



Brussels, 11.3.2024
C(2024) 1426 final

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

of 11.3.2024

amending Delegated Regulation (EU) 2022/805 as regards harmonisation of certain aspects of fees charged by the European Securities and Markets Authority to certain benchmark administrators

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The European Securities and Markets Authority (ESMA) has a complex fee funding system based on several legal bases in sectoral legislation. There are currently seven delegated acts laying down the calculation and payment modalities of the fees charged to the different types of entities under ESMA's direct supervision¹.

Since 1 January 2022 ESMA has been responsible for the supervision of the administrators of certain critical benchmarks and of recognised non-EU benchmarks administrators under Regulation (EU) 2016/1011 (the Benchmark Regulation / BMR). Currently, ESMA supervises one administrator of a critical benchmark, the European Money Markets Institute as the administrator of EURIBOR, and ten recognised third country benchmark administrators. Article 48l (3) of the BMR mandates the Commission to adopt a delegated act to set the fees related to ESMA's direct supervision of these benchmark administrators. The Commission acted on this empowerment by adopting Delegated Regulation (EU) 2022/805.

In its 2018 review, the Internal Audit Service of the European Commission (IAS) concluded that the lack of harmonisation between the sectoral delegated regulations resulted in unnecessary complexity and meant that ESMA's resources were not being used as efficiently or effectively as possible. In the same year, the European Court of Auditors observed that the complexity of ESMA's fee funding system creates risks for the correct calculation of fees.²

Following these observations, the Commission asked ESMA for technical advice on harmonisation and simplification of delegated acts on fees charged by ESMA. ESMA

¹ Commission Delegated Regulation (EU) No 272/2012 of 7 February 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to credit rating agencies, OJ L 90, 28.3.2012, p. 6–10; 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, OJ L 279, 19.10.2013, p. 4–9; 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, OJ L 81, 22.3.2019, p. 58–68; Commission Delegated Regulation (EU) 2020/1732 of 18 September 2020 supplementing Regulation (EU) 2017/2402 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to securitisation repositories, OJ L 390, 20.11.2020, p. 1–6; Commission Delegated Regulation (EU) 2022/805 of 16 February 2022 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council by specifying fees applicable to the supervision by the European Securities Markets Authority of certain benchmark administrators, OJ L 145, 24.5.2022, p. 14–19; Commission Delegated Regulation (EU) 2020/1302 of 14 July 2020 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 central counterparties established in third countries, OJ L 305, 21.9.2020, p. 1–6; Commission Delegated Regulation (EU) 2022/930 of 10 March 2022 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council by specifying fees relating to the supervision by the European Securities Markets Authority of data reporting service providers, OJ L 162, 17.6.2022, p. 1–6.

² European Court of Auditors, 2018 audit of EU agencies in brief – Introducing the European Court of Auditors' 2018 annual report on EU agencies, Publications Office of the European Union, 2019, <https://data.europa.eu/doi/10.2865/74246>

delivered two pieces of technical advice on fees charged to CRAs on 21 June 2021³ and on fees charged to trade repositories under the European Market Infrastructure Regulation (EMIR) and the Securities Financing Transactions Regulation (SFTR) on 8 July 2021⁴ with the aim to facilitate consistency and harmonisation across all delegated regulations on fees charged by ESMA. This technical advice is therefore also relevant for the Delegated Regulation (EU) 2022/805 with regard to fees charged to certain benchmark administrators.

Based on the recommendations from the Internal Audit Service, the European Court of Auditors and the technical advice provided by ESMA, the Commission aims to align technical aspects of the fee collection process across ESMA's supervisory mandates. This requires amending five out of seven delegated regulations. The delegated regulations on central counterparties⁵ and on data reporting service providers⁶ will not be included in this exercise as they already converge on the main relevant aspects. The amendments to Delegated Regulation (EU) 2022/805, together with four other delegated acts on fees charged by ESMA, will ensure consistency with regard to the notion of applicable turnover, payment modalities and the general budgetary approach and thus reduce the complexity of ESMA's fees management.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 21 September 2023, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on the content of this delegated act. The EGESC supported the Commission's approach.

