



Brussels, 25.11.2022
C(2022) 8434 final

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

of 25.11.2022

supplementing Regulation (EU) No 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with Article 9(14) of that Regulation

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 9(15) of Regulation (EU) No 2021/23 ('the Regulation') empowers the Commission to adopt, following the submission of draft regulatory technical standards by the European Securities and Markets Authority (ESMA), and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010, a delegated act specifying the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with Article 9(14) of the Regulation.

In accordance with Article 10(1) of Regulation (EU) No 1095/2010 establishing the ESMA, the Commission must decide within 3 months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA carried out a public consultation on the draft technical standard submitted to the Commission in accordance with Article 9(15) of the Regulation. A consultation paper was published on the ESMA internet site on 12 July 2021, and the consultation closed on 20 September 2021. Moreover, the ESMA invited the ESMA's Securities and Markets Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1095/2010 to provide advice on the draft technical standard. Together with the draft technical standard, the ESMA submitted an explanation of how the outcome of these consultations was taken into account in the development of the final draft technical standard submitted to the Commission.

Together with the draft technical standard and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA submitted its impact assessment, including its analysis of the costs and benefits, for the draft technical standard submitted to the Commission. An analysis is available on the [ESMA website](https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-reports-ccp-recovery-regime)¹.

3. LEGAL COMPONENTS OF THE DELEGATED ACT

This delegated act sets out the methodology for calculation and maintenance of the additional amount of pre-funded dedicated own resources to be used in accordance with Article 9(14) of the Regulation, taking into account all of the following:

- (a) the structure and internal organisation of central counterparties ('CCPs') and the nature, scope and complexity of their activities;
- (b) the structure of incentives of the shareholders, management and clearing members of CCPs and of the clients of clearing members;
- (c) the appropriateness for CCPs, depending on the currencies in which the financial instruments they clear are denominated, the currencies accepted as collateral and the risk stemming from their activities, in particular where they do not clear OTC derivatives as defined in Article 2(7) of Regulation (EU) No

¹ <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-reports-ccp-recovery-regime>

648/2012, to invest that additional amount of dedicated own resources in assets other than those referred to in Article 47(1) of that Regulation;

- (d) the rules applying to and the practices of third-country CCPs, as well as the international developments concerning the recovery and resolution of CCPs, in order to preserve the competitiveness of internationally active Union CCPs, and the competitiveness of Union CCPs compared to third-country CCPs providing clearing services in the Union.

ESMA concluded, on the basis of the criteria referred to in point (c) above, that it is appropriate for CCPs to invest that additional amount of pre-funded dedicated own resources in assets other than those referred to in Article 47(1) of Regulation (EU) No 648/2012. This delegated act, therefore, extends the list of available investments to instruments already accepted as collateral from clearing members in the CCP's collateral policy with the exception of bank guarantees, derivatives and equities. The provisions also specify:

- (a) the procedure through which, in the event that those resources are not immediately available, CCPs may resort to recovery measures that require the financial contribution of non-defaulting clearing members;
- (b) the procedure that CCPs must follow to subsequently reimburse the non-defaulting clearing members referred to in point (a) up to the amount to be used in accordance with Article 9(14) of the Regulation.

Article 1 of the draft regulatory technical standard sets out the method for calculating the additional amount of the CCP's pre-funded dedicated own resources.

Article 2 of the draft regulatory technical standard sets out the method for determining the percentage level of the additional amount of the CCP's pre-funded dedicated own resources.

Article 3 of the draft regulatory technical standard sets out how the additional amount of the CCP's pre-funded dedicated own resources is to be maintained.

Article 4 of the draft regulatory technical standard sets out the procedure for applying recovery measures where the additional amount is not immediately available.

Article 5 of the draft regulatory technical standard sets out the procedure for the compensation of non-defaulting clearing members.

Article 6 of the draft regulatory technical standard sets out the entry into force and application-related provisions.

