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

of 11.3.2024

amending Delegated Regulation (EU) 2019/360 as regards harmonisation of certain aspects of fees charged by the European Securities and Markets Authority to trade 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 supervision.¹

In particular, ESMA charges fees to trade repositories under the Securities Financing Transactions Regulation (SFTR) in accordance with Commission Delegated Regulation (EU) 2019/360², adopted pursuant to Article 11(2), of Regulation (EU) 2015/2365³.

The power to adopt a delegated regulation is provided in Article 11(2) of SFTR. According to that provision, the Commission is empowered to adopt a delegated regulation specifying the types of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

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 (ECA) observed

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 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).

³ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1–34).

that the complexity of ESMA's fee funding system creates risks for the correct calculation of fees⁴.

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 on fees charged to CRAs on 21 June 2021⁵ and on fees charged to trade repositories under the European Market Infrastructure Regulation (EMIR) and SFTR on 8 July 2021⁶ with the aim to facilitate consistency and harmonisation across all delegated regulations on fees charged by ESMA.

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 counterparties⁷ and on data reporting service providers⁸ will not be included in this exercise as they already converge on the main relevant aspects. The amendments to Delegated Regulation (EU) 2019/360, together with four other delegated acts on fees charged by ESMA⁹, 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

In July 2020, the Commission asked ESMA to provide technical advice to review the Commission delegated regulations on fees for trade repositories under EMIR and SFTR. In particular, the Commission indicated that it considers it appropriate that ESMA delivers the advice based on its experience with the use of the delegated acts on fees, as well as the observations made by the IAS and the ECA through their reviews of ESMA's revenue collection processes. It was also indicated that the technical advice should facilitate consistency and harmonisation across all the fee delegated regulations relevant for ESMA.

Following an in-depth technical assessment, ESMA conducted a public consultation on the technical aspects of the envisaged delegated regulation on fees from March to April 2021. The non-confidential responses to the consultation are published on ESMA's website. ESMA submitted its technical advice to the Commission in July 2021.

⁴ 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>.

⁵ 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

⁶ 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

⁷ Commission Delegated Regulation (EU) 2020/1302.

⁸ Commission Delegated Regulation (EU) 2022/930.

⁹ Commission Delegated Regulation (EU) No 272/2012 with regard to fees charged by the European Securities and Markets Authority to credit rating agencies;
Commission Delegated Regulation (EU) No 1003/2013 with regard to fees charged by the European Securities and Markets Authority to trade repositories;
Commission Delegated Regulation (EU) 2020/1732 with regard to fees charged by the European Securities and Markets Authority to securitisation repositories;
Commission Delegated Regulation (EU) 2022/805 specifying fees applicable to the supervision by the European Securities Markets Authority of certain benchmark administrators.

On 21 September 2023, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on ESMA's technical advice and on the content of this Delegated Regulation. EGESC has 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. The responses to the consultation have been published on the Commission's website.¹⁰ Two comments were received on the draft delegated regulation, one from a citizen and one from a trade repository.

The citizen provided general comments on business environment, that the Commission considered unrelated to the content of this delegated act.

The trade repository suggested the provision of additional detail and information on fees and costs and the introduction of a fee cap. This comment was not taken into account because ESMA is a public authority and, as such, subject to strict budgetary and accounting rules. In addition its budget is audited annually by the European Court of Auditors.

The same trade repository raised issues linked to the calculation of the total applicable turnover in case trade repositories leave or enter the market. The Commission believes that the delegated act is sufficiently clear on these matters. After a trade repository has left the market, its turnover, regardless of the reference year for the accounts, will not be considered for determining the total applicable turnover for trade repositories remaining in the market. Conversely, a specific article determines the fees to be paid in the first year in which a trade repository enters the market.

Finally, the trade repository reiterated its request to increase to 60 days the payment terms for annual supervisory and recognition fees. The Commission would like to clarify that the procedure for fixing annual supervisory fees is transparent and trade repositories can foresee them in advance. ESMA presents its annual work programme together with its estimated costs and draft budget in September each year. That gives a first indication of the levels of fees. The approved budget is published on ESMA's website and in the Official Journal of the EU in the beginning of the calendar year to which it relates. Recognition fees are fixed fees and the consequence of an internally approved decision to apply for recognition, therefore, trade repositories can plan their payment in advance.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 of the regulation sets out the amendments to Delegated Regulation (EU) 2019/360. In particular, it provides for amendments to specify, under:

- Article 1 the scope of the costs (direct and indirect) to be fully covered by the fees.
- Article 2, the definition of applicable turnover of trade repositories, on the basis of the audited accounts of the relevant reference year (n - 2) and the conversion in euro of audited accounts provided in currencies other than the euro.

