

Consultation Paper

**Procedural rules for penalties imposed on Third-Country CCPs, TRs
and CRAs**



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by **18 January 2020**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

This consultation is looking for feedback from third-country CCPs, trade repositories, credit rating agencies, market participants and authorities.

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Executive Summary

Reasons for publication

On 24 September 2019, ESMA received a provisional request from the European Commission (the “Commission”) to provide technical advice to assist the Commission in formulating procedural rules for penalties imposed on third-country central counterparties (“TC-CCPs”) and trade repositories (“TRs”) (Annex II).

This consultation paper is published to seek stakeholders’ input on ESMA’s proposals relating to penalties for TC-CCPs, TRs and credit rating agencies (“CRAs”).

Contents

This consultation paper sets out ESMA’s preferred options for the procedural rules on penalties imposed on TC-CCPs and TRs. In order to ensure alignment, the consultation paper sets out also ESMA’s proposed amendments to the existing procedural rules for penalties imposed on CRAs.

ESMA welcomes comments from TC-CCPs, TRs and CRAs in order to assist in the production of the technical advice.

The consultation paper is comprised of 13 sections and two annexes. Section 1 includes the background of this consultation paper. Section 2 concerns the scope of the proposed rules. Section 3 relates to the right to be heard by the investigation officer. Section 4 concerns the rules on the content of the file, that must be submitted to ESMA by the investigation officer. Section 5 relates to the procedure for the imposition of fines and supervisory measures and the rights of the person subject to investigation. Section 6 covers the proposed procedure for the imposition of periodic penalty payments. Section 7 relates to the right of the persons subject to investigation to access the file. Section 8 concerns the procedure for interim decisions that may be imposed by ESMA in case urgent action is needed. Section 9 covers the limitation periods for the imposition of penalties, whereas Section 10 concerns the limitation periods for the enforcement of penalties. Section 11 relates to the methods for the collection of fines and periodic penalty payments, and Section 12 concerns the calculation of periods, dates and time limits to be set in the rules. Section 13 concerns the consistency of the proposed rules with the rules of procedure on penalties imposed on credit rating agencies. Lastly, Section 14 includes Annexes I and II, that respectively provide the summary of the consultation questions and the Commission’s provisional mandate to provide the technical advice.

Next Steps

ESMA will consider the feedback it receives to this consultation and expects to publish a final report and to submit the advice to the European Commission in Q1 2020.

1 Background

1. In the course of 2019, the European Market Infrastructure Regulation (EMIR¹) was amended by two separate legal acts. Firstly, on 28 May 2019, Regulation 2019/834 (EMIR REFIT²) updated several aspects related to the requirements applicable to TRs. Subsequently, the “2019 CCP Supervision Regulation”, known as EMIR 2.2.³, was signed into law on 23 October 2019. In this consultation paper, EMIR as amended by both acts is referred to as “EMIR as amended”. EMIR 2.2 has not yet entered into force. Following the adoption and signature into law of EMIR 2.2 by the European Parliament and the Council, it will enter into force on the twentieth day following that of its publication in the Official Journal.

2. Article 25i(7) of EMIR as amended provides that:

“The Commission shall adopt delegated acts in accordance with Article 82 to specify further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties”.

3. Moreover, as a result of the amendments in EMIR REFIT, the Commission Delegated Regulation (EU) No 667/2014 supplementing Regulation (EU) No 648/2012 with regard to rules of procedures for penalties imposed on trade repositories by ESMA including rules on the right of defence and temporal provisions⁴ (the “TR Commission Delegated Regulation”) should also be amended.

4. Accordingly, on 24 September 2019, ESMA received a provisional request from the Commission to provide technical advice to assist the latter on the possible content of this delegated act. The request is enclosed in Annex II in this paper.

5. ESMA notes that EMIR as amended establishes, inter alia, supervisory competences for ESMA regarding TC-CCPs. Furthermore, a two-tier system for TC-CCPs based on their systemic importance has been introduced. Where a TC-CCP is determined to be systemically important or is likely to become systemically important to the financial stability

¹ 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, OJ L 201, 27.7.2012, p. 1.

² 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.

³ <https://data.consilium.europa.eu/doc/document/PE-88-2019-REV-1/en/pdf>

⁴ 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.

of the Union or of one or more of its Member States, such TC-CCP will be considered a “Tier 2” third-country CCP (Tier 2 TC-CCP) by ESMA.

6. In this regard, Article 25b(1) of EMIR as amended provides that:

“ESMA shall be responsible for carrying out the duties resulting from this Regulation for the supervision on an ongoing basis of the compliance of recognised Tier 2 CCPs with the requirements (...)”.

7. Several Recitals of the 2019 CCP Supervision Regulation are relevant for the definition of the procedural rules applicable to penalties imposed on TC-CCPs.

8. Particularly, Recital (43) of the 2019 CCP Supervision Regulation provides that:

“ESMA should have all the powers necessary to supervise recognised third-country CCPs to ensure their ongoing compliance with the requirements of Regulation (EU) No 648/2012”.

9. Recital (47) provides that:

“ESMA should be able to impose periodic penalty payments to compel third-country CCPs to end an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection”.

10. Recital (48) of the 2019 CCP Supervision Regulation further provides that:

“ESMA should be able to impose fines on both Tier 1 and Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of Regulation (EU) No 648/2012 by providing incorrect or misleading information to ESMA. In addition, ESMA should be able to impose fines on Tier 2 CCPs where it finds that they have committed, intentionally or negligently, an infringement of the additional requirements applicable to them in that Regulation. [...]”.

11. In addition, Recital (55) provides that:

“In the case of an infringement committed by a Tier 2 CCP, ESMA should be empowered to apply a range of supervisory measures, including requiring a Tier 2 CCP to bring the infringement to an end and, as a last resort, withdrawing the recognition where a Tier 2 CCP has seriously or repeatedly infringed Regulation (EU) No 648/2012. [...]”.

12. Finally, Recital (58) of the 2019 CCP Supervision Regulation indicates the following:

“In order to ensure the effective application of the rules laid down in this Regulation in relation to third-country CCPs, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of [...] the further specification of rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of defence, time limits, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalty payments or fines; and measures to amend Annex IV in order to take account of developments in the financial markets. [...]”

13. In order to deliver its advice to the Commission, ESMA took into account the existing Union regulatory framework in areas where European institutions or agencies have the power to impose fines on market participants.

14. In particular, ESMA has considered the TR Commission Delegated Regulation. In addition, ESMA has considered Regulation (EC) No 1060/2009 of 16 September 2009 on credit rating agencies (the “CRA Regulation”)⁵ and the Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 (the “CRA Commission Delegated Regulation”)⁶ with regard to the rules of procedure on fines imposed to CRAs. ESMA has also considered the relevant experience that it has acquired when operating under the mentioned rules of procedure applicable to TRs and CRAs.

15. This consultation paper sets out ESMA’s preferred options for the procedural rules on the imposition of penalties to TC-CCPs. It also analyses whether the procedural rules applicable to the imposition of penalties to TRs and CRAs should be amended. It welcomes comments in order to assist in the production of the advice.

