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

of 11.3.2024

**amending Delegated Regulation (EU) 2020/1732 as regards harmonisation of certain
aspects of fees charged by the European Securities and Markets Authority to
securitisation repositories**

(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.

Chapter 3 of Regulation (EU) 2017/2402 ('the Securitisation Regulation') creates a framework for securitisation repositories that will collect all relevant information on a given securitisation instrument and make it available free of charge to investors, potential investors and competent authorities. Article 16(2) of the Securitisation Regulation mandates the Commission to adopt a delegated act specifying the type of fees to be charged by the European Securities and Markets Authority (ESMA) to securitisation repositories, the matters for which fees are due and the manner in which they are to be paid.

Delegated Regulation (EU) 2020/1732 of 18 September 2020 sets (i) the level of the registration and extension-of-registration fees that are to be paid by applicants, (ii) defines the applicable turnover on the basis of which annual supervisory fees are to be charged and (iii) sets the level of the annual supervisory fees. Finally, the delegated act defines the payment modalities and provides for reimbursements of costs incurred by national competent authorities.

In its 2018 review, the Internal Audit Service of the European Commission 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

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.

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 delivered two pieces of technical advice: i) on fees charged to Credit Rating Agencies on 21 June 2021³ and ii) 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) 2020/1732 with regard to fees charged to securitisation repositories.

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 the Delegated Regulation with regard to fees charged by the European Securities and Markets Authority to securitisation repositories, together with four other delegated acts on fees charged by ESMA⁷, 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 and 31 January 2024, in accordance with the principles

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>.

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.

⁷ Commission Delegated Regulation (EU) No 272/2012 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 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 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) 2022/805 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.

laid down in the Interinstitutional Agreement on Better Law-Making. The non-confidential responses to the consultation are published on the Commission's website.⁸ A securitisation repository replied to the consultation on the draft delegated regulation. It welcomed the amendments and asked for further clarification of the notion of 'indirect cost' to avoid further discretion. This comment was not taken into account because ESMA is a public authority and, as such, subject to strict budgetary and accounting rules. Its budget is audited annually by the European Court of Auditors.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This amending delegated act aligns several elements of the fees to be paid by securitisation repositories to ESMA with corresponding rules in other areas in which ESMA charges fees.

The following amendments are introduced:

Article 1 of the amended Act is amended to specify that the fees should fully cover the costs, direct and indirect, of the supervisory activities.

In Article 2, the amending delegated act sets a deadline for the submission of audited accounts by the securitisation repositories for the calculation of the annual supervisory fees and specifies the conversion into euro of revenues in other currencies for the purposes of determining the applicable turnover.

In Article 4, it specifies that a securitisation repository that is registered in the month of December, does not have to pay an annual supervisory fee for the year it is registered.

It specifies in Article 5 the penalty in case of late payments.

Finally, it removes the possibility for an applicant to get reimbursed if it withdraws its application in Article 6.

This amending act also corrects an incorrect reference in the text of Article 4.

⁸ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13931-European-Securities-and-Markets-Authority-harmonising-and-simplifying-fees-charged-to-securitisation-repositories_en

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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) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012¹, and in particular Article 16(2) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2020/1732² specifies the type and amount of fees charged by the European Securities and Markets Authority (ESMA) to securitisation repositories, and the payment modalities thereof.
- (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 collection of fees 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.
- (3) To fully cover ESMA's expenditures relating to the supervision of securitisation repositories, 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 securitisation repositories should be set at a level that ensures that the full cost of services provided by ESMA is covered and a deficit is avoided, but at the same time

¹ OJ L 347, 28.12.2017, p. 35, ELI: <http://data.europa.eu/eli/reg/2017/2402/oj>.

² 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, ELI: http://data.europa.eu/eli/reg_del/2020/1732/oj).

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

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) ESMA should be able to establish its annual budget in time, based on certified turnover data. To enable ESMA to calculate the annual supervisory fees, a deadline should be set by which securitisation repositories are to submit to ESMA their audited accounts.
- (6) The applicable turnover of securitisation repositories is calculated in euros. It is therefore necessary to specify a mechanism for the conversion into euros of revenues generated in other currencies.
- (7) The registration and extension-of-registration fee is meant to cover the costs incurred by ESMA to investigate whether the securitisation repository concerned fulfils all conditions for registration or extension of registration. Where an applicant securitisation repository withdraws its application, ESMA will have incurred costs and is under no obligation to refund fees related to such registration or extension of registration.
- (8) The administrative cost linked to the first year supervisory fee for a securitisation repository registered in December, is not proportionate to the fee itself. Therefore, a securitisation repository that is registered in December should be exempted from the requirement to pay an annual supervisory fee for the year in which that securitisation repository was registered.
- (9) 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.
- (10) To further simplify the fee management, and to ensure that ESMA has the necessary resources to carry out its planned supervisory activities, ESMA should not refund annual supervisory fees.
- (11) In order to avoid legal uncertainty for the on-going fee collection process, this Regulation should apply from 1 January 2025.
- (12) Delegated Regulation (EU) 2020/1732 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2020/1732

Delegated Regulation (EU) 2020/1732 is amended as follows:

- (1) Article 1 is replaced as follows:

‘Article 1

Recovery of supervisory costs in full

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>).

The fees charged to securitisation repositories shall cover:

(a) all direct and indirect costs relating to the registration and supervision of securitisation repositories by ESMA in accordance with Regulation (EU) 2017/2402, including costs resulting from the extension of registration for trade repositories that have already been registered under Title VI, Chapter 1 of Regulation (EU) No 648/2012 or Chapter III of Regulation (EU) 2015/2365;

(b) all costs for the reimbursement of direct and indirect costs of competent authorities that have carried out work pursuant to Regulation (EU) 2017/2402, and as a result of any delegation of tasks pursuant to Article 14(1) of that Regulation.’;

(2) Article 2 is amended as follows:

(a) the following paragraph 4a is inserted:

‘4a. Securitisation repositories shall provide ESMA on an annual basis with audited accounts as referred to in paragraph 1. The documents shall be submitted to ESMA by electronic means by 30 September each year (n-1).’;

(b) the following paragraph 5a is added:

‘5a. Where the revenues referred to in this Article are reported in another currency than 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.’;

(3) in Article 4, paragraphs 2 and 3 are replaced by the following:

‘2. The annual supervisory fee to be paid by a securitisation repository for the year in which that securitisation repository was registered shall be equal to the registration fee due under Article 3, multiplied by the number of calendar days from the securitisation repository’s date of registration until the end of that year and divided by the total number of days in that year.

By way of derogation from the first subparagraph, where a securitisation repository is registered during the month of December, that repository shall not be required to pay an annual supervisory fee for the year in which it was registered.

3. The annual supervisory fee for a given year n to be paid by a securitisation repository registered on or after 1 October of the preceding year shall be equal to the registration fee due under Article 3.’;

(4) in Article 5, 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 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>).’;

(5) Article 6 is amended as follows:

- (a) the title is replaced by the following:
‘Payment of registration fees’;
- (b) paragraph 2 is replaced by the following:
‘2. ESMA shall not refund registration or extension-of-registration fees where an applicant withdraws its application for registration or extension of registration.’;
- (c) paragraphs 3 is deleted;
- (6) in Article 7, the following subparagraph is added:
‘ESMA shall not refund the annual supervisory fee.’

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