The draft Delegated Regulation was published on the Better Regulation portal for a four-week feedback period from 3 January 2024 to 31 January 2024, in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making. No comments were received on the draft delegated regulation.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

In this delegated act, the modalities of the calculation and collection of fees for benchmark administrators under ESMA supervision are brought into line with those applicable in other areas where ESMA charges fees. This necessitates changes in three areas of the amended regulation:

- Article 2a is added to specify the principle of full cost recovery and the scope of the costs (direct and indirect) to be fully covered by the fees.
- In Article 6 it is specified that the year n fee for the supervision of a recognised third country benchmark administrator should be calculated on the basis of audited accounts of year n-2. Previously, the accounts for the most recent completed financial year were used as a reference.

³ Technical Advice on Fees Charged to CRAs by ESMA, 21 June 2021 | ESMA80-196-5170, https://www.esma.europa.eu/sites/default/files/library/esma80-196-5170_final_report_technical_advice_on_fees_charged_to_cras_by_esma_0.pdf

⁴ Technical advice to EC on simplification and harmonisation of fees to TRs under EMIR and SFTR, 8 July 2021| ESMA74-362-1978, https://www.esma.europa.eu/sites/default/files/library/esma74-362-1978_final_report_technical_advice_on_simplification_tr_fees_under_sftr_and_emir.pdf

⁵ Commission Delegated Regulation (EU) 2020/1302.

⁶ Commission Delegated Regulation (EU) 2022/930.

- In Article 7 it is specified that any late payments shall incur the default interest laid down in Article 99 of Regulation (EU, Euratom) 2018/1046, instead of a fixed daily penalty equal to 0,1 % of the amount due.

Finally, this delegated regulation corrects an error in Article 5 setting out the calculation method for the first-year supervisory fee for both administrators of critical benchmarks and recognised third country benchmark administrators.

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THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014¹, and in particular Article 48l(3) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2022/805² specifies the type of fees, the calculation, and the payment modalities with regard to the fees charged by the European Securities and Markets Authority (ESMA) to certain benchmark administrators.
- (2) In 2018, both the Commission's Internal Audit Service's review and the European Court of Auditors' audit³ concluded that ESMA's fee funding system is unnecessarily complex. To simplify the fee collection and reduce risks linked to the incorrect calculation or inefficient allocation of fees, it is necessary to ensure consistency of technical aspects across the different delegated acts on fees charged by ESMA to directly supervised entities.
- (3) To fully cover ESMA's expenditures relating to the supervision of certain benchmark administrators, the annual supervisory fees should be determined on the basis of the annual estimate of all direct costs necessary for the supervisory tasks performed by ESMA and a reasonable apportionment of ESMA's fixed and variable overheads.
- (4) In line with Commission Delegated Regulation (EU) 2019/715⁴, fees charged to benchmark administrators should be set at a level that ensures that the full cost of

¹ OJ L 171, 29.6.2016, p. 1, ELI: <http://data.europa.eu/eli/reg/2016/1011/oj>.

² Commission Delegated Regulation (EU) 2022/805 of 16 February 2022 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council by specifying fees applicable to the supervision by the European Securities Markets Authority of certain benchmark administrators (OJ L 145, 24.5.2022, p. 14, ELI: http://data.europa.eu/eli/reg_del/2022/805/oj).

³ Court of auditors, Annual report on EU agencies for the financial year 2018, (OJ C 417, 11.12.2019, p.29 and 85ff).

⁴ Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 122, 10.5.2019, p. 1, ELI: http://data.europa.eu/eli/reg_del/2019/715/oj).

services provided by ESMA is covered and a deficit is avoided, but at the same time avoids the accumulation of a significant surplus. Where a significant positive or negative budget result becomes recurrent, the level of the fees should be revised.