The Annex of the draft regulatory technical standard sets out the formulas and parameters for determining the percentage level of the additional amount of the CCP's pre-funded dedicated own resources.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132², and in particular of Article 9 (15), fourth subparagraph thereof,

Whereas:

- (1) The additional amount of pre-funded dedicated own resources to be used by CCPs in distress situations should be determined taking into account the individual characteristics of each CCP.
- (2) The methodology to calculate the additional amount of pre-funded dedicated own resources that are to be used by a CCP following a default or a non-default event should therefore allow for distinguishing between CCPs with a complex risk profile for which the amount of additional pre-funded dedicated own resources should be higher, and CCPs with less complex risk profiles or more conservative management of risks for which the amount of additional pre-funded dedicated own resources should be lower.
- (3) The methodology to calculate the additional amount of pre-funded dedicated own resources that are to be used by a central counterparty following a default or a non-default event should contain sufficiently clear and objective parameters to avoid assessment difficulties and should allow for a consistent application across CCPs. Those parameters should also make it possible to adapt the additional amount of pre-funded dedicated own resources to the structure and the internal organisation of the CCP, the nature, scope and complexity of its activities, and the structure of incentives of its shareholders, management and clearing members, and of the clients of those clearing members. Each parameter should be assigned a value expressed in percentage points. The sum of all parameters should yield the percentage level of the CCP's risk-based capital used as the additional amount of pre-funded dedicated own resources that are to be used by central counterparties following a default or a non-default event.

² OJ L 22, 22.1.2021, p. 1.

- (4) To take into account the structure and the internal organisation of the CCP and the nature, scope and complexity of its activities, a CCP should assess the nature and complexity of the assets classes cleared, the number and complexity of its interdependencies with other financial market infrastructures and financial institutions, the efficiency of its internal organization, the robustness of its risk management framework, and the number of material pending remedial actions following findings from the CCP's competent authority.
- (5) To take into account the structure of incentives of the shareholders, management and clearing members of CCPs and of the clients of clearing members, a CCP should assess the risks linked to its direct or indirect ownership and capital structure, the financial incentives embedded in the CCP's senior management remuneration, as well as the degree of involvement of the clearing members and clients in the CCP's risk governance.
- (6) CCPs should regularly review the additional amount of pre-funded dedicated own resources in order to ensure that that amount remains at an adequate level, including following a material change to a CCP's risk-based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) 648/2012 of the European Parliament and of the Council³.
- (7) In order to avoid unnecessary burdens, a CCP should not be required to undertake the calculation based on specific parameters of the methodology where it decides to voluntarily apply the maximum amount of additional pre-funded dedicated own resources at 25%.
- (8) It is important that in a default scenario the additional amount of pre-funded dedicated own resources are fairly allocated. CCPs that have established more than one default fund for the different classes of financial instruments they clear should therefore allocate the additional amount of pre-funded dedicated own resources to each default fund in proportion to its size. In a non-default scenario, the full amount of additional pre-funded dedicated own resources should be available to cover losses.
- (9) The additional amount of dedicated own resources that are to be used by central counterparties following a default or a non-default event should reflect the relative importance of different parameters reflecting the internal organisation of the CCP, the nature, scope and complexity of its activities, and the structure of incentives of its stakeholders in reinforcing incentives for proper risk management. Therefore, without prejudice to the minimum and maximum percentages to be applied for determining the additional amount of pre-funded dedicated own resources, the calculation of the percentage to be applied for determining the additional amount of pre-funded dedicated own resources should be a cumulative sum of all percentage points assigned to each parameter. The percentage to be applied for each parameter should be the sum of the relevant quantitative indicators. A wide range for the quantitative indicators should be assigned to the most significant parameters in the assessment of the risks and complexity of a CCP, while a narrower range should be assigned to parameters which refer to a specific risk aspect of the CCP.
- (10) The methodology for the maintenance of additional pre-funded dedicated own resources should allow CCPs to mitigate the impact of the requirement for such

³ 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 (OJ L 201, 27.7.2012, p. 1).

additional resources by enabling them to invest those additional resources in assets other than those considered in the CCPs' investment policy referred to in Article 47(1) of Regulation (EU) No 648/2012, provided that those CCPs implement the appropriate procedures for applying recovery measures to mitigate the risk of such assets not being immediately available.

