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 (Text with EEA relevance)

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

(Text with EEA relevance)

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 648/2012[(1)], and in particular Article 11(2) thereof,

Whereas:

(1) Article 62 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(2)] provides that the revenues of the European Securities and Markets Authority (ESMA) consist of fees paid to ESMA in the cases specified in Union legislation, together with contributions from national public authorities and a subsidy from the Union.

(2) A registration fee should be charged to trade repositories established in the Union to cover ESMA's costs for processing the application for registration.

(3) ESMA's costs for processing the application for registration will be higher where the trade repository provides ancillary services. The provision of such ancillary services is an indicator for high expected turnover and for increased costs associated with assessing the application for registration. Therefore, for the purpose of charging registration fees, trade repositories should be classified into two categories of expected total turnover, higher and lower expected turnover, to which different registration fees should apply, depending on whether they intend to provide ancillary services.

(4) Where a trade repository already registered under Regulation (EU) No 648/2012 of the European Parliament and of the Council[(3)] applies for an extension of registration, the expenditure necessary to accurately assess and examine the application would be lower than for a new registration as ESMA is already in possession of pertinent information regarding the applicant trade repository. Therefore, the applicant trade repository should pay a reduced fee. Where a trade repository not already registered under Regulation (EU) No 648/2012 simultaneously submits applications for registration under both

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Regulation (EU) No 648/2012 and Regulation (EU) 2015/2365, the expenditure necessary to accurately assess and examine the applications would also be lower because of the synergies of reviewing once the same type of documents. In the case of simultaneous applications, the trade repository should pay the full registration fee due under Regulation (EU) No 648/2012, and the reduced fee for extension of registration due under Regulation (EU) 2015/2365.

(5) If, after registration, a trade repository starts offering ancillary services and thereby falls into a higher category in terms of expected total turnover, the trade repository should pay the difference between the initial registration fee and the registration fee corresponding to the category of higher expected turnover. Conversely, where a trade repository stops offering ancillary services after registration, it should not be reimbursed by ESMA as the expenditure necessary to assess the application of a high turnover trade repository has effectively been spent during registration.

(6) In order to discourage unfounded applications, registration fees should not be reimbursed if an applicant withdraws its application during the registration process, nor if registration is refused.

(7) To ensure an efficient use of ESMA's budget and, at the same time, alleviate the financial burden on Member States and the Union, it is necessary to ensure that trade repositories pay at least all the costs related to their supervision. Supervisory fees should be set at a level such as to avoid a significant accumulation of deficit or surplus for activities related to trade repositories. Should deficits occur, ESMA should not recover the deficit from the trade repositories. Should the deficit be significant, ESMA should analyse the reasons and amend its pro-forma supervisory costs for the next budgeting period. With regard to surpluses, surpluses of fees should not be recovered by trade repositories.

(8) In order to ensure a fair and clear allocation of fees which, at the same time, reflects the actual administrative effort devoted to each supervised entity, the supervisory fee should be calculated on the basis of the turnover generated by a trade repository's core activities and its ancillary services. For the purpose of calculating the applicable turnover, it is necessary to distinguish ancillary services directly related to the provision of the core services of centrally collecting and maintaining records of securities financing transactions (SFTs) under Regulation (EU) 2015/2365, such as agent lending and collateral management or services relating to centrally collecting and maintaining records of SFTs and derivatives, such as trade matching, trade confirmation/affirmation, collateral valuation, and third-party reporting. The supervisory fees charged to a trade repository should be proportionate to the activity of that individual trade repository compared to the total activity of all registered and supervised trade repositories within a given year. However, given that there are some fixed administrative costs for the supervision of trade repositories, a minimum annual supervisory fee should be established. This amount is not affected by payment of supervisory fees under Regulation (EU) No 648/2012.

(9) Rules should be provided for fees to be charged to third country trade repositories that apply for recognition in the Union pursuant to Regulation (EU) 2015/2365, in order to cover recognition and annual supervisory administrative costs. In this regard,

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the recognition fee should include two components, the necessary expenditure relating to processing the application for recognition of such third-country trade repositories by ESMA pursuant to Article 19(4) of that Regulation and the necessary expenditure relating to the conclusion of cooperation arrangements with the competent authorities of the third country where the applicant trade repository is registered pursuant to Article 20 of that Regulation. The costs associated with the conclusion of cooperation arrangements should be shared among the trade repositories recognised from the same third country. Furthermore, third country trade repositories should be charged an annual supervisory fee.

(10) Where a third-country trade repository already recognised under Regulation (EU) No 648/2012 applies for an extension of its registration of recognition, the costs of processing the application should be lower than the costs of processing a new application due to synergies between the regimes under Regulation (EU) No 648/2012 and Regulation (EU) 2015/2365. Therefore, the component of the recognition fee relating to processing the application should be reduced. On the other hand, the costs of concluding a cooperation agreement entail costs specific to compliance with Regulation (EU) 2015/2365. Therefore, the component of the recognition fee relating to cooperation agreements should be independent from the existence of cooperation agreements under Regulation (EU) No 648/2012.

