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COMMISSION DELEGATED REGULATION (EU) .../...

of 17.1.2023

amending and correcting the regulatory technical standards laid down in Delegated Regulation (EU) 2017/587 as regards certain transparency requirements applicable to transactions in equity instruments

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Regulation (MiFIR) introduced comprehensive pre trade and post trade transparency requirements with regard to trades in both equities (such as shares) and non-equities (such as bonds and derivatives). Several of these requirements are supplemented by regulatory technical standards drafted by the European Securities Markets Authority (ESMA). Delegated Regulation (EU) 2017/587 ('RTS 1') provides regulatory technical standards regarding transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds and other similar financial instruments.

The delegated act amends RTS 1 and contains provisions to improve and further harmonise data quality of post-trade transparency reports, as well as to increase the level of pre-trade and post-trade transparency of exchange traded funds. In particular the following amendments are introduced:

- The concept of 'non-price forming transactions', which leads to the application of among other things the negotiated trade waiver as well as exemptions for post-trade transparency for off-exchange transactions has not been fully harmonised across these different provisions which has led to inconsistent publication of post-trade transparency information and flagging of transactions and eventually resulted in unsatisfactory quality of data reported. The delegated act harmonises the types of transactions considered as non-price forming.
- Pre-trade transparency and post-trade transparency for equity and equity like instruments generally increased following the application of RTS 1, however the level of transparency specifically for exchange traded funds (ETFs) remained rather low. This is caused by the large amount of orders and transactions eligible for pre-trade transparency waivers and post-trade deferrals based on the size ('large in scale waiver and deferral'). The delegated act therefore increases the threshold above which orders and transactions in ETFs benefit from the large in scale waiver and deferral.
- RTS 1 contains the data fields that should be provided for in post-trade transparency reports by approved publication arrangements (APAs) and trading venues (regulated markets or multilateral trading facilities) such as 'time', 'price' and 'quantity', as well as various 'flags' specifying the type of transaction, and prescribes how these fields should be populated for various different financial instruments. The poor quality of these post-trade transparency reports has led to criticism and is one of the main reasons identified by the European Commission and the European Securities and Markets Authority that a consolidated tape¹ has not been established. The delegated regulation contains amendments which aim at increasing clarity and harmonisation of the data standards.
- The act provides specifications on delivery of data to competent authorities in relation to calculations of the average daily turnover, average value of transactions, as well as which market is the most relevant market in terms of liquidity.

¹ See for the proposal of the European Commission on the consolidated tape: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0727>

- Finally, the delegated act clarifies the legal status of so called ‘hybrid systems’ which are systems that combine aspects of different trading systems, such as central limit order book systems and request for quote systems and makes technical adjustments to the exact moment of the day at which a publication of which the deferral has lapsed should be published.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of Regulation (EU) No 1095/2010, ESMA has carried out a public consultation on the draft regulatory technical standards. A Consultation Paper which jointly dealt with the review of EU/2017/587 and EU/2017/583 was published on 9 July 2021 on the ESMA website. The Consultation period ended on 01 October and in total 58 replies were received. In addition ESMA sought the views of the Securities and Markets Stakeholders Group established in accordance with Article 37 of the ESMA regulation.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA submitted its assessment, including the analysis of costs and benefits related to the draft technical standards.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1(1) removes the definition of ‘give-up transaction’ and ‘give-in transaction’ as well as that of ‘securities financing transaction’.

Article 1(2) introduces harmonisation of non-price forming transactions for the purposes of identifying exemptions to the share trading obligation. It does so by adding the list of such transactions included in Article 2(5) of RTS 22 (Commission delegated Regulation EU/2017/590) on transaction reporting to competent authorities.

Article 1(3) introduces harmonisation of non-price forming transactions for the purposes of application of the negotiated trade waiver. It does so by adding the list of such transactions included in RTS 22 (EU/2017/590) on transaction reporting.

Article 1(4) increases the pre-trade large in scale waiver threshold applicable to orders in ETFs from one million to three million euro.

Article 1(5) introduces harmonisation of non-price forming transactions for the purposes of identifying exemptions to post-trade transparency requirements for off-exchange transactions. It does so by limiting these exemptions to the transactions included in RTS 22 (EU/2017/590) on transaction reporting.

Article 1(6) changes the moment of publication of post-trade transparency reports of which the deferral has lapsed.

Article 1(7) changes the day from which calculations on ‘the most relevant market in terms of liquidity’ apply. It furthermore introduces the obligation for APAs and trading venues to deliver calculation data based on the specifications provided for in a new Annex. Finally, it provides for the requirement to convert certain values in post-trade transparency reports to the currency in which the financial instrument is denominated, in case this is not in Euro.

Article 1(8) introduces amendments to Annex I on descriptions of trading systems, the details to be provided in post-trade transparency reports as well on the applicable flags.

Article 1(9) introduces amendments to Annex II in order to increase the post-trade large in scale deferral from 10 million Euro to 15 million Euro.

