EUROPEAN
COMMISSION

Brussels, 14.7.2016
C(2016) 4389 final

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

**of 14.7.2016**

**supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the tick size regime for shares, depositary receipts and exchange traded funds**

(Text with EEA relevance)

# EXPLANATORY MEMORANDUM

## 1. CONTEXT OF THE DELEGATED ACT

Under Article 49 of Directive 2014/65/EU in financial instruments (MiFID II), trading venues have to adopt tick size regimes for shares, DRs, ETFs, certificates, similar financial instruments or other specific financial instruments specified by ESMA, where necessary to ensure the orderly functioning of markets. These regimes should be calibrated to reflect the liquidity profile of the financial instrument in different markets and the average bid-ask spread, taking into account the desirability of enabling reasonably stable prices without unduly constraining further narrowing of spreads. The tick size needs to be adapted for each financial instrument appropriately.

In this context, Article 49(3) of MiFID II requires ESMA to develop draft regulatory technical standards to further specify tick sizes or tick size regimes for the instruments mentioned above.

The draft regulatory technical standards were submitted to the Commission on 28 September 2015. In accordance with Article 10(1) of Regulation No (EU) 1095/2010 establishing the ESMA, the Commission shall decide within three months of receipt of the draft standards whether to endorse them. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

## 2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of the Regulation (EU) 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards. A consultation paper was published on 19 December 2014 on the ESMA website and the consultation closed on 2 March 2015. In addition, the ESMA invited sought the views of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of the ESMA Regulation. The SMSG chose not to provide advice on these issues due to the technical nature of the standards.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted its impact assessment, including the analysis of costs and benefits related to the draft technical standards. This analysis is available at http://www.esma.europa.eu/system/files/2015-esma-1464_annex_ii_-_cba_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

## 3. LEGAL ELEMENTS OF THE DELEGATED ACT

This Regulation lays down rules to further specify the minimum tick sizes or tick size regimes for shares, depositary receipts (DRs), exchange traded funds (ETFs), certificates, similar financial instruments or other specific financial instruments specified by ESMA, where necessary to ensure the orderly functioning of markets. For this purpose it sets out definitions, specifies tick sizes and calculations of average daily number of transactions for the purpose of determining the applicable liquidity bands and tick-sizes.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU[1], and in particular Article 49(3) and (4) thereof,

Whereas:

(1) A tick size regime or minimum tick sizes should be set out in respect of certain financial instruments to ensure the orderly functioning of the markets. In particular, the risk of an ever-decreasing tick size for shares, depositary receipts and certain types of exchange-traded funds and its impact on the orderliness of the market should be controlled by means of a mandatory tick size regime.

(2) For other financial instruments, given the nature of those instruments and the microstructures of the markets on which they are traded, a tick size regime cannot be presumed to effectively contribute to the orderliness of the markets and, hence, those instruments should not be subject to the tick size regime.

(3) In particular, certificates are only traded in certain Member States. In view of the characteristics of those financial instruments and the liquidity, scale and nature of the markets on which they are traded, a mandatory tick size regime is not necessary to prevent the occurrence of disorderly trading conditions.

(4) Non-equity financial instruments and fixed income products are largely traded over the counter, with only a limited number of transactions being executed on trading venues. Due to the specific characteristics of the liquidity of those instruments on electronic platforms and their fragmentation, no mandatory tick size regime for those instruments is deemed necessary either.

(5) The correlation between exchange-traded funds and the underlying equity instruments renders it necessary to determine a minimum tick size for exchange-traded funds having as underlying shares and depositary receipts. However, exchange-traded funds having financial instruments which are not shares or depositary receipts as their underlying should not be subject to a mandatory tick size regime.

(6) It is important that all exchange-traded funds covered by this Regulation have the same tick size regime based on a single liquidity band, regardless of their average

[1] OJ L 173, 12.6.2014, p. 349.

daily number of transactions, so that the risk of circumvention of the tick size regime in relation to those instruments is reduced.

(7) The meaning of the term 'most relevant market in terms of liquidity' should be clarified for the purposes of this Regulation, since Regulation (EU) No 600/2014 of the European Parliament and of the Council[2] uses this term for both the purpose of the reference price waiver and for the purpose of transaction reporting.

(8) The tick size regime only determines the minimum difference between two price levels of orders sent in relation to a financial instrument in the order-book. It should therefore be applied equally, regardless of the currency of the financial instrument.

(9) Competent authorities should be able to react to events known in advance that lead to a change in the number of transactions in a financial instrument whereby the applicable tick size may no longer be appropriate. To that end, a specific procedure should be set out to avoid disorderly market conditions arising from corporate actions that may cause the tick size of one specific instrument to be unsuitable. That procedure should apply to corporate actions that could significantly affect the liquidity of that instrument. While assessing the impact of a corporate action on a specific financial instrument, competent authorities should take account of any previous corporate actions with similar characteristics.

