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

of 6.7.2022

amending the regulatory technical standards laid down in Delegated Regulation (EU) 2018/1229 as regards the date of application of the provisions related to the buy-in regime

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 909/2014 (CSDR)¹ harmonises the conduct of securities settlement in the Union and the rules governing central securities depositories (CSDs). One of the main objectives of this Regulation is to improve the safety and efficiency of securities settlement, in particular for cross-border transactions, by ensuring that buyers and sellers receive their securities and payment on time and without risks. To achieve this objective, the Regulation harmonises the timing and framework for securities settlement in the Union. In particular, it provides for a set of measures to prevent and address failures in the settlement of securities transactions ('settlement fails'), commonly referred to as settlement discipline measures.

Against this background, the Regulation empowers the Commission to adopt, following 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 establishing ESMA², a delegated Regulation specifying further the settlement discipline measures set out in the Regulation. Commission Delegated Regulation (EU) 2018/1229³ on settlement discipline (the 'RTS on settlement discipline'), specifies the following:

(a) measures to prevent settlement fails, including measures to be taken by financial institutions to limit the number of settlement fails as well as procedures and measures to be put in place by CSDs to facilitate and incentivise timely settlement of securities transactions;

(b) measures to address settlement fails, including the requirements for monitoring and reporting of settlement fails by CSDs; the management by CSDs of cash penalties paid by users causing settlement fails; the details of an appropriate buy-in process following settlement fails; the specific rules and exemptions concerning the buy-in process and the conditions under which a CSD may discontinue providing services to users that cause settlement fails.

The RTS on settlement discipline entered into force on 1 February 2022.

However, before that date market participants have conveyed their concerns about the challenges of implementing the mandatory buy-in regime by the scheduled date due to: (i) the absence of clarity regarding some open questions necessary for the implementation of the buy-in requirements, and (ii) the uncertainty as to whether the Commission's legislative proposal on amending Regulation (EU) No 909/2014 of the European Parliament and of the Council ('CSDR') will include amendments to the mandatory buy-in rules and the extent of any potential amendments.

¹ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directive 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

² 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).

³ Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (OJ L 230, 13.9.2018, p. 1).

Having regard to these concerns, in September 2021 ESMA wrote⁴ to the Commission, the Parliament and the Council calling for a delay of the application of the buy-in regime, so that sufficient time was given for the CSDR review to thoroughly consider the mandatory buy-in framework, in order to ensure that it remains proportionate and effective. In its statement ESMA noted that other settlement discipline measures, i.e. reporting obligations by CSDs and cash penalties in case of delayed settlement, are ready to be implemented and that this assessment is shared by market participants.

An amendment to CSDR itself was required to allow setting different dates of application for the various settlement discipline measures in the RTS on settlement discipline. In November 2021, the Parliament and the Council reached a political agreement⁵ on a change to CSDR that allows for a deferral of mandatory buy-ins, as part of the negotiations of the European Commission proposal for a pilot regime for market infrastructures based on distributed ledger technology⁶. Regulation (EU) 2022/858 (the ‘DLT Pilot Regime’) was adopted on 30 May 2022. That Regulation amends Article 76, paragraph 5 of CSDR to allow setting different dates of application for the various settlement discipline measures in the RTS on settlement discipline.

Given the amendment made to CSDR via the DLT Pilot Regime, ESMA adopted a report⁷ on, proposing the deferral of the application of the mandatory buy-ins regime. To this effect, ESMA proposed an amendment to Commission Delegated Regulation (EU) 2018/1229.

This deferral should allow the Commission, the Parliament and the Council additional time to determine the best way forward to improve settlement efficiency.

The CSDR Refit legislative proposal was published by the European Commission on 16 March 2022⁸. However, this is only the beginning of the legislative procedure, which will focus on CSDR, with potentially including amendments to the CSDR buy-in regime and potential related Level 2 measures.

Taking into account the time required by an ordinary legislative procedure, ESMA believes that a deferral of the application of the existing buy-in requirements for three years would be appropriate.

In addition, a consequence of the start of the application of the CSDR settlement discipline regime on 1 February 2022 was the deletion, by Article 72 of CSDR, of Article 15 of Regulation (EU) No 236/2012 on short selling⁹ (‘SSR’). This article required central counterparties clearing transactions in shares to provide in their rules for a buy-in regime in case of settlement fails.

⁴ [ESMA letter](#) to the European Commission dated 23 September 2021

⁵ [Press statement](#) from the European Commission dated 25 November 2021: “*The Commission also welcomes the political agreement reached on the changes to the Central Securities Depositories Regulation that allow for a deferral of mandatory buy-ins. This will allow further time to determine the best way forward to improve settlement efficiency while avoiding potential negative consequences.*”

⁶ Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology

⁷ “CSDR RTS on settlement discipline – Suspension of buy-in”, European Securities and Markets Authority, 02 June 2022, ESMA70-156-5011

⁸ [The Commission proposes simpler rules to make settlement in EU financial markets safer and more efficient | European Commission \(europa.eu\)](#)

⁹ Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24.