16. Finally, in this consultation paper, ESMA is advising only on the mentioned procedural aspects and is not performing a cost-benefit analysis as ESMA understands that, as part of the approval of EMIR as amended, impact assessments of the different policy choices have already been performed.

⁵ Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1.

⁶ Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions, OJ L 282, 16.10.2012, p. 23.

2 Scope

17. ESMA is invited by the Commission to provide technical advice to assist it in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments on TC-CCPs, including provisions on the rights of the defence, temporal provisions, the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties.
18. In addition, ESMA is also invited to provide technical advice to assist the Commission in formulating amendments, if and where appropriate, to the TR Commission Delegated Regulation.
19. More generally, ESMA is invited to advise on whether – in light of EMIR’s amendments – the TR Commission Delegated Regulation should be amended in order to ensure a degree of consistency in the procedures applicable to TC-CCPs and to TRs, where appropriate.
20. Before proposing rules of procedure for the imposition of penalties on TC-CCPs and amendments to the TR rules, ESMA would like to highlight the following points.
21. First, regarding the scope in terms of entities that would be subject to the rules of procedure in the TC-CCP area, ESMA notes that EMIR as amended uses different terms and refers to different entities across the various relevant articles. For example, it refers to “persons subject to the investigations” in Article 25i, “persons subject to the proceedings” in Article 25l, “CCP concerned” in Article 25i, “person concerned” in Articles 25i and 25l, “Tier 2 CCP” in Sections I to IV of Annex III and Articles 25g and 25h, “CCPs” in Article 25j, Section V of Annex III and Annex IV, “recognised CCPs” in Article 25f, “related third parties to whom those CCPs have outsourced operational functions (...)” in Articles 25f, 25g and 25h, the “parties involved” in Article 25m, etc. As much as possible, in the proposals that it makes below for the procedural rules, ESMA has tried to align with the wording of EMIR as amended as well as with the wording of the TR Commission Delegated Regulation.
22. Second, ESMA notes that the advice requested is in relation to the requirement at Article 25i(7) of EMIR as amended for the Commission to adopt rules of procedure for the exercise of the power to impose fines or periodic penalty payments by ESMA. Accordingly, this technical advice does not address matters of procedure in respect of the withdrawal of recognitions under Article 25p of EMIR as amended, which are outside the scope of this empowerment and, therefore, of this request for technical advice.
23. Third, supervisory measures (under Article 25q of EMIR as amended) which are unconnected with fines could, in theory, be also considered out of scope. However, this exclusion is in practice meaningless because it is only at the end of the enforcement procedure that ESMA decides whether to impose a fine and/or another supervisory measure (such as the issuance of a public notice). In addition, ESMA notes that in its request for technical advice, the Commission itself makes reference to supervisory measures. Furthermore, the wording of the TR Commission Delegated Regulation refers to supervisory measures even though the scope of the empowerment under Article 64(7)

of EMIR is identical to the one provided in Article 25i(7) of EMIR as amended. ESMA considers that it makes sense to follow the same logic as in the TR Commission Delegated Regulation and, where relevant, to also cover supervisory measures in its proposals.

24. Fourth, the Commission requested ESMA to assess whether the TR Commission Delegated Regulation should be amended in order to ensure a degree of consistency in the procedures applicable to TC-CCPs and to TRs, where appropriate. ESMA's proposals below aim at ensuring this consistency. Nevertheless, because of the similarities that already exist between the rules of procedure applicable respectively to TRs and CRAs, ESMA also considers that it is justified to make proposals for amendments to the CRA Commission Delegated Regulation even though this was not explicitly requested by the Commission.
25. Fifth, ESMA notes that TRs registered by ESMA for the purposes of Article 4 of the Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse (SFTR)⁷ and securitisation repositories registered by ESMA for the purposes of Article 5 of Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (STSR)⁸ can also be trade repositories registered with ESMA for the purposes of Article 9 of EMIR as amended. In addition, ESMA notes that Article 9 of SFTR and Article 14 of STSR indicate that the powers conferred on ESMA in accordance with Articles 61 to 68, 73 and 74 of EMIR, in conjunction with its Annex I and II, shall also be exercised with respect to these Regulations. Among these provisions, there is Article 64, devoted to the procedural rules for taking supervisory measures and imposing fines. Therefore, the material scope of the rules of procedure applicable to TRs should be understood as covering also the procedure to impose fines or periodic penalty payments on TRs registered by ESMA for the purposes of Article 4 of the SFTR and securitisation repositories. However, for the sake of clarity, the Commission might want to consider making this point explicit in the recitals of the TR Commission Delegated Regulation.

3 Right to be heard by the investigation officer

3.1 Regarding TC-CCPs

26. ESMA is invited by the Commission to advise on the procedure regarding the rights of the persons subject to the investigation to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to

⁷ 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.

⁸ 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 648/2012, OJ L 347, 28.12.2017, p. 35.

investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.

27. ESMA has taken into account the similarities between Article 25i and Article 64 of EMIR as amended, as well as with Article 23e of the CRA Regulation. ESMA has also considered Articles 2 of the TR and CRA Commission Delegated Regulations. Furthermore, ESMA has had regard to Recitals (2) and (3) of the TR Commission Delegated Regulation and Recitals (3) and (5) of the CRA Commission Delegated Regulation, as well as, more generally, to Article 41 of the Charter of Fundamental Rights of the European Union⁹.
28. Based on the practice of the investigation officers in previous enforcement cases with respect to TRs and CRAs, ESMA does not consider that changes are needed for the procedural rules regarding TC-CCPs compared to the ones currently applicable to TRs and CRAs.
29. In order to guarantee the rights of defence of the person subject to the investigation, this person should have the right to be heard at different stages of the procedure. One of the stages takes place upon the completion of the investigation officer's investigation, when Article 25i of EMIR as amended is applicable. This right to be heard should materialise through granting the person the right to make written comments.
30. In practice, after the investigation is completed, the investigation officer has to produce a statement of findings. The person subject to the investigation must be given the right to comment on the statement of findings of the investigation officer before the latter submits the file with his or her findings to ESMA.
31. The statement of findings must set out the facts and the reasons for which they constitute one or more of the infringements listed in the Annex III of EMIR as amended, including any aggravating or mitigating factors of these infringements.
32. The statement of findings must set a reasonable time limit within which the person subject to the investigation may provide its written submissions. The investigation officer should not be obliged to take into account written submissions received after that time limit has expired. This is justified to ensure that the procedure for the adoption of fines and supervisory measures is not unduly delayed and remains efficient.
33. In its written submissions, the person subject to the investigation should be allowed to comment on the facts set out in the statement of findings, including to set out all the facts known to it which are relevant to its defence. It must attach any relevant documents as proof of the facts set out. This is justified to ensure that the decision of ESMA in the enforcement proceedings would be ultimately based on facts and evidence and not on unsubstantiated allegations made by the person subject to the investigation, which would be contrary to the applicable principles governing the burden and standard of proof.

⁹ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391.