(10) To ensure that the tick size regime can operate effectively and that market participants have sufficient time to implement the new requirements, it is appropriate to provide for the collection of certain data and for an early publication of the average daily number of transactions for each financial instrument covered by this Regulation.

(11) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions laid down in this Regulation and the related national provisions transposing Directive 2014/65/EU apply from the same date. However, to ensure that the tick size regime can operate effectively, certain provisions of this Regulation should apply from the date of its entry into force.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(13) 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 opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[3],

[2] 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 648/2012 (OJ L 173, 12.6.2014, p. 84)

[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).

HAS ADOPTED THIS REGULATION:

*Article 1*
***Most relevant market in terms of liquidity***

For the purposes of this Regulation, the most relevant market in terms of liquidity for a share or a depositary receipt shall be considered to be the most relevant market in terms of liquidity as referred to in Article 4(1)(a) of Regulation (EU) No 600/2014 and specified in Article 4 of Commission Delegated Regulation (EU) ....../.....[4].

*Article 2*
*(Article 49(1) and (2) of Directive 2014/65/EU)*
***Tick size for shares, depositary receipts and exchange-traded funds***

1. Trading venues shall apply to orders in shares or depositary receipts a tick size which is equal to or greater than the one corresponding to:

   (a) the liquidity band in the table in the Annex corresponding to the range of average daily number of transactions in the most relevant market in terms of liquidity for that instrument; and

   (b) the price range in that liquidity band corresponding to the price of the order.

2. By way of derogation from paragraph 1(a), where the most relevant market in terms of liquidity for a share or depositary receipt operates only a trading system that matches orders on the basis of a periodic auction and a trading algorithm operated without human intervention, trading venues shall apply the liquidity band corresponding to the lowest average daily number of transactions in the table in the Annex.

3. Trading venues shall apply to orders in exchange-traded funds a tick size which is equal to or greater than the one corresponding to:

   (a) the liquidity band in the table in the Annex corresponding to the highest average daily number of transactions; and

   (b) the price range in that liquidity band corresponding to the price of the order.

4. The requirements set out in paragraph 3 shall only apply to exchange-traded funds the underlying financial instruments of which are solely equities subject to the tick size regime under paragraph 1 or a basket of such equities.

*Article 3*
*(Article 49(1) and (2) of Directive 2014/65/EU)*
***Average daily number of transactions for shares and depositary receipts***

1. By 1 March of the year following the date of application of Regulation (EU) No 600/2014 and by 1 March of each year thereafter, the competent authority for a specific share or depositary receipt shall, when determining the most relevant market

[4] Commission Delegated Regulation (EU) ...../..... of ..... 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 the obligation for investment firms to execute transactions in certain shares on a trading venue or a systematic internaliser (OJ .........)

in terms of liquidity for that share or depositary receipt calculate the average daily number of transactions for that financial instrument in that market and ensure the publication of that information.

The competent authority referred to in subpagraph 1shall be the competent authority of the most relevant market in terms of liquidity as specified in Article 16 of Commission Delegated Regulation (EU) xxx/20xx[5].

2. The calculation referred to in paragraph 1 shall have the following characteristics:

(a) it shall include, for each trading venue, transactions executed under the rules of that trading venue, excluding reference price and negotiated transactions flagged as set out in Table 4 of Annex I to Commission Delegated Regulation (EU) ....../.....[6] and transactions executed on the basis of at least one order that has benefitted from a large in scale waiver and where the transaction size is above the applicable large-in-scale threshold as determined in accordance with Article 7 of Commission Delegated Regulation (EU) ...../......[7]

(b) it shall cover either the preceding calendar year or, where applicable, the period of the preceding calendar year during which the financial instrument was admitted to trading or has been traded on a trading venue and was not suspended from trading.

3. Paragraphs 1 and 2 shall not apply to shares and depositary receipts which were first admitted to trading or were first traded on a trading venue four weeks or less before the end of the preceding calendar year.

4. Trading venues shall apply the tick sizes of the liquidity band corresponding to the average daily number of transactions as published in accordance with paragraph 1 from 1 April following that publication.

5. Before the first admission to trading or before the first day of trading of a share or depositary receipt, the competent authority of the trading venue where that financial instrument is to be first admitted to trading or is to be first traded shall estimate the average daily number of transactions for that trading venue, taking into account the previous trading history of that financial instrument, where applicable, as well as the previous trading history of financial instruments that are considered to have similar characteristics, and publish that estimation.

The tick sizes of the liquidity band corresponding to that published estimate average daily number of transactions shall apply from the publication of that estimate until

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5 Commission Delegated Regulation (EU) xxx/20xx on reporting obligations under Article 26 of Regulation (EU) 600/2014 (OJ .......)