However, this repeal of Article 15 of SSR was justified by the fact that CSDR “*harmonises at Union level the measures to prevent and address settlement fails and has a wider scope of application of application for such measures than [SSR]*”¹⁰.

Therefore, given the envisaged deferral of application of the CSDR buy-in regime, ESMA believes that it is necessary to maintain the requirement formerly introduced by Article 15 of SSR on buy-in.

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

Taking into account the additional time needed for the application of mandatory buy-ins due to the aforementioned developments, which could not be envisaged at the time of adoption of the RTS on settlement discipline, a deferral of the relevant rules is required in order to ensure that the Commission, the Parliament and the Council have sufficient time to determine the best way forward to improve settlement efficiency in the context of the CSDR Refit legislative proposal. It seems therefore appropriate for the Commission to endorse the draft RTS as submitted by ESMA.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Given that the amendment is limited in scope, as well as the urgency to have legal certainty as to the implementation and enforcement of the CSDR buy-in regime, ESMA has not conducted an open public consultation in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010 (‘ESMA Regulation’)¹¹. However, ESMA has consulted the Securities and Markets Stakeholder Group (‘SMSG’) and has conducted a high-level analysis of the costs and benefits. ESMA has also cooperated closely with the members of the European System of Central Banks (‘ESCB’).

More specifically, ESMA noted that the benefits of this proposal would be: (a) avoiding the risk of disorderly and fragmented implementation due to the absence of clarification of certain aspects of the existing mandatory buy-in regime; (b) allowing the Commission and the co-legislators further time to determine the best way forward to improve settlement efficiency; (c) the relief for market participants and authorities; (d) ensuring a legal certainty and transparency for the market and (e) ensuring that market participants will not incur duplicative implementation costs in case those rules are amended as a result of the review of CSDR.

Stakeholders have also contacted the Commission in support of a deferral of the application of the mandatory buy-in regime.

¹⁰ See Recital 78 of CSDR: “Taking into account the fact that this Regulation harmonises at Union level the measures to prevent and address settlement fails and has a wider scope of application for such measures than Regulation (EU) No 236/2012 of the European Parliament and of the Council, it is necessary to repeal Article 15 of that Regulation.”

¹¹ 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.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The Commission Delegated Regulation suspends the application of the provisions relating to the mandatory buy-in regime of the RTS on settlement discipline for three years from the date of entry into force of the Commission Delegated Regulation.

The Commission Delegated Regulation also includes the provisions of former Article 15(1) of SSR in the RTS on settlement discipline itself, to be applied for the duration of the deferral.

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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 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012¹², and in particular Article 7(15) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2018/1229¹³ specifies measures to prevent and address settlement fails and to encourage settlement discipline. Those measures include monitoring settlement fails and collecting and distributing cash penalties for settlement fails. Delegated Regulation (EU) 2018/1229 also specifies the operational details of the buy-in process referred to in Article 7(3) to (8) of Regulation (EU) No 909/2014.
- (2) Delegated Regulation (EU) 2018/1229 was amended by Commission Delegated Regulation (EU) 2020/1212¹⁴ to defer the date of entry into force of Delegated Regulation (EU) 2018/1229 until 1 February 2021. That deferred date of entry into force was again deferred to 1 February 2022 by Commission Delegated Regulation (EU) 2021/70¹⁵.
- (3) Stakeholders have, however, provided evidence that mandatory buy-ins could increase liquidity pressure and the costs of securities at risk of being bought in. Such impact could be further exacerbated in cases of market volatility. Against that background, applying the rules on mandatory buy-ins as laid down in Regulation (EU) No 909/2014 and further specified in Delegated Regulation (EU) 2018/1229 could have a negative impact on the efficiency and competitiveness of capital markets in the

¹² OJ L 257, 28.8.2014, p. 1.

¹³ Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (OJ L 230 13.9.2018, p. 1).

¹⁴ Commission Delegated Regulation (EU) 2020/1212 of 8 May 2020 amending Delegated Regulation (EU) 2018/1229 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (OJ L 275, 24.8.2020, p. 3).

¹⁵ Commission Delegated Regulation (EU) 2021/70 of 23 October 2020 amending Delegated Regulation (EU) 2018/1229 concerning the regulatory technical standards on settlement discipline, as regards its entry into force (OJ L 27, 27.1.2021, p. 1).