- (5) The initial supervisory fee due by a benchmark administrator in the year of recognition or authorisation, as applicable, should be proportionate to the period of time in that first year during which the benchmark administrator was recognised or authorised.
- (6) To ensure consistency among delegated acts on fees to be paid to ESMA, and to enable ESMA to receive in due time audited turnover data for the estimation of fees due by benchmark administrators to ESMA, the reference year of the audited accounts for the determination of the applicable turnover should be 2 years prior to the year for which ESMA charges fees to the benchmark administrator.
- (7) The applicable turnover of benchmark administrators is calculated in euros. It is therefore necessary to specify a mechanism for the conversion into euros of revenues generated in other currencies.
- (8) To ensure consistency among delegated acts on fees to be paid to ESMA, ESMA should calculate the penalty in case of late payments in line with the provisions on default interest set out in Article 99 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council⁵.
- (9) In order to avoid legal uncertainty for the currently on-going fee collection process, this Regulation should apply from 1 January 2025.
- (10) Delegated Regulation (EU) 2022/805 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2022/805

Delegated Regulation (EU) 2022/805 is amended as follows:

- (1) the following Article 2a is inserted:

'Article 2a

Recovery of supervisory costs in full

The fees charged to benchmark administrators shall cover:

- (a) all direct and indirect costs relating to the supervision of benchmark administrators by ESMA in accordance with Regulation (EU) 2016/1011, including costs resulting from the recognition, authorisation or extension of authorisation;

⁵ 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) 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, ELI: <http://data.europa.eu/eli/reg/2018/1046/oj>).

- (b) all costs for the reimbursement of direct and indirect costs of competent authorities to which ESMA has delegated tasks in accordance with Regulation (EU) 2016/1011.’;

- (2) in Article 5, the first subparagraph is replaced by the following:

‘By way of derogation from Article 4, the annual supervisory fee in the first year for recognised third country administrators and for authorised critical benchmark administrators, with reference to the year in which they have been recognised or authorised, shall be calculated by applying to the fee for recognition or authorisation, as applicable, the following coefficient:

$$\text{Coefficient} = \frac{\text{Number of calendar days from the date of registration to 31 December}}{\text{Number of calendar days in year } n},$$

- (3) Article 6 is replaced by the following:

‘Article 6

Applicable turnover

1. The applicable turnover of a recognised third country benchmark administrator for a given year *n* shall be its revenues accrued in relation to the use of its benchmarks by supervised entities in the Union as stated in the audited accounts of year *n-2*.

2. A recognised third country benchmark administrator shall provide ESMA, on an annual basis, with audited figures confirming its revenues accrued in relation to the use of its benchmarks in the Union. The figures shall be certified by an external audit and shall be submitted to ESMA by electronic means by 30 September each year (*n-1*). A third country administrator that is recognised after 30 September shall provide the figures immediately upon recognition and by end of the calendar year of recognition. A recognised third country benchmark administrator shall provide the documents containing audited figures in a language customary to financial services.

3. Where the recognised third country benchmark administrator did not operate during the full year (*n - 2*), ESMA shall estimate the applicable turnover by extrapolating, for the recognised third country benchmark administrator, the value calculated for the number of months during which the recognised third country benchmark administrator operated in year (*n - 2*) to the whole year (*n - 2*).

4. Where no audited accounts for year (*n - 2*) are available, ESMA shall use the audited accounts of year (*n - 1*).

5. Where the revenues reported are expressed in a currency other than the euro, ESMA shall convert those revenues into euro using the average euro foreign exchange rate applicable to the period during which those revenues were recorded. For that purpose, ESMA shall use the euro foreign exchange reference rate published by the European Central Bank.’;

- (4) in Article 7, paragraph 2 is replaced by the following:

‘2. Any late payments shall incur the default interest laid down in Article 99 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council*.

* 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) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No

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*. It shall apply from 1 January 2025.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11.3.2024

For the Commission
The President
Ursula VON DER LEYEN