(11) The supervisory functions exercised by ESMA in respect of recognised third-country trade repositories mainly relate to the implementation of cooperation arrangements, including the effective exchange of data between relevant authorities. The cost of providing those functions should be covered by annual supervisory fees charged to recognised trade repositories. As those costs will be much lower than the costs incurred by ESMA for providing direct supervision of registered trade repositories in the Union, the supervisory fees for recognised trade repositories should be significantly lower than the minimum supervisory fee charged to registered trade repositories directly supervised by ESMA.

(12) National competent authorities incur costs when carrying out work pursuant to Regulation (EU) 2015/2365 and as a result of any delegation of tasks by ESMA to national competent authorities pursuant to Article 74 of Regulation (EU) No 648/2010 and in accordance with Article 9(1) of Regulation (EU) 2015/2365. The fees charged by ESMA to trade repositories should also cover those costs. In order to avoid competent authorities incurring a loss or profit from carrying out delegated tasks or from assisting ESMA, ESMA should reimburse the actual costs incurred by that national competent authority.

(13) As only limited data will be available regarding the activity of a trade repository in the year in which it is registered, an interim supervisory fee should be calculated on the basis of an estimate of the expenditure necessary for supervising that trade repository in its first year. The exact calculation of the fee should take into account the date of the registration of the trade repository and the date when the reporting obligation referred to in Article 4(1) of Regulation (EU) 2015/2365 starts so as to accurately reflect the level of supervision required from ESMA. If the regulatory reporting of a trade repository

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only starts in the year following its registration, the interim supervisory fee for the year of registration should be based on the registration fee. This is because the expenditure necessary for the supervision of a trade repository not yet reporting is comparable to the expenditure necessary for assessing the application for registration. Depending on the time between registration and the end of the year, the amount is adjusted pro rata assuming that a standard registration process requires 150 working days. If the regulatory reporting of a trade repository starts in the first six months of the year of its registration, the interim supervisory fee should be calculated on the basis of the applicable turnover reflecting the trade repository's revenues for the first half year. If the regulatory reporting of a trade repository starts in the last six months of the year of its registration, the interim supervisory fee should be calculated on the basis of the level of the trade repository's registration fee. This is because there is only limited data available for the application of the applicable turnover.

(14) Trade repositories registered in 2019 will not start providing reporting services before the end of 2019 and their level of activity in 2019 is likely to be almost non-existent. Therefore, their annual supervisory fee for 2020 should be calculated on the basis of their applicable turnover during the first half of 2020.

(15) This Regulation should form the basis for ESMA's right to charge fees to trade repositories,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Recovery of supervisory costs in full

The fees charged to trade repositories shall cover:

(a) all 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 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 (EC) No 2015/2365 (EU).

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Article 2

Applicable turnover

1 Trade repositories registered under Regulation (EU) 2015/2365 only shall keep audited accounts for the purposes of this Regulation which distinguish between at least the following:

a revenues generated from core functions of centrally collecting and maintaining records of SFTs under Regulation (EU) 2015/2365;

b revenues generated from ancillary services that are directly related to centrally collecting and maintaining records of SFTs under Regulation (EU) 2015/2365.

The applicable revenues from ancillary services of the trade repository for a given year (n) shall be the revenues from the services determined under point (b).

2 Trade repositories registered under both Regulation (EU) 2015/2365 and Regulation (EU) No 648/2012 shall keep audited accounts for the purposes of this Regulation which distinguish between at least the following:

a revenues generated from core functions of centrally collecting and maintaining records of SFTs under Regulation (EU) 2015/2365;

b revenues generated from core functions of centrally collecting and maintaining records of derivatives under Regulation (EU) No 648/2012;

c revenues generated from ancillary services that are directly related to centrally collecting and maintaining records of SFTs under Regulation (EU) 2015/2365;

d revenues generated from ancillary services that are directly related to both centrally collecting and maintaining records of SFTs under Regulation (EU) 2015/2365 and centrally collecting and maintaining records of derivatives under Regulation (EU) No 648/2012.

The applicable revenues from ancillary services of the trade repository for a given year (n) shall be the sum of

— the revenues referred to in point (c) and

— a share of the revenues referred to in point (d).

The share of the revenues referred to in point (d) shall be equal to the revenues referred to in point (a), divided by the sum of

— the revenues referred to in point (a) and

— the revenues referred to in point (b).

3 The applicable turnover of a trade repository for a given year (n) shall be the sum of

— its 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 previous year (n – 1) and

— its applicable revenues from ancillary services determined according to paragraphs 1 and 2, as applicable, on the basis of the audited accounts of the previous year (n – 1)

divided by the sum of

— 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 previous year (n – 1) and