Article 1(10) introduces a new Annex IV providing specifications on delivery of data to competent authorities in relation to calculations of the average daily turnover, average value of transactions, as well as which market is the most relevant market in terms of liquidity.

Article 2(1) corrects an incorrect cross-reference to arrangements on machine readability of information published by data reporting services providers.

Article 2(2) corrects an incorrect cross-reference.

Article 3 provides for a transitional provision.

Article 4 provides for the entry into force and the application date.

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amending and correcting the regulatory technical standards laid down in Delegated Regulation (EU) 2017/587 as regards certain transparency requirements applicable to transactions in equity instruments

(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 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012², and in particular Article 4(6), third subparagraph, Article 7(2), third subparagraph, Article 14(7), third subparagraph, Article 20(3), third subparagraph, Article 22(3), second subparagraph, and Article 23(3), third subparagraph thereof,

Whereas:

- (1) Taking into consideration the experience acquired with the application of Commission Delegated Regulation (EU) 2017/587³, the identification of inconsistent application of provisions that rely on whether or not a transaction is ‘non-price forming’ and taking into account the changes in trading practices due to technological developments and adaptations of behaviour of market participants which allow information to be published with a shorter delay, it is necessary to amend certain provisions of that Delegated Regulation.
- (2) The concept of non-price forming transactions, which is relevant for the application of the negotiated trade waiver, the share trading obligation, as well as the exemption of post-trade transparency requirements for bilateral transactions, has been interpreted differently by entities under supervision, which has led to inconsistent publication of post-trade transparency information. To improve the transparency, data quality and ultimately to facilitate data aggregation, it is necessary to simplify and clarify the reporting regime applicable to equity transactions. To avoid diverging interpretation, the various provisions that rely on the concept of non-price forming transactions in both Delegated Regulation (EU) 2017/587 and Commission Delegated Regulation (EU) 2017/590⁴, which deals with the reporting of transactions to competent authorities, should be aligned. Delegated Regulation (EU) 2017/590 contains all the

² OJ L 173, 12.6.2014, p. 84.

³ Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser (OJ L 87, 31.3.2017, p. 387).

⁴ Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities (OJ L 87, 31.3.2017, p. 449).

transactions to be excluded from reporting requirements, the separate transactions in Delegated Regulation (EU) 2017/587 should therefore be removed.

- (3) Aligning the concept of non-price forming transactions with that concept in Delegated Regulation (EU) 2017/590 makes the definition of ‘give-up transactions’ or ‘give in transactions’ redundant, since that definition was only used in provisions dealing with that concept. Furthermore, the definition of ‘securities financing transaction’ is not used in that Delegated Regulation. Those definitions should therefore be deleted.
- (4) Although pre-trade transparency in equity and equity-like instruments increased due to the application of Delegated Regulation (EU) 2017/587, the level of real time pre-trade transparency remains low for exchange traded funds (ETFs). This is a consequence of a significant percentage of ETF transactions, both in terms of the number of trades and volume traded, currently benefitting from a waiver, in particular the large in scale waiver as provided for in Article 4(1), point (c), of Regulation (EU) No 600/2014. Therefore, the objective of that Regulation of increasing the transparency in the ETF market has not been fully achieved. To increase real-time pre-trade transparency in ETF, it is therefore necessary to increase the pre-trade large in scale transparency threshold applicable to ETFs. The increase of the threshold will ensure that more transactions in ETFs are subject to real-time pre-trade transparency requirements while ensuring sufficient protection against price impact for large orders.
- (5) Similarly, the level of post-trade transparency for ETFs remains low, with the proportion of deferred publication of transactions in ETF remaining significantly higher than for shares and other equity instruments. To ensure that more transactions in ETFs are subject to real-time post trade transparency requirement, it is necessary to increase the minimum qualifying size of transactions in ETFs that are entitled to a 60 minute deferral. That increase of the threshold reflects the right balance between increasing real-time transparency and ensuring sufficient protection against potential negative consequences of displaying large orders.
- (6) Market participants have been interpreting the pre-trade transparency requirements for hybrid trading systems differently, which has resulted in inconsistent pre-trade transparency disclosed by operators of such systems. Hybrid systems are systems which combine two or more trading systems. To ensure that those operators disclose appropriate pre-trade transparency information in a consistent manner across the Union, pre-trade transparency requirements should be introduced for hybrid trading systems which ensure that pre-trade transparency requirements are aligned with those of the individual systems of which the hybrid system consists.
- (7) Technological and market developments, such as increased use of systems with less latency, allow market participants to provide information on transactions at an earlier point in time. Taking this into account, the possibility to publish deferred post-trade information no later than noon of the following trading day for transactions executed less than 2 hours before the end of the trading day is unnecessarily long. To ensure the timely publication of post-trade information, it is therefore necessary to reduce that period to no later than 9 am local time of the following trading day.
- (8) Trading venues, approved publication arrangements (APAs) and investment firms do not interpret the requirements related to the disclosure of post-trade transparency information to the public and the information to be provided to the European Securities and Markets Authority (ESMA) and competent authorities for the purpose of the transparency calculations consistently. As a result, such information is incomplete, inaccurate or inconsistent. This undermines the usability of such

information and the quality and accuracy of the transparency calculations based on the submitted data. To promote the consistent application of the post-trade transparency requirements across the Union, it is therefore necessary to further specify the content of the data requests, and in particular the details to be disclosed by trading venues, APAs and consolidated tape providers when they report reference data and quantitative data to ESMA and competent authorities.