6 Commission Delegated Regulation (EU) ...../..... of ..... 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 the obligation for investment firms to execute transactions in certain shares on a trading venue or a systematic internaliser (OJ .........)

7 Commission Delegated Regulation (EU) ...../..... of ..... 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 the obligation for investment firms to execute transactions in certain shares on a trading venue or a systematic internaliser (OJ .........)

the publication of the average daily number of transactions for that instrument in accordance with paragraph 6.

6. No later than six weeks after the first day of trading of the share or depositary receipt, the competent authority of the trading venue where the financial instrument was first admitted to trading or was first traded on a trading venue shall calculate and ensure the publication of the average daily number of transactions in that financial instrument for that trading venue, using the data relating to the first four weeks of trading of that financial instrument.

   The tick sizes of the liquidity band corresponding to that published average daily number of transactions shall apply from the publication until a new average daily number of transactions for that instrument has been calculated and published in accordance with the procedure set out in paragraphs 1 to 4.

7. For the purposes of this Article, the average daily number of transactions for a financial instrument shall be calculated by dividing, for the relevant time period and the relevant trading venue, the total number of transactions in that financial instrument by the number of trading days.

*Article 4*
*(Article 49(1) and (2) of Directive 2014/65/EU)*
***Corporate actions***

Where a competent authority considers that a corporate action may modify the average daily number of transactions of a particular financial instrument thereby causing this financial instrument to fall within a different liquidity band, the competent authority shall determine and ensure publication of a new applicable liquidity band for that financial instrument treating it as if it were first admitted to trading or first traded on a trading venue and apply the procedure set out in Article 3(5) and (6).

*Article 5*
***Transitional provisions***

1. The competent authority of the trading venue where a share or depositary receipt was first admitted to trading or has been traded for the first time before the date of application of Regulation (EU) No 600/2014, shall collect the necessary data and calculate and ensure the publication of the average daily number of transactions for that financial instrument and for that trading venue within the following time-limits:

   (a) no later than four weeks prior to the date of application of Regulation (EU) No 600/2014 where the date on which shares or depositary receipts are traded for the first time on a trading venue within the Union is a date not less than ten weeks prior to the date of application of Regulation (EU) No 600/2014;

   (b) no later than the date of application of Regulation (EU) No 600/2014 where the date on which financial instruments are traded for the first time on a trading venue within the Union is a date falling within the period commencing ten weeks prior to the date of application of Regulation (EU) No 600/2014 and ending on the day preceding the date of application of Regulation (EU) No 600/2014.

2. The calculations referred to in paragraph 1(a) shall be carried out as follows:

(a) where the date on which shares or depositary receipts are traded for the first time on a trading venue within the Union is a date not less than sixteen weeks prior to the date of application of Regulation (EU) No 600/2014, the calculation shall be based on data available for a forty-week reference period commencing fifty-two weeks prior to the date of application of Regulation (EU) No 600/2014;

(b) where the date on which shares or depositary receipts are traded for the first time on a trading venue within the Union is a date within the period commencing sixteen weeks prior to the date of application of Regulation (EU) No 600/2014 and ending ten weeks prior to the date of application of Regulation (EU) No 600/2014, the calculation shall be based on data available for the first four week trading period of the financial instrument;

(c) where the date on which shares or depositary receipts are traded for the first time on a trading venue within the Union is a date falling within the period commencing ten weeks prior to the date of application of Regulation (EU) No 600/2014 and ending on the day preceding the date of application of Regulation (EU) No 600/2014, the calculation shall be based on the trading history of the share or depositary receipt or other financial instruments considered to have similar characteristics to those shares or depositary receipts.

3. The tick sizes of the liquidity band corresponding to the published average daily number of transactions referred to in paragraph 1 shall be applied until 1 April of the year following the date of application of Regulation (EU) No 600/2014. During that period, competent authorities shall ensure that the tick sizes for financial instruments referred to under points (b) and (c) of paragraph 2 and for which they are the competent authority, do not contribute to disorderly trading conditions. Where a competent authority identifies a risk for the orderly functioning of the markets due to such tick sizes, it shall determine and publish an updated average daily number of transactions for the relevant financial instruments to address that risk. It shall do so on the basis of longer and more comprehensive trading history data of those instruments. Trading venues shall immediately apply the liquidity band corresponding to that updated average daily number of transactions. They shall do so until 1 April of the year following the date of application of Regulation (EU) No 600/2014 or until any further publication by the competent authority in accordance with this paragraph.

*Article 6*
*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*.

This Regulation shall apply from the date that appears first in the second subparagraph of Article 93(1) of Directive 65/2014/EU.

However, Article 5 shall apply from the date of entry into force of this Regulation.

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

Done at Brussels, 14.7.2016

*For the Commission*
*The President*
*Jean-Claude JUNCKER*