

Brussels, 25.11.2022
C(2022) 8433 final

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

of 25.11.2022

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

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 20(2) 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 order in which recompense must be paid, the appropriate maximum number of years and the appropriate maximum share of the CCP's annual profits referred to in the second subparagraph of Article 20(1) of the Regulation (recompense to non-defaulting clearing members).

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 20(2) 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 has 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 website¹](https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-reports-ccp-recovery-regime).

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This delegated act specifies the order in which recompense must be paid, the appropriate maximum number of years and the appropriate maximum share of the central counterparty's (CCP) annual profits referred to in the second subparagraph of Article 20(1) of the Regulation.

Article 1 of the draft regulatory technical standard sets out the order in which the CCP is required to recompense clearing members in accordance with Article 20(1) of the Regulation.

Article 2 of the draft regulatory technical standard sets out the maximum share of the CCP's annual profits payable as annual recompense payments.

Article 3 of the draft regulatory technical standard sets out the maximum number of years during which the CCP can be required to make annual recompense payments.

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

Article 4 of the draft regulatory technical standard sets out the entry into force and application-related provisions.

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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 Article 20(2), third subparagraph thereof,

Whereas:

- (1) It is necessary to ensure that non-defaulting clearing members eligible for the recompense referred to in Article 20(1) of Regulation (EU) 2021/23 are treated in a fair manner. Therefore, where there is a split between cash payments and instruments recognising a claim on future profits, the allocation between the cash payments and those instruments should be identical for all non-defaulting clearing members that have to be recompensed.
- (2) According to Article 20(1) of Regulation (EU) 2021/23, the competent authority of a CCP may require a CCP to recompense the clearing members for their loss through the issuance of instruments recognising a claim on the future profits of that CCP. The issuance of such instruments, and the ensuing claims on the CCP's future profits, should however not jeopardise the viability of the CCP and its ability to meet its investment needs, nor diminish the attractiveness of the CCP for its shareholders and external investors over a long period. To diminish that risk, it is appropriate to lay down that the annual claims on the future profits of a CCP should not exceed 70 % of the CCP's annual profits, and that such instruments and claims should not exceed a period of more than ten years.
- (3) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (4) The European Securities and Markets Authority conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and

² OJ L 22, 22.1.2021, p. 1.

Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³,

HAS ADOPTED THIS REGULATION:

Article 1

Order in which the recompense referred to in Article 20(1) of Regulation (EU) 2021/23 is to be paid

1. A CCP that has been required by its competent authority, in accordance with Article 20(1) of Regulation (EU) 2021/23, to recompense non-defaulting clearing members shall recompense those clearing members *pari passu*.
2. A CCP that has been required by its competent authority to recompense its non-defaulting clearing members both in cash and through the distribution of instruments recognising a claim on the CCP's future profits shall use exactly the same allocation scheme for all non-defaulting clearing members when determining which parts of that recompense shall be allocated in cash and non-cash recompense.
3. Any profit-transfer agreement that may impair the profit level shall be reintegrated in the CCP's profit amount.

Article 2

Maximum share of the CCP's annual profits that is to be used towards payments relating to instruments recognising a claim on future profits of the CCP

Annual recompense payments to be made by a CCP pursuant to instruments recognising a claim on its future profits and that have been issued to each affected non-defaulting clearing member shall not exceed 70 % of that CCP's annual profit for each financial year.

Article 3

Maximum number of years during which the possessor is entitled to receive payments from the CCP until the loss has been recouped

The number of years during which an instrument recognising a claim on future profits of the CCP entitles the possessor to receive payments from the CCP on an annual basis until the loss has been recouped shall not exceed 10 years.

Article 4

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*.

³ 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).

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