

II

(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2023/1626

of 19 April 2023

on amending the regulatory technical standards laid down in Delegated Regulation (EU) 2018/1229 as regards the penalty mechanism for settlement fails relating to cleared transactions submitted by CCPs for settlement

(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 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012⁽¹⁾, and in particular Article 7(15), third subparagraph, thereof,

Whereas:

- (1) Pursuant to Article 7(11) of Regulation (EU) 909/2014, the cash penalties regime is not to apply to failing participants which are CCPs.
- (2) Article 19 of Commission Delegated Regulation (EU) 2018/1229⁽²⁾ as currently applicable provides for a specific mechanism on the collection and distribution by CCPs of cash penalties ('penalty mechanism') to ensure that, in respect of settlement fails relating to cleared transactions, where CCPs interpose themselves between counterparties, cash penalties are not applied to CCPs.
- (3) However, due to the multiplicity of parties involved, the application of the penalty mechanism by CCPs adds operational risks, technical complexities and costs to the process of collecting and distributing cash penalties for settlement fails relating to cleared transactions. Penalties for settlement fails relating to cleared transactions could be fully calculated, applied, collected and redistributed by CSDs, from and to all the participants identified in the settlement instructions submitted by CCPs, in accordance with Articles 16, 17 and 18 of Delegated Regulation (EU) 2018/1229, as any other penalties for settlement fails relating to uncleared transactions.
- (4) Pursuant to Article 2(19) of Regulation (EU) No 909/2014, any institution, central counterparty, settlement agent, clearing house, system operator or clearing member of a CCP may qualify as a participant.

⁽¹⁾ OJ L 257, 28.8.2014, p. 1

⁽²⁾ Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline (OJ L 230, 13.9.2018, p. 1).

- (5) To facilitate the calculation, collection and distribution of the cash penalties for fails of settlement instructions relating to cleared transactions submitted by CCPs, while at the same time reducing the risks and the cost related to such process, CSDs should calculate, collect from and distribute to their relevant participants, pursuant to Articles 16, 17 and 18 of Delegated Regulation (EU) 2018/1229, the cash penalties relating to settlement instructions submitted by CCPs for cleared transactions.
- (6) Where CCPs interpose themselves between counterparties, the net amount of penalties that CSDs have to collect and distribute in relation to settlement instructions submitted by a CCP would normally amount to zero since the settlement instructions submitted by the CCP represent both legs of the cleared transactions. However, in certain cases such as a late delivery of securities to a CCP on the intended settlement date which does not allow for the settlement of the delivery instructions from the CCP, or in cases of differences in the penalties calculated by different CSDs, imbalanced positions in respect of cleared transactions may remain in the books of the CCPs and the net amount of penalties to be collected from, or distributed to, CCPs can be different from zero. In such cases, the CCPs should be allowed to allocate to their clearing members the remaining net amount of penalties, credit or debit. CCPs should establish an appropriate mechanism in their rules to that effect.
- (7) Delegated Regulation (EU) 2018/1229 should therefore be amended accordingly.
- (8) To ensure that the calculation of penalties for settlement fails that occur before the date of application of this Regulation is not retroactively affected, it is appropriate to include transitional provisions.
- (9) To enable CCPs and CSDs to implement the necessary technological adaptations in view of ensuring compliance with the amended penalty mechanism, it is appropriate to defer the application of this Regulation.
- (10) This Regulation is based on the draft regulatory technical standards developed in close cooperation with the members of the European System of Central Banks and submitted to the Commission by the European Securities and Markets Authority.
- (11) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽³⁾,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2018/1229

Article 19 of Delegated Regulation (EU) 2018/1229 is replaced by the following:

'Article 19

Penalty mechanism for settlement fails relating to cleared transactions submitted by CCPs for settlement

With respect to settlement fails relating to cleared transactions submitted by CCPs for settlement, CSDs shall apply Articles 16, 17 and 18.

CCPs may allocate to their clearing members any remaining net amount of penalties, credit or debit, paid pursuant to Article 16 and distributed pursuant to Article 17(2).

CCPs shall establish an appropriate mechanism in their rules to that effect.'

⁽³⁾ 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

*Article 2***Transitional provision**

Article 19 of Delegated Regulation (EU) 2018/1229 as applicable on 1 September 2024 shall continue to apply to settlement fails that occurred before 2 September 2024.

*Article 3***Entry into force and application**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 2 September 2024.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 April 2023.

For the Commission
The President
Ursula VON DER LEYEN