34. In addition, the person subject to the investigation should be able to propose that the investigation officer hears other persons who may corroborate the facts set out in its submissions. The investigation officer may also invite the person subject to the investigation to attend an oral hearing if the investigation officer considers it to be necessary in order to clarify the written submissions made by the person subject to the investigation. However, whether to organise an oral hearing remains a decision of the investigation officer because the right to be heard of the person subject to the investigation would have been already ensured by the opportunity given to that person to provide written comments. Where organised, oral hearings should not be held in public.
35. The persons subject to the investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by the investigation officer.
36. The investigation officer should consider whether, as a result of the submissions made by the person subject to the investigation, he/she finds it necessary to amend his/her statement of findings before submitting it to ESMA as part of the complete file (see Section 4 of this consultation paper). By analogy with Recital (2) of the TR Commission Delegated Regulation, the person subject to the investigation should be given an opportunity to make further submissions in case the amended statement of findings refers to facts which affect the investigation officer's initial findings in a material way and on which it has not yet had the opportunity to comment.

Regarding the procedure applicable to the investigation by the investigation officer and the right to be heard at this stage, ESMA proposes that:

- Upon completion of the investigation and before submitting the file to ESMA, 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. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex III of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements;
- 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;
- 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;
- 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.

Q1. Do you agree with the proposal regarding the right to be heard and the procedure at the stage of the investigation conducted by the investigation officer? Please elaborate on the reasons for your answer.

3.2 Regarding TRs

37. ESMA does not propose any amendment to Article 2 of the TR Commission Delegated Regulation.

4 File to be submitted by the investigation officer

4.1 Regarding TC-CCPs

38. ESMA is invited by the Commission to advise on the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding TC-CCPs.

39. ESMA has taken into account the similarities between Article 25i(2) and Article 64(2) of EMIR as amended, as well as with Article 23e(2) of the CRA Regulation. ESMA has also considered Articles 3 of the TR and CRA Commission Delegated Regulations. Based on its experience, ESMA does not consider that major changes are needed for the procedural rules regarding TC-CCPs compared to the ones currently applicable to TRs and CRAs.

40. The completeness of the file is assessed by ESMA with regard to the list of documents to be included in the file according to the TR and CRA Commission Delegated Regulations. When one of these documents is missing, ESMA should request it to the investigation officer. However, ESMA cannot direct the investigation of the investigation officer who is independent.

41. Based on the practice of the investigation officers in previous enforcement cases with respect to TRs and CRAs, ESMA considers that, where relevant, it would make sense to provide for the inclusion of a copy of the statement of findings of the investigation officer, as amended, in the file. Following the receipt of the written submissions of the person subject to the investigation, it may happen that the investigation officer produces an amended version of his/her statement of findings. In such cases, both versions of the statement of findings should be included in the file to be submitted to ESMA.

ESMA proposes that 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 (including its amended version, where relevant) addressed to the TC-CCP or the person subject to the investigation;
- copy of the written submissions by the TC-CCP or the person subject to the investigation;
- minutes of any oral hearing.

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 a reasoned request for additional documents.

Q2. Regarding TC-CCPs, do you agree with the proposal regarding the file to be submitted by the investigation officer to ESMA? Please elaborate on the reasons for your answer.

4.2 Regarding TRs

42. In order to ensure consistency between the rules of procedure applicable under EMIR to penalties imposed on TRs and to those imposed on TC-CCPs, it would make sense to amend the TR Commission Delegated Regulation so that a copy of the statement of findings of the investigation officer, as amended where this is relevant, is also included in the file submitted by the investigation officer to ESMA.

ESMA proposes that Article 3(1) of the TR Commission Delegated Regulation is amended so as to refer to a “copy of the statement of findings (including its amended version where relevant)”.

Q3. Regarding TRs, do you agree with the proposal regarding the file to be submitted by the investigation officer to ESMA? Please elaborate on the reasons for your answer.

5 Procedure before ESMA with regard to fines and supervisory measures, including the right to be heard

5.1 Regarding TC-CCPs

43. ESMA is invited by the Commission to advise on the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the rights to be heard of the persons subject to the investigation, including the timeframes and procedures for the

submission of comments in writing or in oral hearings by the persons subject to investigations.

44. ESMA has taken into account the similarities between Articles 25i(5), 25i(6) and Articles 64(5), 64(6) of EMIR as amended, as well as with Articles 23e(5) and 23e(6) of the CRA Regulation. ESMA has also considered Articles 3 of the TR and CRA Commission Delegated Regulations. Furthermore, ESMA had regard to Recitals (2) and (3) of the TR Commission Delegated Regulation and Recitals (3), (4) and (5) of the CRA Commission Delegated Regulation, as well as, more generally, to Article 41 of the Charter of Fundamental Rights of the European Union.
45. Based on ESMA's practice in previous enforcement cases with respect to TRs and CRAs, ESMA does not consider that changes are needed for the procedural rules regarding TC-CCPs compared to the ones currently applicable to TRs and CRAs.
46. Another stage where ESMA has to guarantee the rights of defence of the person subject to the investigation through its right to be heard is before ESMA, once the investigation officer has submitted the complete file. This right to be heard should take place by granting the person the right to make further written comments.
47. Once ESMA has considered that the file submitted by the investigation officer is complete, it must consider whether or not it agrees with the investigation officer's statement of findings.
48. If ESMA does not agree with the findings of the investigation officer because none of the facts described in the statement of findings constitute an infringement, it must close the file. It is worth reminding here that it is not for ESMA to investigate the matter itself or direct the investigation of the investigation officer.
49. ESMA may agree with the findings of the investigation officer in whole or in part.
50. If ESMA does not agree with the findings of the investigation officer because it does not agree with the legal qualification of the facts or with the assessment made by the investigation officer of the existence of negligence or intent or of the aggravating or mitigating circumstances applicable to one or more infringements, it must adopt its own statement of findings and submit it to the persons subject to the investigation setting a reasonable time limit within which those persons may make written submissions.
51. The person subject to the investigation should be notified accordingly of the above decision(s) taken by ESMA.
52. In respect of findings of the investigation officer which ESMA agrees to adopt, ESMA must set a reasonable time limit within which the person subject to the investigation may make written submissions to ESMA.

53. ESMA should not be obliged to take into account written submissions received after the expiry of the specified time limit. This is justified to ensure that the procedure for the adoption of fines and supervisory measures is not unduly delayed and remains efficient.
54. Although the right to be heard would already be considered to have been observed where the persons concerned are granted the right to make written submissions, ESMA reserves the right to also invite the persons subject to the investigation to an oral hearing if it considers that it is necessary in order to clarify the written submissions made by those persons.
55. If an oral hearing takes place, the persons subject to the investigation should be allowed to be assisted by their lawyers or other qualified persons admitted by ESMA. Oral hearings should not be held in public.

Regarding the procedure before ESMA with regards to fines and supervisory measures, including the right to be heard, ESMA proposes that:

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement with the meaning of Annex III 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.

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.

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 25j and 25q 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.

If ESMA decides that one or more of the infringements listed in Annex III 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 25j, it shall notify immediately that decision to the person subject to investigation.

