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

of 16.2.2022

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council by specifying rules of procedure for the exercise of the power to impose fines or periodic penalty payments by the European Securities Markets Authority regarding data reporting service providers

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2019/2175, amending Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR), was published in the Official Journal on 27 December 2019.

As of 1 January 2022, the Regulation grants the European Securities and Markets Authority (ESMA) direct authorisation and supervisory powers over data reporting services providers, except for those Approved Reporting Mechanisms and Approved Publication Arrangements that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State. Article 38k(10) of MiFIR, empowers the Commission to adopt a delegated act to further specify the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including 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 fines and periodic penalty payments.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 18 June 2020, the Commission asked ESMA for an opinion (technical advice) on the Commission delegated regulations to be adopted under Article 38k(10) MiFIR. ESMA submitted its technical advice to the Commission on 23 March 2021.

Following an in-depth technical assessment, as part of its technical advice, ESMA conducted a public consultation on the technical aspects of the envisaged delegated regulations on fines from 23 December 2020 to 23 January 2021. Two stakeholders responded to ESMA's consultation. The responses dealt with, among other things, the absence of a possibility for a person under investigation to submit comments before ESMA has adopted an interim decision. The Commission proposes to apply the derogation from the duty to respect the right to be heard only with regard to ESMA, but not with regard to the investigation officer.

On 19 July 2021, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on ESMA's technical advice and on the content of this delegated act. No comments were received on supervisory measures.

The draft Delegated Regulation was published on the Better Regulation portal for a four-week feedback period from 29 July to 27 August 2021, in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making. No comments were received on supervisory measures.

An impact assessment has not been carried out because this Delegated Regulation largely follows the measures proposed by ESMA in its technical advice and the decision to impose fines and periodic penalty payments was taken in the Regulation which already sets out the method for calculating these penalties and the situations when they should be imposed. The Regulation also establishes data reporting services providers' rights of defence. The overall objectives and the need for these rules were outlined in the impact assessment accompanying the Commission proposal for Regulation (EU) 2019/2175. Furthermore, the provisions for fines included in this delegated acts are of a procedural nature. This Regulation follows the logic from previously adopted Regulations on fines and periodic penalty payments.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 of the delegated regulation sets out the relevant definition.

Articles 2 to 9 of the delegated regulation set out the provisions on fines and penalties. The articles describe the procedure for the exercise of power to impose fines or penalties.

Article 10 of the delegated regulation contains the entry into force.

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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 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012¹, and in particular Article 38k(10),

Whereas:

- (1) Given the cross-border dimension of market data handling, data quality and the necessity to achieve economies of scale, and to avoid the adverse impact of potential divergences on both data quality and the task of data reporting providers, Regulation (EU) 2019/2175 of the European Parliament and of the Council² transferred authorisation and supervision powers with regard to the activities of data reporting services providers ('DRSPs') in the Union to the European Securities and Markets Authority ('ESMA').
- (2) It is appropriate to specify the rules of procedure for the exercise of the power to impose fines and periodic penalty payments by ESMA with regard to the DRSPs in scope of its supervision. In particular, Regulation (EU) No 600/2014 prescribes that those rules of procedures should include provisions on the rights of the defence, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of fines and periodic penalty payments.
- (3) Where ESMA finds that there are serious indications of possible existence of facts liable to constitute one or more infringements of the requirements for data reporting services providers, ESMA is to appoint an independent investigation officer within ESMA to investigate the matter. Upon completion of the investigation, the investigation officer is to give the person subject to the investigation the opportunity to be heard. This means that the person should have the right to make written comments

¹ OJ L 173, 12.6.2014, p. 84.

² Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (OJ L 334, 27.12.2019, p. 1).

within a reasonable time limit of not less than four weeks before the investigation officer submits its findings to ESMA. The person subject to the investigation should be allowed to be assisted by a counsel of their choice. The investigation officer should consider, whether, as a result of the submissions made by the person subject to the investigation, it is necessary to amend the statement of findings before submitting it to ESMA.