- (11) It is necessary to mitigate the impact of the additional pre-funded dedicated own resources on CCPs. CCPs' investment possibilities for the maintenance of additional pre-funded dedicated own resources should therefore be partially aligned with the list of assets eligible as collateral accepted by CCPs from clearing members. That approach would still guarantee that CCPs have the appropriate framework and procedures to manage the risks associated with those assets and their liquidation in times of stress. However, some assets which are eligible as collateral should remain excluded from the list of eligible investments as they cannot be considered to be sufficiently liquid, or would expose the CCP's own resources to excessive credit and market risk, and therefore cannot be deemed suitable for a CCP's investment.
- (12) When the additional amount of pre-funded dedicated own resources invested in assets other than those referred to in Article 47(1) of Regulation (EU) No 648/2012 is not immediately available, CCPs should, following a default or non-default event, inform their competent authority and their clearing members thereof. In such case, CCPs should be entitled to cover the unavailable additional amount of pre-funded dedicated own resources by requesting financial contributions from their non-defaulting clearing members. Such contributions should be allocated in a fair and proportionate manner.
- (13) CCPs should reimburse non-defaulting clearing members for the financial contribution that those clearing members provided to cover the unavailable additional amount of pre-funded dedicated own resources. In order to limit the exposure of the CCPs' non-defaulting clearing members, and to ensure they are able to withstand any future cash contributions, such reimbursement should be provided within a reasonable timeframe, in cash and in the same currency in which the financial contribution was provided. The reimbursement should be paid only after the CCPs have complied with their other payment obligations. Where the reimbursement is not performed within a reasonable timeframe, CCPs should, as an incentive to recoup the amounts due, be required to pay an annual interest on those amounts.
- (14) In order to preserve the international competitiveness of Union CCPs, the European Securities and Markets Authority (ESMA), when developing the draft regulatory technical standards, analysed the rules applicable to and the practices of third-country CCPs, together with international developments in the recovery and resolution of CCPs. Based on those analyses, ESMA concluded that the methodology proposed for the calculation of additional amounts of pre-funded dedicated own resources for Union CCPs should not adversely affect the competitiveness of internationally active Union CCPs.
- (15) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the ESMA.
- (16) ESMA developed the draft technical standards in cooperation with the European Banking Authority and after having consulted the European System of Central Banks. In accordance with Article 10 of Regulation (EU) 1095/2010 of the European

Parliament and of the Council⁴, ESMA has conducted open public consultations on these draft regulatory technical standards, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

Article 1

Calculation and allocation of the additional amount of the CCP's pre-funded dedicated own resources

1. CCPs shall calculate the additional amount of pre-funded dedicated own resources referred to in Article 9(14) of Regulation (EU) 2021/23 by multiplying the risk-based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) No 648/2012 and Commission Delegated Regulation (EU) No 152/2013⁵ with the percentage level 'P' of the additional amount of the CCPs' pre-funded dedicated own resources determined in accordance with Article 2.
2. CCPs shall review the determination of the percentage level and the additional amount of pre-funded dedicated own resources calculated in accordance with paragraph 1 following every material change to their risk-based capital requirements calculated in accordance with Article 16(2) of Regulation (EU) 648/2012, and at least once a year.
3. CCPs that decide to voluntarily apply the maximum 25% percentage to calculate the additional amount of pre-funded dedicated own resources referred to in Article 9(14) of Regulation (EU) No 2021/23 shall not be required to determine the percentage level referred to in Article 2 of this Regulation.
4. CCPs that have established more than one default fund for the different classes of financial instruments they clear, shall allocate the additional amount of pre-funded dedicated own resources calculated in accordance with paragraph 1 to each of the default funds in proportion to the size of each default fund. CCPs shall indicate the allocation separately in their balance sheets. CCPs shall use the additional amounts allocated to a default fund for defaults arising in the market segments to which the default fund refers. In the case of a non-default event, CCPs shall allocate the full amount of the additional amount of pre-funded dedicated own resources calculated in accordance with paragraph 1 against the losses incurred as a result of the non-default event.

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).

⁵ Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on capital requirements for central counterparties (OJ L 52, 23.2.2013, p.37).

Article 2

Determination of the percentage level of the additional amount of the CCP's pre-funded dedicated own resources

CCPs shall calculate the percentage level of the additional amount of the CCP's pre-funded dedicated own resources referred to in Article 1(1) in accordance with the formulas set out in Annex.