- Q4. Do you agree with the proposal regarding the procedure before ESMA with regards to fines and supervisory measures, including the right to be heard? Please elaborate on the reasons for your answer.**

5.2 Regarding TRs

56. ESMA does not propose any amendment to Article 3 of the TR Commission Delegated Regulation.

6 Procedure with regard to periodic penalty payments

6.1 Regarding TC-CCPs

57. ESMA is invited by the Commission to advise on the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the rights to be heard of the persons subject to the investigation, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
58. ESMA notes that it is key that periodic penalty payments that would be imposed by ESMA, for example, during the investigation phase to compel a Tier 2 TC-CCP to submit to an investigation or an inspection (Article 25k in relation to Articles 25g or 25h of EMIR as amended), could be adopted by ESMA within a short timeframe. Such periodic penalty payments should be subject to a fast-track procedure distinct from the one applicable for the adoption of supervisory measures and the imposition of fines. The procedural rules set forth in Article 25i of EMIR as amended does not apply and, therefore, the investigation officer is not involved in the adoption of the periodic penalty payment.
59. ESMA has also considered the persons which could be subject to period penalty payment in accordance with Article 25k of EMIR as amended. These include Tier 2 TC-CCPs as well as the persons referred to in Article 25f(1) of EMIR as amended, i.e. recognized TC-CCPs and related third parties to whom those CCPs have outsourced operational functions or activities, where they have been requested to provide information by decision.
60. In addition, ESMA has taken into account the similarities between Article 25k and Article 66 of EMIR as amended, as well as with Article 36b of the CRA Regulation. It has also considered Articles 4 of the TR and CRA Commission Delegated Regulations.
61. ESMA has not yet imposed any periodic penalty payments (neither on TRs nor on CRAs). It does not have relevant experience in this respect and would therefore advise to set up

rules for the adoption of periodic penalty payments on TC-CCPs, which are similar to the current ones applicable to TRs and CRAs.

Regarding the procedure for the imposition of periodic penalty payments, ESMA proposes that:

Before making a decision imposing a periodic penalty payment according to Article 25k 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 TC-CCP or person concerned has complied with the relevant decision referred to in Article 25k(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.

Q5. Do you agree with the proposal regarding the periodic penalty payments? Please elaborate on the reasons for your answer.

6.2 Regarding TRs

62. ESMA does not propose any amendment to Article 4 of the TR Commission Delegated Regulation.

7 Access to the file

7.1 Regarding TC-CCPs

63. ESMA is invited by the Commission to advise on the procedure regarding the rights to access to the file of the persons subject to the investigation, including the limits to such access to protect other persons' business secrets, ESMA's internal preparatory documents and other confidential information.

64. ESMA has taken into account the similarities between Articles 25i(4), 25l(2), 64(4) and 67(2) of EMIR as amended, as well as with Articles 23e(4), 25(2), 36c(2) of the CRA Regulation. It has also taken into consideration Articles 5 of the TR and CRA Commission Delegated Regulations.
65. Based on ESMA's practice in previous enforcement cases with respect to TRs and CRAs, ESMA does not consider that changes would be needed and sees merits in having similar rules for the TC-CCPs.

Regarding the access to the file by TC-CCPs, ESMA proposes that:

If so requested, ESMA shall grant access to the file to the parties to whom the investigation officer or ESMA has sent a statement of findings. Access shall be granted following the notification of any statement of findings.

File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

- Q6. Do you agree with the proposal regarding the access to the file by TC-CCPs? Please elaborate on the reasons for your answer.**

7.2 Regarding TRs

66. ESMA is invited by the Commission to advise on whether – in light of the amendments in EMIR to the procedure regarding the rights to access to the file of the persons subject to the investigation, including the limits to such access to protect other persons' business secrets, ESMA's internal preparatory documents and other confidential information – the TR Commission Delegated Regulation should be amended.
67. ESMA has taken into account the revised drafting of Article 64(4) of EMIR as a result of the amendments in EMIR REFIT¹⁰. ESMA considers that this amendment does not require any change in the corresponding provisions on access to the file, which are provided by Article 5 of the TR Commission Delegated Regulation.
68. Therefore, ESMA does not propose any amendment to Article 5 of the TR Commission Delegated Regulation.

¹⁰ <https://eur-lex.europa.eu/eli/reg/2019/834/oj>

8 Procedure for interim decisions

8.1 Regarding TC-CCPs

69. ESMA is invited by the Commission to advise on the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the rights to be heard by ESMA of the persons subject to the investigation as soon as possible after the adoption of such interim decisions.
70. ESMA notes that, even though Article 25(1), second paragraph, of the CRA Regulation provides for the adoption of interim measures in cases where urgent action is needed, there is no procedure laid down in the CRA Commission Delegated Regulation regarding the adoption of such kind of measures. ESMA likewise notes that no procedure for interim decisions yet exists in the TR Commission Delegated Regulation because the possibility to adopt interim decisions was not foreseen in EMIR until the amendments in EMIR REFIT.
71. Article 25i(2) of EMIR as amended provides that, where urgent action is needed in order to prevent significant and imminent damage to the financial system, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision. In line with Article 25l(1) of EMIR as amended, this interim decision can be a decision to impose a fine or a periodic penalty payment.
72. ESMA considers that the rules of procedure should specify two stages. The first stage would lead to the adoption of an interim decision which would be adopted without the opportunity for the person concerned to submit comments on ESMA's findings. The second stage would lead to the adoption of a decision on whether to confirm the interim decision (i.e. a confirmatory decision); during this second stage, the person concerned must have the right to provide written comments on the interim decision before a confirmatory decision is adopted.
73. Article 25l(2) of EMIR as amended refers to ESMA in general, without excluding that this could also cover the investigation by the investigation officer. In light of the objective pursued by Article 25l(2) of EMIR as amended, which is to ensure that an interim decision could be adopted as soon as possible to avoid significant and imminent damage to the financial system, ESMA considers that it is justified that the exception to the right to provide comments on the findings before they are adopted should also cover the findings of the investigation officer. In order to ensure the rights of defence of the person concerned, it would be sufficient to provide that person with the opportunity to submit comments before the decision-making body of ESMA during the second phase, i.e. before the adoption of the confirmatory decision.
74. Finally, the specific procedure for the adoption of interim decisions should be clearly limited to cases where it is established that there is a risk of significant and imminent damage to the financial system. Having regard to Article 25l(1) of EMIR as amended, it is proposed

that ESMA determines, on the basis of cogent and consistent evidence, whether such a risk exists.

Regarding the procedure for the adoption of interim decisions imposing fines when urgent action is needed, ESMA proposes that:

Where there is cogent and consistent evidence that an urgent action by ESMA is needed in order to prevent significant and imminent damage to the financial system, the specific procedure for the adoption of an interim decision is applied.

The investigation officer shall submit the file to ESMA, including his / her statement of findings.

The investigation officer shall inform the person subject to investigation of his/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 III of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements. No access to the file shall be provided at this stage.

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer appear not to constitute an infringement with the meaning of Annex III 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.

Where ESMA agrees with all or some of the findings of the investigation officer, it shall adopt an interim decision based on those findings.

If ESMA decides that one or more of the infringements listed in Annex III to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and has adopted an interim decision imposing a fine in accordance with Article 25j, it shall notify immediately that interim decision to the person subject to investigation.