- (4) ESMA should assess the completeness of the file submitted by the investigation officer based on a list of documents. To ensure that the person subject to the investigation is able to adequately prepare their defence, before adopting a final decision with regard to fines or supervisory measures, ESMA should provide them the right to provide further written comments.
- (5) In order to ensure that persons cooperate with an investigation, ESMA should be able to take certain coercive measures. When ESMA has taken a decision requiring a person to bring an infringement to an end, or has requested to supply complete information or to submit complete records, data or any other material, or has taken a decision to conduct an on-site inspection, it may impose periodic penalty payments in order to compel the person subject to the investigation to comply with the decision taken. Before imposing periodic penalty payments ESMA should provide the person the opportunity to provide written submissions.
- (6) The right of defence should be weighed against the need, under specific circumstances, for urgent action by ESMA. Where urgent action pursuant to Article 381 of Regulation (EU) No 600/2014 is warranted, the right of defence of the person subject to the investigation should not be an impediment to ESMA taking urgent measures. In such case, in order to prevent significant and imminent damage to the financial system, ESMA may adopt an interim decision without providing the person subject to the investigation the opportunity to make submissions. ESMA should give the person the opportunity to be heard as soon as possible after adopting the interim decision and before a confirmatory decision is adopted. The procedure should nonetheless grant the right of the person subject to the investigation to be heard in advance by the investigation officer.
- (7) The files prepared by ESMA and the investigation officer contain information that is indispensable to the person concerned in preparing for judicial or administrative proceedings. After a person subject to investigation has received the notification of statement of finding either from the investigation officer or from ESMA, the person should therefore be entitled to have access to the file subject to the legitimate interest of other persons in the protection of their business secrets. The use of file documents accessed should only be permitted for judicial or administrative proceedings in relation to infringements of Regulation (EU) No 600/2014.
- (8) Both the power to impose fines and periodic penalty payments and the power to enforce fines and periodic penalty payments should be subject to a limitation period. 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 and ESMA's experience in applying such legislation.
- (9) In order for ESMA to ensure safekeeping of collected fines and periodic penalties, ESMA should deposit them on interest-bearing accounts that are opened exclusively for the purpose of a single fine or periodic penalty payments aiming at ending a single infringement. As a matter of budgetary prudence, ESMA should only transfer the

amounts to the Commission once the decisions are final due to the rights to appeal being exhausted or lapsed.

- (10) In order to ensure smooth functioning of the new supervisory framework for DRSPs, as introduced in Article 4 of Regulation 2019/2175, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1
Definition

For the purpose of this Regulation “data reporting services provider”, or “DRSP”, means an approved publication arrangement or an approved reporting mechanism as defined in Article 2(1)(34) and Article 2(1)(36) of Regulation (EU) No 600/2014.

Article 2
Rules of procedure in infringement proceedings before the investigation officer

1. Upon completion of an investigation of potential infringements of the requirements referred to in Article 38g(1) of Regulation (EU) No 600/2014 and before submitting the file to ESMA, the investigation officer referred to in Article 38k(1) of that Regulation shall inform the person subject to investigation in writing stating its findings and shall provide that person with the opportunity to make written submissions pursuant to paragraph 3. The statement of findings shall set out the facts liable to constitute one or more of the infringements of the requirements referred to in Article 38g(1) of (EU) No 600/2014, including an assessment of the nature and seriousness of those infringements, taking into account the criteria laid down in Article 38g(2) of that Regulation.
2. The statement of findings shall set a reasonable time limit for the person subject to investigation to make its written submissions. In investigations other than those referred to in Article 5, this time limit shall be at least four weeks. The investigation officer shall not be obliged to take into account written submissions received after that time limit has expired.
3. In the written submissions, the person subject to investigation may set out all the facts which are relevant to its defence, and shall, if possible, attach documents as proof of the facts set out. The person subject to investigation may propose that the investigation officer hears other persons who may corroborate the facts set out in the submissions of the person subject to investigation.
4. The investigation officer may 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 a counsel of their choice. Oral hearings shall not be public.

Article 3
Rules of procedure in infringement proceedings before 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 thereof addressed to the person subject to the investigation;
 - (b) a copy of the written submissions by the person subject to the investigation;
 - (c) the minutes of any oral hearing.
- 2. When a file is incomplete, ESMA shall make a reasoned request for additional documents to the investigation officer.
- 3. Where ESMA considers that the facts described in the statement of findings of the investigation officer do not constitute infringements of the requirements referred to in Article 38g(1) of Regulation (EU) No 600/2014, it shall decide to close the case and it shall notify that decision to the person 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 person subject to investigation. That statement of findings shall set a time limit of at least four weeks 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 for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 38g and 38h of Regulation (EU) No 600/2014.
- 5. Where ESMA agrees with all or some of the findings of the investigation officer, it shall inform the person subject to investigation accordingly. Such communication shall set a time limit of at least two weeks in case ESMA agrees with all of the findings, and at least four weeks in case ESMA does not agree with all of the findings, within which period 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 for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 38g and 38h of Regulation (EU) No 600/2014.
- 6. ESMA may invite the person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The person subject to investigation may be assisted by a counsel of their choice. Oral hearings shall not be public.
- 7. If ESMA decides that one or more of the infringements of the requirements referred to in Article 38g(1) of Regulation (EU) No 600/2014 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 38h of that regulation, it shall notify immediately that decision to the person subject to investigation.

Article 4

Rules of procedure in infringement proceedings before ESMA with regard to periodic penalty payments

- 1. Before making a decision imposing a periodic penalty payment pursuant to Article 38i of Regulation (EU) No 600/2014, 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 of at least four weeks within which the person subject to the 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.