- (9) Delegated Regulation (EU) 2017/587 should therefore be amended accordingly.
- (10) To allow trading venues, APAs and investment firms to implement the required changes into their systems, certain amendments introduced by this Regulation should apply from 1 January 2024. To ensure legal certainty and continuity for transactions executed before 1 January 2024 but which are published or amended after that date, Articles 2, 6 and 13 of and Annex I to Delegated Regulation (EU) 2017/587 as applicable on 31 December 2023 should continue to apply to those transactions.
- (11) This Regulation is based on the draft regulatory technical standards submitted to the Commission by ESMA.
- (12) ESMA 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 Council⁵,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2017/587

Delegated Regulation (EU) 2017/587 is amended as follows:

- (1) in Article 1, points (2) and (3) are deleted;
- (2) Article 2 is amended as follows:
 - (a) points (d) to (i) are deleted;
 - (b) the following point (j) is added:

‘(j) the transaction does not constitute a transaction for the purposes of Article 26 of Regulation (EU) No 600/2014 in accordance with Article 2(5) of Commission Delegated Regulation (EU) 2017/590*.

*Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities (OJ L 87, 31.3.2017, p. 449).’;

- (3) Article 6 is amended as follows:
 - (a) points (d) to (i) are deleted;

⁵ 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).

- (b) the following point (k) is added:
 ‘(k) the transaction does not constitute a transaction for the purposes of Article 26 of Regulation (EU) No 600/2014 in accordance with Article 2(5) of Delegated Regulation (EU) 2017/590.’;
- (4) in Article 7, paragraph 2 is replaced by the following:
 ‘2. An order in respect of an ETF shall be considered to be large in scale where the order is equal to or larger than EUR 3 000 000.’;
- (5) in Article 13, points (b), (c) and (d) are deleted;
- (6) in Article 15(3), point (b) is replaced by the following:
 ‘(b) no later than the opening of the next trading day of the most relevant market in terms of liquidity for transactions not covered in point (a).’;
- (7) Article 17 is amended as follows:
 - (a) paragraph 2 is replaced by the following:
 ‘2. Competent authorities, market operators and investment firms including investment firms operating a trading venue shall use the information published in accordance with paragraph 1 of this Article for the purposes of Article 4(1), points (a) and (c) and Article 14(2) and (4) of Regulation (EU) No 600/2014, for the period between the first Monday of April of the year in which the information is published and the day before the first Monday of April of the subsequent year.’;
 - (b) the following paragraphs 6 and 7 are added:
 ‘6. Where ESMA or competent authorities require information in accordance with Article 22 of Regulation (EU) No 600/2014 trading venues, APAs and CTPs shall provide such information in accordance with Annex IV to this Regulation.
 7. Where the trade size determined for the purposes of Article 7(1) and (2), Article 8 (2), point (a), Article 11(1) and Article 15(1) is expressed in monetary value and the financial instrument is not denominated in Euros, the trade size shall be converted to the currency in which the financial instrument is denominated by applying the European Central Bank euro foreign exchange reference rate as of 31 December of the preceding year.’;
- (8) Annex I is amended in accordance with Annex I to this Regulation;
- (9) Annex II is amended in accordance with Annex II to this Regulation;
- (10) The text set out in Annex III to this Regulation is added as Annex IV.

Article 2

Corrections to Delegated Regulation (EU) 2017/587

Delegated Regulation (EU) 2017/587 is corrected as follows:

- (1) in Article 9, point (b) is replaced by the following:
 ‘(b) the arrangement complies with technical arrangements equivalent to those specified for approved publication arrangements (APAs) in Article 14 of Delegated Regulation (EU) 2017/571 that facilitate the consolidation of the data with similar data from other sources.’;
- (2) Article 18 is replaced by the following:

‘Article 18

Reference to competent authorities

(Article 22(1) of Regulation (EU) No 600/2014)

The competent authority for a specific financial instrument responsible for performing the calculations and ensuring the publication of the information referred to in Articles 4, 7, 11 and 17 shall be the competent authority of the most relevant market in terms of liquidity in Article 26 of Regulation (EU) No 600/2014 and specified in Article 16 of Delegated Regulation (EU) 2017/590.’.

Article 3

Transitional provision

Articles 2, 6 and 13 of and Annex I to Delegated Regulation (EU) 2017/587 as applicable on 31 December 2023 shall continue to apply to transactions executed before 1 January 2024.

Article 4

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*.

Article 1, points (2), (3), (5), and (8) shall apply from 1 January 2024.

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

Done at Brussels, 17.1.2023

For the Commission

The President

Ursula VON DER LEYEN