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.

If so requested, ESMA shall grant access to the file to the parties to whom it has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to whom the interim decision has been notified 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.

If ESMA decides that one or more of the infringements listed in Annex III to Regulation (EU) No 648/2012 has been committed by a person subject to investigation and adopts a confirmatory decision imposing a fine in accordance with Article 25j, it shall notify immediately that decision to the persons subject to investigation.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed. It shall immediately notify the person subject to investigation.

Regarding the procedure for the adoption of interim decisions imposing periodic penalty payments when urgent action is needed, ESMA proposes that:

Where there is cogent and consistent evidence that an urgent action by ESMA is needed in order to prevent significant and imminent damage to the financial system, the specific procedure for the imposition of periodic penalty payments by interim decision is applied.

Where ESMA considers that there are reasons justifying the urgent imposition of a periodic penalty payment, it shall adopt an interim decision, without providing the person subject to the proceedings with the opportunity to make submissions before its adoption.

The interim 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 shall notify immediately that interim decision to the person concerned and shall set a time limit within which that person 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.

No access to the file shall be provided before the adoption of the interim decision. If so requested, ESMA shall grant access to the file to the parties to whom ESMA has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

ESMA may also invite the person subject to the proceedings to whom the interim decision has been notified 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.

If ESMA decides to adopt a confirmatory decision imposing a periodic penalty payment in accordance with Article 25k, it shall notify immediately that decision to the person concerned.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed. It shall immediately notify the person subject to investigation.

Once the TC-CCP or person concerned has complied with the relevant decision referred to in Article 25k(1) of Regulation (EU) No 648/2012, a periodic penalty payment can no longer be imposed.

Q7. Do you agree with the proposal regarding the adoption of interim decisions for TC-CCPs? Please elaborate on the reasons for your answer.

8.2 Regarding TRs

75. ESMA is invited to advise on the procedure for interim decisions to impose fines or periodic penalty payments on TRs, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system or to the integrity, transparency, efficiency and orderly functioning of financial markets, including to the stability or the correctness of data reported to a trade repository, and the procedure to guarantee rights to be heard by ESMA of the persons subject to the investigation as soon as possible after the adoption of such interim decisions.
76. As already explained in Section 8.1 above, no procedure for interim decisions exists yet in the TR Commission Delegated Regulation because interim decisions were not foreseen for TRs in EMIR until the amendments in EMIR REFIT. EMIR as amended now provides for interim decisions in both areas of TC-CCPs and TRs. ESMA considers that it makes sense to align as much as possible the procedural rules for the adoption of interim decisions in the area of TC-CCPs with those applicable in the area of TRs.
77. However, ESMA also notes that Article 67(1), second paragraph, of EMIR as amended diverges to some extent from Article 25l(1), second paragraph, of EMIR as amended. In particular, in the case of TC-CCPs the procedure for the adoption of interim decisions is applicable where “urgent action is needed in order to prevent significant and imminent damage to the financial system”, whereas in the case of TRs it is applicable where “urgent action is needed in order to prevent significant and imminent damage to the financial system or to prevent significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including the stability or the correctness of data reported to a trade repository”.
78. In addition, ESMA notes that regarding TC-CCPs, Articles 25l(1) and (2) of EMIR as amended provide that the procedure for interim decisions applies to decisions regarding the adoption of fines and periodic penalty payments, whereas regarding TRs, Article 67(1), second paragraph, of EMIR as amended provides that the procedure for interim decisions applies to decisions referred to in points (a), (c) and (d) of Article 73(1) of EMIR as amended (i.e. to decisions imposing supervisory measures other than fines) where urgent action is needed. Therefore, the procedure for the adoption of interim decisions applicable to TRs where urgent action is needed does not cover fines and periodic penalty payments.

79. Except for the amendments which are justified to incorporate the above-mentioned differences, ESMA proposes to align the procedural rules for the adoption of interim decisions regarding TRs with the ones for TC-CCPs.

Regarding the procedure for the adoption of interim decisions when urgent action is needed, ESMA proposes that:

Where there is cogent and consistent evidence that an urgent action by ESMA is needed in order to prevent significant and imminent damage to the financial system or to prevent significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including the stability or the correctness of data reported to TR, the specific procedure for the adoption of an interim decision is applied.

The investigation officer shall submit the file to ESMA, including his / her statement of findings.

The investigation officer shall inform the person subject to investigation of his/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 of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements. No access to the file shall be provided at this stage.

Where ESMA considers, on the basis of a complete file, that the facts described in the statement of findings of the investigation officer 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 the investigation.

Where ESMA agrees with all or some of the findings of the investigation officer, it shall adopt an interim decision based on those findings.

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 adopts an interim decision imposing a supervisory measure in accordance with points (a), (c) and (d) of Article 73(1), it shall notify immediately that interim decision to the person subject to investigation.

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.

If so requested, ESMA shall grant access to the file to the parties to whom it has notified an interim decision. File documents accessed shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EU) No 648/2012.

ESMA may also invite the persons subject to investigation to whom the interim decision has been notified 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.

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 the investigation and adopts a confirmatory decision imposing a supervisory measure in accordance with points (a), (c) and (d) of Article 73(1), it shall notify immediately that decision to the person subject to the investigation.

If ESMA decides not to adopt a confirmatory decision, the interim decision shall be automatically repealed. It shall immediately notify the person subject to investigation.

Q8. Do you agree with the proposal regarding the adoption of interim decisions for TRs? Please elaborate on the reasons for your answer.

9 Limitation periods for the imposition of penalties

9.1 Regarding TC-CCPs

80. ESMA is invited by the Commission to advise on the limitation periods for the imposition of penalties.

81. ESMA has taken into account the similarities between Article 25m and Article 68 of EMIR as amended, as well as with Article 36d of the CRA Regulation. It has also taken into consideration Article 6 of the TR and CRA Commission Delegated Regulations.

82. Based on its experience in previous enforcement cases, ESMA does not consider that changes to the existing rules are needed. ESMA therefore advises to adopt similar rules regarding the limitation periods for the imposition of penalties imposed on TC-CCPs.

Regarding the limitation periods for the imposition of penalties on TC-CCPs, ESMA proposes that:

The powers conferred on ESMA to impose fines and periodic penalty payments on TC-CCPs and other persons subject to investigation shall be subject to a limitation period of five years.

The limitation period referred to in paragraph 1 shall begin to run on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, that limitation period shall begin to run on the day on which the infringement ceases.

Any action taken by ESMA for the purpose of the investigation or proceedings in respect of an infringement of Regulation (EU) No 648/2012 shall interrupt the limitation period for the imposition of fines and periodic penalty payments. That limitation period shall be interrupted with effect from the date on which the action is notified to the TC-CCP or the person subject to the investigation in respect of an infringement of Regulation (EU) No 648/2012.

Each interruption shall cause the limitation period to start running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without ESMA having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

The limitation period for imposing fines and periodic penalty payments shall be suspended for as long as the decision of ESMA is the subject of proceedings pending before the Board of Appeal, in accordance with Article 58 of Regulation (EU) No 1095/2010, and before the Court of Justice of the European Union, in accordance with Article 25n of Regulation (EU) No 648/2012.

