

**COMMISSION DELEGATED REGULATION (EU) 2021/732****of 26 January 2021****amending Delegated Regulation (EU) No 667/2014 with regard to the content of the file to be submitted by the investigation officer to the European Securities and Markets Authority, the right to be heard with regard to interim decisions and the lodging of fines and periodic penalty payments****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories <sup>(1)</sup>, and in particular Article 64(7) thereof,

Whereas:

- (1) Regulation (EU) No 648/2012 has been amended by Regulation (EU) 2019/834 of the European Parliament and of the Council <sup>(2)</sup>. Those amendments concerned, inter alia, the definition of financial counterparties, the right of access to the investigation file by persons subject an investigation, the fines to be paid by a trade repository that has, intentionally or negligently, committed one of the infringements listed in Annex I to Regulation (EU) No 648/2012, and the right of persons that may be subject to a periodic penalty payment to be heard.
- (2) Commission Delegated Regulation (EU) No 667/2014 <sup>(3)</sup> was adopted on the basis of Article 64(7) of Regulation (EU) No 648/2012 and deals with the rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority ('ESMA'), including rules on the right of defence. Since the amendments introduced by Regulation (EU) 2019/834 into Regulation (EU) No 648/2012 concern those rules of procedure, it is necessary to ensure that those amendments are also reflected in Delegated Regulation (EU) No 667/2014.
- (3) It is important that transparency is ensured between the investigation officer appointed by ESMA in accordance with Article 64 of Regulation (EU) No 648/2012 and ESMA itself. Such transparency requires that the investigation officer's file contains the submissions made by persons subject to the investigation and the statement of findings on the basis on which those persons provided their submissions.
- (4) According to the second subparagraph of Article 67(1) of Regulation (EU) No 648/2012, ESMA has the possibility to adopt, where urgent action is needed, interim decisions without first hearing the persons subject to an investigation or proceedings. To ensure the effectiveness of ESMA's power to adopt interim decisions, persons subject to an investigation should not have the right to access the file or to be heard before the investigation officer submits the file with his or her findings to ESMA or before ESMA adopts its interim decision. However, to respect the rights of defence, persons subject to an investigation should have the right to access the file as soon as the investigation officer has submitted the file with his or her statement of findings to ESMA and the right to be heard as soon as possible after ESMA has adopted its interim decision.

<sup>(1)</sup> OJ L 201, 27.7.2012, p. 1.

<sup>(2)</sup> Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

<sup>(3)</sup> Commission Delegated Regulation (EU) No 667/2014 of 13 March 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority including rules on the right of defence and temporal provisions (OJ L 179, 19.6.2014, p. 31).

- (5) According to Article 68(5) of Regulation (EU) No 648/2012, the amounts corresponding to the fines and periodic penalty payments collected by ESMA are to be allocated to the general budget of the Union. Fines and periodic penalty payments collected by ESMA should be lodged to interest bearing accounts until they become final. For each decision imposing fines or periodic penalty payments, the amounts collected by ESMA should be lodged to a separate account or subaccount to ensure traceability until that decision becomes final.
- (6) Delegated Regulation (EU) No 667/2014 should be amended accordingly.
- (7) In the interest of the immediate exercise by ESMA of effective supervisory and enforcement powers, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

Delegated Regulation (EU) No 667/2014 is amended as follows:

- (1) in Article 3, paragraph 1 is replaced by the following:

'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 of the statement of findings 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) the following Article 3a is inserted:

*'Article 3a*

#### **Right to be heard by ESMA with regard to interim decisions on supervisory measures**

1. By way of derogation from Articles 2 and 3, the procedure set out in this Article shall apply where ESMA adopts interim decisions pursuant to the second subparagraph of Article 67(1) of Regulation (EU) No 648/2012.

2. The investigation officer shall submit the file with his or her findings to ESMA and immediately inform the person subject to investigation of his or her findings but shall not provide that person with the opportunity to make submissions. The statement of findings of the investigation officer shall set out the facts liable to constitute one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements.

Where so requested, the investigation officer shall grant access to the file to the person subject to investigation.

3. Where ESMA considers that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement listed in Annex I to Regulation (EU) No 648/2012, it shall decide to close the investigation and notify that decision to the person subject to investigation.

4. Where ESMA decides that one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and adopts an interim decision imposing supervisory measures as laid down in Article 73(1), points (a), (c) and (d), of Regulation (EU) No 648/2012, ESMA shall immediately notify that interim decision to that person.

ESMA shall set a reasonable time limit within which the persons subject to investigation may make written submissions on the interim decision. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit.

Where so requested, ESMA shall grant access to the file to the persons subject to the investigation.

ESMA may invite the persons subject to investigation to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers, or by other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

5. ESMA shall hear the person subject to the investigation and take a final decision as soon as possible after the adoption of the interim decision.

Where ESMA considers, based on the complete file and after having heard the persons subject to investigation, that one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012 has been committed by the person subject to investigation, it shall adopt a confirmatory decision imposing one or more of the supervisory measures laid down in Article 73(1), points (a), (c) and (d), of Regulation (EU) No 648/2012. ESMA shall immediately notify the person concerned of that decision.

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

(3) Article 8 is amended as follows:

(a) the first subparagraph is replaced by the following:

‘The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest-bearing account opened by the accounting officer of ESMA until such time as they become final. In case multiple fines or periodic penalty payments are collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts. Amounts paid shall not be entered into ESMA’s budget or recorded as budgetary amounts.’;

(b) the third subparagraph is replaced by the following:

‘ESMA’s Accounting Officer shall report on a regular basis to the Authorising Officer of Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission on the amounts of fines and periodic penalty payments imposed and their status.’.

#### *Article 2*

This Regulation shall enter into force on the 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, 26 January 2021.

*For the Commission*  
*The President*  
Ursula VON DER LEYEN

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