Article 3

Maintenance of the additional amount of the CCPs' pre-funded dedicated own resources

1. CCPs shall immediately notify their competent authority in writing where the additional amount of pre-funded dedicated own resources falls below the required additional amount calculated in accordance with Article 1(1), and in case of any subsequent reductions of that additional amount. That written notification shall set out in detail the remaining additional amount of pre-funded dedicated own resources and inform the competent authority of whether any further reduction to that amount is to be expected in the five business days following that notification. The written notification shall also set out why the additional amount of pre-funded dedicated own resources has fallen below the required additional amount and contain a comprehensive description of the measures and the timetable for the replenishment of that amount.
2. CCPs shall use only the residual amount of the additional amount of pre-funded dedicated own resources for the purposes of Article 9(14) of Regulation (EU) No 2021/23 where a subsequent default of one or more clearing members or a non-default event occurs before the CCP concerned has replenished the full additional amount of its pre-funded dedicated own resources as calculated in accordance with Article 1(1).
3. CCPs shall replenish the additional amount of pre-funded dedicated own resources at the latest within 20 working days from the first notification in writing referred to in paragraph 1.
4. Where the percentage level determined in accordance with Article 2(1) is higher than 10%, CCPs may, invest the excess requested amount of additional pre-funded dedicated own resources in gold and in financial instruments considered to be highly liquid collateral in accordance with Article 46(1) of Regulation (EU) 648/2012, provided that:
 - (a) such assets are included in the CCPs' collateral policy;
 - (b) such assets are not bank guarantees, derivatives or equities;
 - (c) the CCPs concerned have in place the procedures set out in Article 4 and Article 5 of this Regulation.

Article 4

Procedure for applying recovery measures where the additional amount is not immediately available

1. CCPs shall immediately inform their competent authority and their clearing members of the fact that, following a default or a non-default event, the additional amount of pre-funded dedicated own resources calculated in accordance with Article 1 is not

immediately available. They shall also provide their competent authority and their clearing members with a detailed description of the additional amount of pre-funded dedicated own resources unavailable, and the reason for that unavailability.

2. Where, following a default or non-default event, CCPs collect financial resources from non-defaulting clearing members, the amount shall be equal to the unavailable additional amount of pre-funded dedicated own resources and the CCPs concerned shall distribute that amount among the non-defaulting clearing members proportionally to their default fund contributions.

Article 5

Procedure for the compensation of non-defaulting clearing members that have provided a financial contribution where the additional amount is not immediately available

1. CCPs shall take all reasonable measures to reimburse non-defaulting clearing members that have contributed financially to the CCP in accordance with Article 4(2). They shall do so by monetising the assets used to invest the additional amount of pre-funded dedicated own resources calculated in accordance with Article 1(1) at the latest within 20 working days after notification of the funds' unavailability referred to in Article 4(1).
2. Subject to paragraph 4, CCPs shall reimburse the non-defaulting clearing members within a reasonable timeframe and continue until all amounts have been recouped.
3. The reimbursement of all amounts due to non-defaulting clearing members shall be made in cash, in the same currency in which the non-defaulting clearing member contributed financially to the CCP.
4. CCPs shall pay non-defaulting clearing members their amounts due after all of the following has occurred:
 - (a) operational costs have been serviced;
 - (b) any due and payable debt obligation has been paid;
 - (c) any recompense to be paid within the timeframe set out in Article 3 of Commission Delegated Regulation [XXX]⁶ has been paid.
5. CCPs shall pay an annual interest on the amounts due where the full reimbursement takes more than 120 working days from the date of the initial recovery measure that required the financial contribution of non-defaulting clearing members. The interest rate shall be set at the default interest rate calculated in accordance with Article 99 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.⁷

⁶ [Please insert the related OJ L reference for the Commission Delegating Regulation (EU) .../... supplementing Regulation (EU) 2021/23 of the European Parliament and of the Council with regard to regulatory technical standards specifying the order in which CCPs are to pay the recompense referred to in Article 20(1) of Regulation (EU) 2021/23, the maximum number of years during which those CCPs are to use a share of their annual profits for such payments to possessors of instruments recognising a claim on their future profits and the maximum share of those profits that is to be used for those payments].

⁷ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU)

Article 6

Entry into force

This Regulation shall enter into force on the twentieth 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, 25.11.2022

For the Commission
The President
Ursula VON DER LEYEN

No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).