Q9. Do you agree with the proposal regarding the limitation periods for the imposition of penalties imposed on TC-CCPs? Please elaborate on the reasons for your answer.

9.2 Regarding TRs

83. ESMA does not propose any amendment to Article 6 of the TR Commission Delegated Regulation.

10 Limitation periods for the enforcement of penalties

10.1 Regarding TC-CCPs

84. ESMA is invited by the Commission to advise on the limitation periods for the enforcement of penalties.
85. ESMA has taken into account the similarities between Article 25m and Article 68 of EMIR as amended, as well as with Article 36d of the CRA Regulation. It has also taken into consideration Articles 7 of the TR and CRA Commission Delegated Regulations. ESMA does not consider that major changes are needed and aims at ensuring consistency between the rules applicable to TC-CCPs and the ones applicable to TRs under EMIR as amended.
86. ESMA therefore sees merits in having the same rules, with limited adjustments which are justified by the fact that the enforcement of penalties imposed on TC-CCPs will take place in third countries. A reference to the third-country authority is thus needed. In addition, having in mind potential uncertainties and delays that could derive from the fact that the enforcement of the penalties imposed on TC-CCPs would be governed by the rules of civil procedure in force in a third country (as provided by Article 25m of EMIR as amended), it is advised to extend the limitation period to 8 years rather than the 5 years currently applicable in case of enforcement of penalties imposed on TRs in a Member State.

Regarding the limitation periods for the enforcement of penalties imposed on TC-CCPs, ESMA proposes that:

The power of ESMA to enforce decisions taken pursuant to Articles 25j and 25k of Regulation (EU) No 648/2012 shall be subject to a limitation period of eight years.

The eight-year period referred to in paragraph 1 shall start to run on the day following that on which the decision becomes final.

The limitation period for the enforcement of penalties shall be interrupted by:

(a) a notification by ESMA to the TC-CCPs or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;

(b) any action of ESMA, of the authority of a Member State or of the authority of the third country concerned acting at the request of ESMA, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.

Each interruption shall cause the limitation period to start running afresh.

The limitation period for the enforcement of penalties shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a pending decision of ESMA Board of Appeal, in accordance with Article 58 of Regulation (EU) No 1095/2010, and the Court of Justice of the European Union, in accordance with Article 25n of Regulation (EU) No 648/2012.

Q10. Do you agree with the proposal regarding the limitation periods for the enforcement of penalties imposed on TC-CCPs? Please elaborate on the reasons for your answer.

10.2 Regarding TRs

87. ESMA does not propose any amendment to Article 7 of the TR Commission Delegated Regulation.

11 Collection of fines and periodic penalty payments

11.1 Regarding TC-CCPs

88. ESMA is invited by the Commission to reflect on the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

89. ESMA has taken into account the similarities between Article 25m and Article 68 of EMIR as amended, as well as with Article 36d of the CRA Regulation. ESMA has also taken into consideration Articles 8 of the TR and CRA Commission Delegated Regulations. Based on its experience, ESMA does not consider that major changes are needed. The only change which would make sense on the basis of ESMA's practice in previous enforcement cases with respect to CRAs and TRs would be to specify that in cases where multiple decisions imposing fines or periodic penalty payments are adopted in parallel, the respective amounts collected by ESMA shall be lodged to different accounts (or subaccounts).

90. In addition, ESMA notes that the reference to "DG MARKT" which is included in Articles 8 of the TR and CRA Commission Delegated Regulations should be updated, for example, to a reference to "the relevant DG of the Commission in charge of financial matters".

Regarding the fines and periodic penalty payments collected from TC-CCPs, ESMA proposes that:

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. Such amounts shall not be entered in ESMA's budget or recorded as budgetary amounts. In case of multiple fines and periodic penalty payments collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

Once ESMA's Accounting Officer has established that the fines or periodic penalty payments have become final following the outcome of all possible legal challenges he/she shall transfer those amounts plus any interest accruing to the Commission. These amounts shall then be entered in the Union budget under general revenue.

ESMA's Accounting Officer shall report on a regular basis to the Authorising Officer of the relevant DG of the Commission in charge of financial matters on the amounts of fines and periodic penalty payments imposed and their status.

Q11. Do you agree with the proposed collection of fines and periodic penalty payments regarding TC-CCPs? Please elaborate on the reasons for your answer.

11.2 Regarding TRs

91. In order to ensure consistency between the rules of procedure applicable under EMIR to penalties imposed on TRs and those imposed on TC-CCPs, it would make sense to amend the TR Commission Delegated Regulation so that it would also specify that in cases where multiple decisions imposing fines or periodic penalty payments are adopted in parallel, the respective amounts collected by ESMA shall be lodged to different accounts (or subaccounts).
92. The reference to “DG MARKT” should also be updated, for example, to a reference to “the relevant DG of the Commission in charge of financial matters”.

Regarding the fines and periodic penalty payments collected from TRs, ESMA proposes to amend Article 8 of the TR Commission Delegated Regulation in order to refer for example to “the relevant DG of the Commission in charge of financial matters” rather than “DG MARKT” and to add:

In case of multiple fines and periodic penalty payments collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

- Q12. Do you agree with the proposed collection of fines and periodic penalty payments regarding TRs? Please elaborate on the reasons for your answer.**

12 Calculation of periods, dates and time limits

12.1 Regarding TC-CCPs

93. ESMA is invited by the Commission to advise on the calculation of periods, dates and time limits to be laid down in the delegated act.
94. ESMA refers to Article 9 of the TR Commission Delegated Regulation. This article is consistent with Article 9 of the CRA Commission Delegated Regulation.
95. ESMA is of the view that the rule laid down in Article 9 of the TR and CRA Commission Delegated Regulations could be taken up in the relevant provision of the new delegated act on TC-CCPs. There is no reason why not to follow the same approach and it is appropriate to apply rules that already exist within the Union legislation, namely Regulation (EEC, Euratom) No 1182/71.

ESMA proposes that Regulation (EEC, Euratom) No 1182/71 shall apply to periods of time, dates and time limits.

**Q13. Do you agree with the proposed calculation of periods, dates and time limits?
Please elaborate on the reasons for your answer.**

12.2 Regarding TRs

96. ESMA does not propose any amendment to Article 9 of the TR Commission Delegated Regulation.

13 Consistency with the rules of procedure on penalties imposed on CRAs

97. Because of the similarities which exist between the TR and the CRA Commission Delegated Regulations, ESMA considers that it is justified to propose amendments to the CRA Commission Delegated Regulation on the points where it considers that amendments are needed with regard to the TR one. ESMA acknowledges that this was not included in the Commission's request for technical advice, but nevertheless advises the Commission to ensure this alignment of the rules of procedure.

98. First, in order to ensure consistency, it would make sense to amend the CRA Commission Delegated Regulation so that, where relevant, a copy of the statement of findings of the investigation officer, as amended, is included in the file submitted by the investigation officer to ESMA.

