparagraph.

ESMA shall send the invoice for any additional payment pursuant to the second subparagraph at least 30 days before the respective payment date.'

Article 3

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 the Member States.

Done at Brussels, 24.3.2021

For the Commission
The President
Ursula VON DER LEYEN