¹⁰ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13933-European-Securities-and-Markets-Authority-harmonising-and-simplifying-fees-charged-to-trade-repositories-under-EMIR_en and https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13934-European-Securities-and-Markets-Authority-harmonising-and-simplifying-fees-charged-to-trade-repositories-under-SFTR_en

- Article 6, the legal reference on ESMA’s budget principles and how to determine the initial supervisory fee in the year of the trade repository’s registration.
- Article 8, the applicable interest rate to apply to any late payments.
- Article 9, the time of payment of registration fees.
- Article 10, the time of payment of annual supervisory fees.
- Article 11, the time of payment of recognition and annual supervisory fees for third country trade repositories.

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THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012¹, and in particular Article 11(2) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2019/360² 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 trade repositories.
- (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, where appropriate and possible.
- (3) To fully cover ESMA's expenditure relating to supervision of trade 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) To ensure consistency among delegated acts on fees to be paid to ESMA, and to enable ESMA to receive in due time the audited turnover data for the estimation of fees due by trade repositories 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 trade repository.

¹ OJ L 337, 23.12.2015, p. 1, ELI: <http://data.europa.eu/eli/reg/2015/2365/oj>.

² 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, ELI: http://data.europa.eu/eli/reg_del/2019/360/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.

- (5) The applicable turnover of trade repositories is calculated in euros. It is therefore necessary to specify a mechanism for the conversion into euros of revenues generated in other currencies.
- (6) Annual supervisory fees should be equal to the estimate of expenditure relating to the supervision of trade repositories' activities under Regulation (EU) 2015/2365, as included in ESMA's budget for that year.
- (7) In line with Commission Delegated Regulation (EU) 2019/715⁴, fees charged to trade 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 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.
- (8) To avoid an excessive supervisory fee in the year of its registration, a registered trade repository should pay an initial supervisory fee the amount of which should be proportional to the period of time in that first year during which the trade repository has been registered.
- (9) The administrative cost linked to the first year supervisory fee for a trade repository registered in December, is not proportionate to that fee. Therefore, a trade repository that is registered in December should be exempted from the requirement to pay an annual supervisory fee for the year in which that trade repository was registered.
- (10) 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.
- (11) To enhance transparency with respect to the terms and processes of payment of fees for trade repositories, it is necessary to determine within which period of time, or at which date, trade repositories are to pay an ESMA invoice on fees. For the annual supervisory fees, it is necessary to specify the amount and the latest date on which ESMA is to send the relevant invoice to trade repositories.
- (12) To ensure the timely payment of registration fees and recognition fees, those fees should in any case be paid within 30 calendar days from the date of issuance of ESMA's invoice.
- (13) To further simplify the fee payment flows, and to ensure ESMA has the necessary funds to carry out its planned supervisory activities, annual supervisory fees should be paid in a single instalment during the first 3 months of the calendar year for which such fees are due.

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)

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>).

- (14) To provide sufficient time and facilitate internal approval processes, ESMA should send invoices for the payments of annual supervisory fees at least 30 calendar days before the relevant payment date.
- (15) In order to avoid legal uncertainty for the ongoing fee collection process this Regulation should apply from 1 January 2025.
- (16) Delegated Regulation (EU) 2019/360 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2019/360

Delegated Regulation (EU) 2019/360 is amended as follows:

- (1) Article 1 is replaced by the following:

Article 1

Recovery of supervisory costs in full

The fees charged to trade repositories shall cover:

- (a) all direct and indirect costs relating to the registration and supervision of trade repositories by ESMA in accordance with Regulation (EU) 2015/2365, including those costs resulting from the recognition of trade repositories as well as costs resulting from the extension of registration or extension of recognition for trade repositories that have already been registered or recognised under Regulation (EU) No 648/2012;
 - (b) all costs for the reimbursement of direct and indirect costs of competent authorities that have carried out work pursuant to Regulation (EU) 2015/2365, and as a result of any delegation of tasks pursuant to Article 74 of Regulation (EU) No 648/2012 and in accordance with Article 9 of Regulation (EU) 2015/2365.’;
- (2) Article 2 is amended as follows:
 - (a) paragraph 3 is replaced by the following:

‘3. The applicable turnover of a given trade repository for a given year (n) shall be the sum of the amounts referred to in points (a) and (b), divided by the sum of the amounts referred to in points (c) and (d):