ESMA proposes that Article 3(1) of the CRA Commission Delegated Regulation is amended so as to refer to a "copy of the statement of findings (including its amended version where relevant)".

99. Second, it would make sense to align the CRA Commission Delegated Regulation with the rules of procedure for the collection of fines and periodic penalty payments proposed by ESMA regarding TC-CCPs and TRs, in particular so that it would be specified that in cases where multiple decisions imposing fines or periodic penalty payments are adopted in parallel, the respective amounts collected by ESMA shall be lodged to different accounts (or subaccounts).

Regarding the fines and periodic penalty payments collected from CRAs, ESMA proposes to amend Article 8 of the CRA Commission Delegated Regulation in order for example to refer to "the relevant DG of the Commission in charge of financial matters" rather than "DG MARKT" and to add:

In case of multiple fines and periodic penalty payments collected by ESMA in parallel, the accounting officer of ESMA shall ensure that they are lodged to different accounts or subaccounts.

100. Third, ESMA notes that the CRA Commission Delegated Regulation does not include any rules of procedure regarding the adoption of interim decisions, although the CRA Regulation provides for the possibility of adopting such decision in its Article 25(1), second paragraph, of the CRA Regulation when urgent action is needed.
101. According to the CRA Regulation, the procedure for the adoption of interim decisions is available for the urgent adoption of the supervisory measures listed in Article 24(1) of the CRA Regulation. However, Article 36c of the CRA Regulation does not contemplate this possibility for the adoption of fines and periodic penalty payments. The CRA Regulation is thus very similar to EMIR as amended regarding the interim decisions on TRs.
102. The difference between TRs and CRAs lies in the conditions under which an urgent action is needed: i.e. for TRs, interim decisions can be taken “in order to prevent significant and imminent damage to the financial system or to prevent significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including the stability or the correctness of data reported” whereas for CRAs, they are taken “in order to prevent significant and imminent damage to the financial system”, which is also the drafting used by the legislators in Article 25 of EMIR as amended regarding the interim measures for TC-CCPs.

Regarding the procedure for the adoption of interim decisions when urgent action is needed, ESMA proposes that the CRA Commission Delegated Regulation should be amended to include rules of procedure that would be similar to the ones proposed for the TRs, except regarding the conditions which define an urgent action which should be limited to “in order to prevent significant and imminent damage to the financial system” as proposed for the rules of procedure for TC-CCPs.

Q14. Do you agree with the proposals to amend the CRA Commission Delegated Regulation to ensure consistency with the rules of procedure applicable to TRs? Please elaborate on the reasons for your answer.

14 Annexes

14.1 Annex I

Summary of questions

Q1. Do you agree with the proposal regarding the right to be heard and the procedure at the stage of the investigation conducted by the investigation officer? Please elaborate on the reasons for your answer.

Q2. Regarding TC-CCPs, do you agree with the proposal regarding the file to be submitted by the investigation officer to ESMA? Please elaborate on the reasons for your answer.

Q3. Regarding TRs, do you agree with the proposal regarding the file to be submitted by the investigation officer to ESMA? Please elaborate on the reasons for your answer.

Q4. Do you agree with the proposal regarding the procedure before ESMA with regards to fines and supervisory measures, including the right to be heard? Please elaborate on the reasons for your answer.

Q5. Do you agree with the proposal regarding the periodic penalty payments? Please elaborate on the reasons for your answer.

Q6. Do you agree with the proposal regarding the access to the file by TC-CCPs? Please elaborate on the reasons for your answer.

Q7. Do you agree with the proposal regarding the access to the file by TC-CCPs? Please elaborate on the reasons for your answer.

Q8. Do you agree with the proposal regarding the adoption of interim decisions for TRs? Please elaborate on the reasons for your answer.

Q9. Do you agree with the proposal regarding the limitation periods for the imposition of penalties imposed on TC-CCPs? Please elaborate on the reasons for your answer.

Q10. Do you agree with the proposal regarding the limitation periods for the enforcement of penalties imposed on TC-CCPs? Please elaborate on the reasons for your answer.

Q11. Do you agree with the proposed collection of fines and periodic penalty payments regarding TC-CCPs? Please elaborate on the reasons for your answer.

Q12. Do you agree with the proposed collection of fines and periodic penalty payments regarding TRs? Please elaborate on the reasons for your answer.

Q13. Do you agree with the proposed calculation of periods, dates and time limits? Please elaborate on the reasons for your answer.

Q14. Do you agree with the proposals to amend the CRA Commission Delegated Regulation to ensure consistency with the rules of procedure applicable to TRs? Please elaborate on the reasons for your answer.

14.2 Annex II

Commission mandate to provide technical advice

PROVISIONAL REQUEST TO THE EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA) FOR TECHNICAL ADVICE ON A POSSIBLE DELEGATED ACT CONCERNING PROCEDURAL RULES FOR PENALTIES IMPOSED ON THIRD-COUNTRY CENTRAL COUNTERPARTIES AND ON POSSIBLE AMENDMENTS TO THE DELEGATED ACT CONCERNING PROCEDURAL RULES FOR PENALTIES IMPOSED ON TRADE REPOSITORIES

With this provisional mandate the Commission seeks the technical advice of European Securities and Markets Authority (ESMA) on a possible delegated act concerning the European Market Infrastructure Regulation (EMIR¹) as amended by the 2019 CCP Supervision Regulation² ("**EMIR as amended**"). Delegated acts should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The provisional nature of the mandate stems from the fact that EMIR as amended has not yet entered into force. The Council and the European Parliament have approved the political agreement on the text of the 2019 CCP Supervision Regulation, but the text is still subject to legal revision and translation prior to its publication in the EU Official Journal.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows EMIR (Article 82), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),³ and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").⁴

According to Article 25f(7) of EMIR as amended, with regard to the procedural rules for taking supervisory measures and imposing fines on third-country CCPs, the Commission shall adopt delegated acts to specify further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties.

Moreover, as a result of the amendments in EMIR REFIT⁵, the Commission's Delegated Regulation (EU) No 667/2014 supplementing Regulation (EU) No 648/2012 with regard to rules of procedures for penalties imposed on trade repositories by ESMA including rules on the right of defence and temporal provisions¹¹, may have to be amended.

The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee,¹² the Commission

¹ 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, OJ L 201, 27.7.2012, p.1.

² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0438+0+DOC+PDF+V0//EN>

³ Communication of 9.12.2009. COM (2009) 673 final.

⁴ OJ L 304, 20.11.2010, p. 47.

⁵ <https://eur-lex.europa.eu/eli/reg/2019/834/oj>

¹¹ OJ L 179, 19.6.2014, p. 31.

¹² Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p.45.

will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 82 of EMIR. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context

1.1 Scope

On 13 June 2017, the Commission published its proposal to amend EMIR as regards the procedures and authorities involved for the authorisation of central counterparties ('CCPs') and requirements for the recognition of third-country CCPs. On 13 March 2019, the European Parliament and the Council reached a political agreement on a compromise text, which was formally endorsed by the two institutions on 18 April 2019 and 20 March 2019, respectively. Publication in the Official Journal is expected by Q3 2019. The text will enter into force on the twentieth day following its publication.