Union. That impact could in turn lead to wider bid-offer spreads, reduced market efficiency and reduced incentives to lend securities in the securities lending and repo markets and to settle transactions with central securities depositories established in the Union. The costs of applying the rules on mandatory buy-ins, as currently specified in Regulation (EU) No 909/2014, are therefore expected to outweigh the potential benefits.

- (4) Article 76(5) of Regulation (EU) No 909/2014 has been amended by Article 17 of Regulation (EU) 2022/858 of the European Parliament and of the Council¹⁶. That amendment provides for the possibility to have different dates of application for each of the settlement discipline measures referred to in Article 7(1) to (13) of Regulation (EU) No 909/2014, as further specified in Delegated Regulation (EU) 2018/1229, with the aim of providing for sufficient time to reassess the settlement discipline framework laid down in Regulation (EU) No 909/2014, and in particular of the rules on mandatory buy-ins. It is therefore necessary to ensure that the provisions of Delegated Regulation (EU) 2018/1229 that relate to mandatory buy-ins do not apply until that reassessment has been finalised. That would also ensure that market participants do not incur duplicative implementation costs in case those rules are amended as a result of a review of Regulation (EU) No 909/2014¹⁷.
- (5) As a result, those provisions of Delegated Regulation (EU) 2018/1229 that relate to mandatory buy-ins should not apply from the date of the entry into force of this Regulation until [*OJ, please insert date three years after entry into force of this amending RTS*].
- (6) Pursuant to Article 72 of Regulation (EU) No 909/2014, and to Article 76(5) of that Regulation as it stood before its amendment by Regulation (EU) 2022/858, Article 15 of Regulation (EU) No 236/2012 of the European Parliament and of the Council¹⁸ was deleted from the date of entry into force of Delegated Regulation (EU) 2018/1229, to reflect the fact that from that date on, Regulation (EU) No 909/2014 and Delegated Regulation (EU) 2018/1229 were expected to harmonise at Union level the measures to prevent and address settlement fails with a wider scope of application than Regulation (EU) No 236/2012. Given that the provisions of Delegated Regulation (EU) 2018/1229 that deal with mandatory buy-ins will not apply from the date of the entry into force of this Regulation until [*OJ, please insert date three years after entry into force of this amending RTS*], it is necessary to provide for the buy-in procedures that were previously laid down in Article 15 of Regulation (EU) 236/2012 until the rules laid down in Articles 21 to 38 of Regulation (EU) 2018/1229 apply.
- (7) Delegated Regulation (EU) 2018/1229 should therefore be amended accordingly.
- (8) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (9) Given the limited scope of the amendment, the need to provide clarity to market participants as soon as possible, and the input already provided by those market

¹⁶ Regulation (EU) 2022/858 of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology (OJ L 151, 2.6.2022, p.1).

¹⁷ On 16 March 2022, the European Commission adopted a legislative proposal to amend Regulation (EU) No 909/2014 to enhance the efficiency of the Union's settlement markets, while safeguarding financial stability (https://ec.europa.eu/info/publications/220316-central-securities-depositories-regulation-review_en).

¹⁸ Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).

participants to the public consultation ran by the European Commission within the context of the legislative proposal for Regulation (EU) 2022/858, ESMA has not conducted any open public consultations. ESMA has nevertheless conducted a high-level analysis of the potential related costs and benefits and has requested the advice of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁹. In developing the draft regulatory technical standards, ESMA has also cooperated with the members of the European System of Central Banks,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2018/1229

Delegated Regulation (EU) 2018/1229 is amended as follows:

- (1) in Chapter IV, Final provisions, the following Article 41a is inserted:

‘Article 41a

Transitional provisions

Until [*OJ, please insert a date three years after the entry into force of this amending RTS*], a central counterparty in a Member State that provides clearing services for shares shall ensure that procedures are in place that comply with all of the following requirements:

- (a) where a natural or legal person who sells shares is not able to deliver the shares for settlement within four business days after the day on which settlement is due, procedures are automatically triggered for the buy-in of the shares to ensure delivery for settlement;
 - (b) where the buy-in of the shares for delivery is not possible, an amount is paid to the buyer based on the value of the shares to be delivered at the delivery date plus an amount for losses incurred by the buyer as a result of the settlement failure;
 - (c) the natural or legal person who fails to settle, reimburses all amounts paid pursuant to points (a) and (b).’;
- (2) Article 42 is amended as follows:
- (i) the title is replaced by the following:
‘Entry into force and application’;
 - (ii) the following subparagraph is added:
*‘The settlement discipline measures set out in Articles 21 to 38 shall, however, not apply until [*OJ, please insert date three years after entry into force of this amending RTS*].’.*

¹⁹ 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 2

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, 6.7.2022

For the Commission
The President
Ursula VON DER LEYEN