 - (a) the revenues generated from the core functions of centrally collecting and maintaining records of SFTs under Regulation (EU) 2015/2365 on the basis of the audited accounts of the year (n - 2);
 - (b) the applicable revenues from the ancillary services determined in accordance with paragraphs 1 and 2, as applicable, on the basis of the audited accounts of the year (n - 2);
 - (c) the total revenues of all registered trade repositories generated from the core functions of centrally collecting and maintaining records of SFTs under Regulation (EU) 2015/2365 on the basis of the audited accounts of the year (n - 2);

- (d) the total applicable revenues from the ancillary services of all registered trade repositories determined in accordance with paragraphs 1 and 2, as applicable, on the basis of the audited accounts of the year (n - 2).’;
- (b) the following paragraph 3a is inserted:
 ‘3a. Trade repositories shall provide ESMA, on an annual basis, with the audited accounts referred to in paragraphs 1 and 2. Trade repositories shall submit those accounts to ESMA by electronic means by 30 September each year (n - 1).’;
- (c) paragraph 4 is replaced by the following:
 ‘4. Where the trade repository did not operate during the full year (n - 2), ESMA shall estimate its applicable turnover in accordance with paragraph 3 and by extrapolating the value calculated for the number of months during which the trade repository operated in year (n - 2) to the whole year (n - 2).’;
- (d) the following paragraphs 5 and 6 are added:
 ‘5. Where no audited accounts for year (n - 2) are available, ESMA shall use the audited accounts for year (n - 1).
 6. Where the revenues referred to in paragraph 3 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 the revenues were recorded. For that purpose, ESMA shall use the euro foreign exchange reference rate published by the European Central Bank.’;
- (3) Article 3 is deleted;
- (4) Article 6 is amended as follows:
- (a) in paragraph 2, point (a) is replaced by the following:
 ‘(a) the total annual supervisory fee for a given year (n) shall be the estimate of expenditure relating to the supervision of registered trade repositories' activities under Regulation (EU) 2015/2365 as included in ESMA's budget for that year.’;
- (b) paragraph 3 is replaced by the following:
 ‘3. In no case shall a trade repository registered under Article 5(5) of Regulation (EU) 2015/2365 pay an annual supervisory fee of less than EUR 30 000.’;
- (c) the following paragraph 4 is added:
 ‘4. By way of derogation from paragraphs 1, 2 and 3, a registered trade repository shall pay, in the year of its registration (‘year (n)’), an initial supervisory fee (‘SF(n)’), equal to the following:

$$SF(n) = RF \cdot k$$
 where:
 RF = the registration fee calculated in accordance with Article 5;

$$k = \frac{\text{number of calendar days from the date of registration until 31 December in year (n)}}{\text{number of calendar days in year (n)}}.$$
 The trade repository shall pay the supervisory fee of the first year after it has been notified by ESMA that its application has been successful and within 30 calendar

days from the date of issuance of ESMA's invoice. However, where a trade repository is registered during the month of December, that trade repository shall not be required to pay an annual supervisory fee for the year in which it was registered.';

(5) in Article 8, paragraph 2 is replaced by the following:

'2. Any late payment 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>).;

(6) in Article 9, paragraph 1 is replaced by the following:

'1. The registration fee referred to in Article 5 shall be due at the time the trade repository submits its application for registration under Article 5(5) of Regulation (EU) 2015/2365 and shall be paid in full within 30 calendar days from the date of issuance of ESMA's invoice.';

(7) in Article 10, paragraphs 1 and 2 are replaced by the following:

'1. The annual supervisory fee referred to in Article 6 for a given year (n) shall be paid in a single instalment which shall be due by the end of March of the year to which it relates. The annual supervisory fee shall not be reimbursed.

2. ESMA shall send the invoice specifying the amount of the annual supervisory fee to the trade repositories at least 30 calendar days before the payment date.';

(8) Article 11 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

'1. The recognition fees referred to in Articles 7(1) and 7(2) shall be due at the time the trade repository submits its application for recognition under Article 19(4) of Regulation (EU) 2015/2365 and shall be paid in full within 30 calendar days from the date of issuance of ESMA's invoice.

ESMA shall not refund the recognition fee.

2. The annual supervisory fee for a recognised trade repository for a given year (n) shall be paid by the end of the third month of the calendar year for which such fee is due. ESMA shall send the invoice specifying the amount of the annual supervisory fee to the recognised trade repository at least 30 calendar days before the payment date.'.

(b) paragraph 3 is deleted.

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