EMIR as amended will strengthen the framework for the supervision of Union and third-country CCPs that provide clearing services to EU clearing members or trading venues. This is to address the increasing concentration of risk in these infrastructures and the significant proportion of financial instruments denominated in Union currencies that are cleared outside the Union, including as a result of the expected withdrawal of the UK from the Union. The objective of EMIR as amended is to reinforce the overall stability of the Union's financial system.

EMIR as amended will give the European Securities and Markets Authority (ESMA) direct recognition and supervisory powers over third-country CCPs. According to Articles 25f, 25g and 25h ESMA will have the power to impose fines and periodic penalty payments on such CCPs that have committed infringements listed in Annex III of EMIR as amended.

According to Article 25f of EMIR as amended, with regard to the procedural rules for taking supervisory measures and imposing fines on third-country CCPs, 'the Commission shall adopt delegated acts in accordance with Article 82 to specify further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties'.

An earlier amendment to EMIR (EMIR REFIT) has been published in the Official Journal on 28 May 2019. The text will enter into force on the twentieth day following its publication. Those amendments introduce changes to the rules of procedure for taking supervisory measures and imposing fines, including the rights of the defence, in Articles 64, 65 and 67 in relation to ESMA's power to impose fines and periodic penalty payments on trade repositories. These

amendments should be reflected, as appropriate, in Commission Delegated Regulation (EU) No 667/2014 on the rules of procedure for penalties imposed on trade repositories by ESMA including rules on the right of defence and temporal provisions.

This provisional mandate focuses on the technical aspects of the rules of procedure for the exercise of the power to impose fines or periodic penalty payments on third-country CCPs and on trade repositories, as well as of the rules on the limitation periods with respect to third-country CCPs.

1.2 Principles that ESMA should take into account

On the working approach, ESMA is invited to take account of the following principles:

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of EMIR as amended. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens.
- The technical advice should take account of the rule-of-law principle, which requires appropriate rights of defence for persons that are subject to ESMA's supervision. At the same time, it should ensure a high level of investor protection, which is a guiding principle of EU financial regulation and requires a strong supervisor with the power to carry out supervision and ensuring compliance with EMIR in an effective and efficient way.
- When preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**")¹³, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.
- ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.
- In accordance with the ESMA Regulation, ESMA should, where relevant, involve the European Banking Authority and the European Insurance and Occupational Pensions Authority in order to ensure cross-sectoral consistency. It should also cooperate, where relevant, with the European Systemic Risk Board on any issues related to systemic risk.

¹³ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84.

- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner, and take into account the resulting opinions in its advice. ESMA should provide a detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to its technical advice. The technical advice should justify ESMA's choices vis-à-vis the main arguments raised during the consultation.
- ESMA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. ESMA should provide the Commission with a description of the problem, the objectives of the technical advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The cost-benefit analysis should justify ESMA's choices vis-à-vis the main considered options.
- ESMA's technical advice should not take the form of a legal text. However, ESMA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.
- ESMA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
 - the relevant provisions of EMIR, as amended;
 - the corresponding recitals, or;
 - the relevant Commission's request included in this mandate.
- ESMA should address to the Commission any question to clarify the text of EMIR as amended that ESMA considers of relevance to the preparation of its technical advice.

2 Procedure

The Commission is requesting ESMA's technical advice in view of the preparation of a delegated act to be adopted pursuant to EMIR, as amended, and in particular regarding the questions referred to in section 3 of this provisional mandate.

The mandate takes into account EMIR (Article 82), the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this provisional mandate. The technical advice received on the basis of this provisional mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to EMIR, as amended.

The Commission has duly informed the European Parliament and the Council about this provisional mandate. As soon as the Commission adopts a delegated act, it will notify it simultaneously to the European Parliament and the Council.

3 ESMA is invited to provide technical advice on the following issues

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act specifying further the rules of procedure for the exercise of the power to impose fines or periodic penalty payments on third-country CCPs, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of penalties, and more specifically on the following aspects:

- ESMA is invited to advise on the procedure regarding the persons' subject to the investigations rights to be heard by the investigation officer upon his or her completion of the investigation but before the file with his or her findings is submitted to ESMA, including the timeframes and procedures for informing the persons subject to investigation of the investigation officer's preliminary findings and the submission of comments in writing or in oral hearings by the persons subject to investigations.
- ESMA is invited to advise on the content of the file with his or her findings that the investigation officer must submit to ESMA, with a view of ensuring that ESMA is in a position to take into consideration all relevant facts when adopting supervisory measures or enforcement decisions regarding third-country CCPs.
- ESMA is invited to advise on the procedure for the imposition of fines and supervisory measures by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- ESMA is invited to advise on the procedure for the imposition of periodic penalty payments by ESMA and the procedure to guarantee the persons' subject to the investigations rights to be heard, including the timeframes and procedures for the submission of comments in writing or in oral hearings by the persons subject to investigations.
- ESMA is invited to advise on the procedure for interim decisions to impose fines or periodic penalty payments, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.
- ESMA is invited to advise on the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information.

- ESMA is invited to advise on the limitation periods for the imposition of penalties.
- ESMA is invited to advise on the limitation periods for the enforcement of penalties.
- ESMA is invited to advise on the calculation of periods, dates and time limits to be laid down in the delegated act.
- ESMA is invited to reflect on the methods for the collection of fines and periodic penalty payments, including the procedures to guarantee the payment of fines or periodic penalty payments until such time as they become final, following the outcome of possible legal challenges or reviews.

ESMA is also invited to provide technical advice to assist the Commission in formulating amendments, if and where appropriate, to the Commission Delegated Regulation (EU) No 667/2014 on the rules of procedure for penalties imposed on trade repositories by ESMA including rules on the rights of defence and temporal provisions, and more specifically on the following aspects:

- ESMA is invited to advise on the procedure for interim decisions to impose fines or periodic penalty payments on trade repositories, adopted by ESMA when urgent action is needed in order to prevent significant and imminent damage to the financial system or to the integrity, transparency, efficiency and orderly functioning of financial markets, including to the stability or the correctness of data reported to a trade repository, and the procedure to guarantee the persons' subject to the investigations rights to be heard by ESMA as soon as possible after the adoption of such interim decisions.
- ESMA is invited to advise on whether – in light of the amendments to the procedure regarding the persons' subject to the investigations rights to access to the file, including the limits to such access to protect other person's business secrets, ESMA's internal preparatory documents and other confidential information – the Commission Delegated Regulation should be amended.
- ESMA is invited to advice on whether – in light of EMIR's amendments– the Commission Delegated Regulation should be amended in order to ensure a degree of consistency in the procedures applicable to third-country CCPs and to trade repositories where appropriate.

4. Indicative timetable

This provisional mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of EMIR that allows the European Parliament and the Council to object to a delegated act within a period of three months, extendible by three further months. Delegated acts will only enter into force if neither the European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

In order for EMIR as amended to be fully operational and for ESMA to be able to impose fines or periodic penalty payments on third-country CCPs, it is important to start working on this issue in due time.



The deadline set to ESMA to deliver the technical advice is therefore Q1 2020.