2. Once the DRSP or the person subject to the proceedings, has complied with the relevant decision referred to in Article 38i(1) of Regulation (EU) No 600/2014, a periodic penalty payment shall no longer be imposed.
3. A decision referred to in Article 38i(1) of Regulation (EU) No 600/2014 shall indicate the legal basis and the reasons for the decision, the amount and the starting date of the periodic penalty payment.
4. ESMA may invite the person subject to the proceedings to attend an oral hearing. The person subject to the proceedings may be assisted by a counsel of their choice. Oral hearings shall not be public.

Article 5

Rules of procedure for interim decisions on supervisory measures

1. By way of derogation from Article 3(4), (5) and (6) and from Article 4(1) and (4), the procedure set out in this Article shall apply where ESMA adopts interim decisions pursuant to Article 38l(1), second subparagraph of Regulation (EU) No 600/2014.
2. Where ESMA decides that one or more of the infringements of requirements referred to in Article 38g(1) of Regulation (EU) No 600/2014 has been committed by a person subject to investigation and adopts an interim decision imposing supervisory measures pursuant to Article 38g of Regulation (EU) No 600/2014, it shall notify immediately that interim decision to the person subject to the interim decision.

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

Upon request, ESMA shall grant access to the file to the person subject to the interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 600/2014.

ESMA may invite the person subject to the interim decision to attend an oral hearing. The persons subject to the interim decision may be assisted by a counsel of their choice. Oral hearings shall not be public.

3. ESMA shall take a final decision as soon as possible after the adoption of the interim decision.

Where ESMA considers, after having heard the person subject to the interim decision, that an infringement of the provisions referred to in Article 38g(1) of Regulation (EU) No 600/2014 has been committed by the person subject to the interim decision, it shall adopt a confirmatory decision imposing one or more supervisory measures laid down in Article 38g of Regulation (EU) No 600/2014. ESMA shall immediately notify that decision to the persons subject to the interim decision.

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

Article 6

Access to the file and use of documents

1. Upon request, ESMA shall grant access to the file to the person subject to the investigation 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 shall be used by the person referred to in paragraph 1 only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 600/2014.

Article 7

Limitation periods for the imposition of fines and periodic penalty payments

1. Fines and periodic penalty payments on DRSPs and other persons subject to investigation shall be subject to a limitation period of five years.
2. The limitation period referred to in paragraph 1 shall begin on the day following that on which the infringement is committed. In the case of continuing or repeated infringements, that limitation period shall begin on the day on which the infringement ceases.
3. Any action taken by ESMA, or by the national competent authority acting at the request of ESMA in accordance with Article 38o of Regulation (EU) No 600/2014 for the purpose of the investigation or proceedings in respect of an infringement of the requirements referred to in Article 38g(1) of Regulation (EU) No 600/2014 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 DRSP or the person subject to the investigation in respect of an infringement of the requirements referred to in Article 38g(1) of Regulation (EU) No 600/2014.
4. Each interruption as referred to in paragraph 3 shall restart the limitation period. 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 subject to proceedings pending before the Board of Appeal referred to in Article 60 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³, or is subject to a review by the Court of Justice of the European Union in accordance with Article 38m of Regulation (EU) No 600/2014.

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).

Article 8

Limitation periods for the enforcement of penalties

1. The power of ESMA to enforce decisions taken pursuant to Articles 38h and 38i of Regulation (EU) No 600/2014 shall be subject to a limitation period of five years.
2. The limitation period referred to in paragraph 1 shall be calculated from 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 the proceedings, of a decision varying the original amount of the fine or periodic penalty payment;
 - (b) any action of ESMA, or of a national competent authority acting at the request of ESMA in accordance with Article 38o of Regulation (EU) No 600/2014, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.
4. Each interruption referred to in paragraph 3 shall restart the limitation period.
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 a review by the Court of Justice of the European Union in accordance with Article 38m of Regulation (EU) No 600/2014.

Article 9

Collection of fines and periodic penalty payments

1. The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest-bearing account opened by ESMA until such time as they become final. In case of multiple fines and periodic penalty payments collected by ESMA in parallel ESMA shall ensure that they are lodged to different accounts or subaccounts. Fines and periodic penalty payments paid shall not be entered into ESMA's budget or recorded as budgetary amounts.
2. Once ESMA has established that the fines or periodic penalty payments have become final following the exhaustion of all appeal rights ESMA shall transfer those amounts and potential interest accruing to the Commission. These amounts shall then be entered in the Union Revenue budget.
3. ESMA shall report on a regular basis to the Commission on the amounts of fines and periodic penalty payments imposed and their status.

Article 10

Entry into force and date of application

This Regulation shall enter into force and apply on the third 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, 16.2.2022

For the Commission
The President
Ursula VON DER LEYEN