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 (Text with EEA relevance)

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

(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[(1)], and in particular Article 64(7) thereof,

Whereas:

(1) Regulation (EU) No 648/2012 empowers the Commission to lay down rules of procedure for the exercise of the power to impose fines or periodic penalty payments by the European Securities and Markets Authority (ESMA) upon trade repositories and persons involved in trade repositories. In the application of this Regulation, account should be taken of ESMA's organisational rules laid down in Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(2)], including, in particular, the delegation of certain clearly defined tasks and decisions to internal committees or panels in accordance with Article 41 of Regulation (EU) No 1095/2010, whilst fully respecting the rights of defence of persons subject to investigation and the principle of collegiality that governs ESMA's operations.

(2) The right to be heard is recognised in the Charter of Fundamental Rights. In order to respect the rights of defence of trade repositories and of other persons subject to action by the European Securities and Markets Authority (ESMA) and to ensure that it takes all relevant facts into account when adopting enforcement decisions, ESMA should hear the trade repositories or any other persons concerned. Persons subject to the investigations should therefore be granted the right to make written submissions in response to statements of findings issued by the investigation officer and ESMA, including in case of material change in the initial statement of findings.

(3) Following the written submissions by the trade repository to the investigation officer, the complete file, including those submissions, should be submitted to ESMA.

Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) No 667/2014. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

However, it may occur that some elements of the written submissions that the trade repository made to the investigation officer or to ESMA, are not sufficiently clear or detailed, and that they need to be further explained by the trade repository. Should the investigation officer or ESMA consider that this is the case, the trade repository or the persons subject to investigation may be invited to attend an oral hearing to clarify those elements.

(4) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy is recognised in the Charter of Fundamental Rights of the European Union. Articles 64(5) and 67 of Regulation (EU) No 648/2012 establish that, persons subject to ESMA proceedings, are entitled to have access to ESMA's file, subject to the legitimate interest of other persons to protect their business secrets and their personal data. The right of access to the file should not extend to confidential information.

(5) Council Regulation (EC) No 1/2003[(3)] lays down detailed rules on limitation periods for when the Commission has to fine an undertaking under Article 101 or 102 of the Treaty on the Functioning of the European Union. Legislation in force in Member States also provides for rules on limitation periods either specifically relating to securities, or generally in their general administrative laws. It is therefore appropriate to base rules on limitations periods on common features that have been extracted from those national rules and from Union legislation.

(6) Regulation (EU) No 648/2012 and this Regulation refer to time periods and dates. This is the case, for instance, when establishing limitation periods for the imposition and enforcement of penalties. To enable those periods to be correctly calculated, it is appropriate to apply rules which already exist within Union legislation for acts of the Council and the Commission as provided for in Regulation (EEC, Euratom) No 1182/71 of the Council[(4)] for acts of the Council and the Commission.

(7) Article 68(4) of Regulation (EU) No 648/2012 provides that penalties imposed by ESMA pursuant to Articles 65 and 66 of that Regulation shall be enforceable, and that enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The corresponding amounts shall be allocated to the general budget of the Union.

(8) In the interest of the immediate exercise of effective supervisory and enforcement activity, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation lays down rules of procedure regarding fines and periodic penalty payments to be imposed by the European Securities and Markets Authority (ESMA) on trade repositories or other persons that are subject to ESMA's investigation and enforcement proceedings, including rules on the right of defence and limitation periods.

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Article 2

Right to be heard by the investigation officer

1 Upon completion of the investigation and before submitting the file to ESMA pursuant to Article 3(1), the investigation officer shall inform the person subject to investigation in writing stating its findings and shall provide that person with the opportunity to make written submissions pursuant to paragraph 3. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex I of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements.

2 The statement of findings shall set a reasonable time limit within which the person subject to investigation may make its written submissions. The investigation officer shall not be obliged to take into account written submissions received after that time limit has expired.

3 In its written submissions, the person subject to investigation may set out all the facts known to it which are relevant to its defence. It shall attach any relevant documents as proof of the facts set out. It may propose that the investigation officer hear other persons who may corroborate the facts set out in the submissions of the person subject to investigation.

4 The investigation officer may also invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by the investigation officer. Oral hearings shall not be held in public.

Article 3

Right to be heard by ESMA with regard to fines and supervisory measures

1 The complete file to be submitted by the investigation officer to ESMA shall include at least the following documents:

— copy of the statement of findings addressed to the trade repository or the person subject to the investigation;

— copy of the written submissions by the trade repository or the person subject to the investigation;

— minutes of any oral hearing.

2 Where ESMA considers that the file submitted by the investigation officer is not complete, it shall send back the file to the investigation officer with reasoned request for additional documents.

3 Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings appear not to constitute an infringement with the meaning of Annex I of Regulation (EU) No 648/2012, it shall decide to close the case and it shall notify that decision to the persons subject to investigation.

4 Where ESMA does not agree with the findings of the investigation officer it shall submit a new statement of findings to the persons subject to investigation.

The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures

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and the imposition of a fine in accordance with Article 65 and 73 of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

5 Where ESMA agrees with all or some of the findings of the investigation officer it shall inform the persons subject to investigation accordingly. Such communication shall set a reasonable time limit within which the person subject to investigation may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Article 65 and 73 of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings shall not be held in public.

6 If 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 has adopted a decision imposing a fine in accordance with Article 65, it shall notify immediately that decision to the person subject to investigation.

Article 4

Right to be heard by ESMA with regard to periodic penalty payments

Before making a decision imposing a periodic penalty payment according to Article 66 of Regulation (EU) No 648/2012, ESMA shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a penalty payment and the amount of the penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person concerned may make written submissions. ESMA shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

Once the trade repository or person concerned has complied with the relevant decision referred to in Article 66(1) of Regulation (EU) No 648/2012, a periodic penalty payment can no longer be imposed.

The decision imposing a periodic penalty payment shall indicate the legal basis and the reasons for the decision, the amount and the starting date of the periodic penalty payment.

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