



Brussels, 17.12.2021
C(2021) 9430 final

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

of 17.12.2021

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council by specifying criteria for derogation of the principle that approved publication arrangements and approved reporting mechanisms are supervised by the European Securities Markets Authority

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2019/2175, amending Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR), was published in the Official Journal on 27 December 2019. As of 1 January 2022, the Regulation grants the European Securities and Markets Authority (ESMA) direct authorisation and supervisory powers over data reporting services providers, except for those ARMs and APAs that, by way of derogation from MiFIR on account of their limited relevance for the internal market, are subject to authorisation and supervision by a competent authority of a Member State. The power for the Commission to adopt a delegated act on this derogation is provided in Article 2(3) of MiFIR. When drafting the delegated act, the Commission shall take into account any or all of the following elements: the extent to which the services are provided to investment firms authorised in one Member State only, the number of trade reports or transactions and/or whether the ARM or APA is part of a group of financial market participants operating cross border.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 18 June 2020, the Commission asked ESMA for an opinion (technical advice) on the Commission delegated regulations to be adopted under Article 2(3) of MiFIR. ESMA submitted its technical advice to the Commission on 23 March 2021.

Following an in-depth technical assessment, as part of its technical advice, ESMA conducted a public consultation on the technical aspects of the envisaged delegated regulations on derogation from 20 November 2020 to 4 January 2021. ESMA received five responses. The Commission simplified the methodology as proposed by ESMA so that only two steps, instead of four steps apply. This simplified methodology does not lead to a different outcome than the one proposed by ESMA.

On 19 July 2021, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on ESMA's technical advice and on the content of this delegated act. Some EGESC members provided comments regarding the derogation determination which have been taken into account in the draft delegated act.

The draft delegated act was published on the Better Regulation portal for a four-week feedback period from 29 July to 27 August 2021, in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making. The received feedback was thoroughly examined before deciding to move forward with the adoption of the delegated act. The feedback was mixed with some respondents advocating for less entities to be derogated and others for more entities to be derogated. Some respondents indicated that they would like clarity before 1 January 2022 on the entities that will fall within ESMA supervision and the height of the fees. One respondent argued that the criterion that minimally 70% of the investment firms are required to be established in the home member state could lead to DRSPs with a very limited number of clients that represent an insignificant share of the total DRSP market to fall under ESMA supervision. The Commission accommodated this concern by lowering the percentage to 50%.

An impact assessment has not been carried out because this Regulation largely follows the measures proposed by ESMA in its technical advice.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Articles 1 and 2 of the proposed regulation set out the provisions for derogation of ESMA supervision. In particular the criteria on whether services are provided to investment firms authorised in different Member States and the number of reports or transactions.

Articles 3 and 4 of the proposed regulation set out the final provisions. The articles contain the transitional provisions and the entry into force.

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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 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 648/2012¹, and in particular Article 2(3) thereof,

Whereas:

- (1) Given the cross-border dimension of market data handling, data quality and the necessity to achieve economies of scale, and to avoid the adverse impact of potential divergences on both data quality and the task of data reporting providers, Regulation (EU) 2019/2175 of the European Parliament and of the Council² transferred authorisation and supervision powers with regard to the activities of data reporting services providers ('DRSPs') in the Union to the European Securities and Markets Authority ('ESMA').
- (2) At the same time, approved publication arrangements ('APAs') and approved reporting mechanisms ('ARMs') are derogated from ESMA supervision, and instead remain in scope of national supervision, where their activities are of limited relevance for the internal market.
- (3) The activities of an APA or an ARM should firstly be considered to be of limited relevance for the internal market based on the relative amount of clients established in Member States different from the home Member State of the APA or the ARM. If the services offered by APAs or ARMs are to a large extent cross border, derogation should not apply. Secondly the relevance for the internal market should be based on the share of the total reported or published transactions that is reported or published by individual APAs or ARMs. If this share exceeds a minimum threshold, then the activities should not be considered to be of limited relevance to the internal market.

¹ OJ L 173, 12.6.2014, p. 84.

² Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (OJ L 334, 27.12.2019, p. 1).

The calculation for the APA should be based on transparency data submitted to the Financial Instruments Reference Data System and the Financial Instruments Transparency System, while the calculation for the ARM should be based on the transaction reports submitted to the competent authorities.

- (4) Where an APA and an ARM or multiple APAs or ARMs are operated by a single operator, derogation of ESMA supervision is only possible if all APAs or ARMs are eligible for derogation.
- (5) In order to ensure smooth functioning of the new supervisory framework for DRSPs, as introduced in Article 4 of Regulation 2019/2175, this Regulation should enter into force without delay and enter into application as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1

Assessment of APAs and ARMs

1. Approved publication arrangements ('APAs') and approved reporting mechanisms ('ARMs') shall be subject to authorisation and supervision by a competent authority of a Member State as defined in Article 4(1), point (26) of Directive 2014/65/EU on account of their limited relevance for the internal market if the activities of those APAs and ARMs on average do not exceed any of the thresholds set out in Article 2 of this Regulation. Where more than one APA or ARM is operated by the same operator, a derogation shall only apply if the activities of none of the APAs or ARMs exceed the thresholds set out in Article 2.
2. For the purpose of authorisation, the assessment of the criteria set out in Article 2 shall be based on estimates of the future activities provided by the applicant.
3. The relevance for the internal market of the activities of an APA or an ARM referred to in paragraph 1 shall be reassessed by ESMA every year, starting in the year following the first full calendar year after authorisation. The assessment of the criteria in Article 2 shall be based on data representing the full calendar year prior to the reassessment.
4. In the case that based on the reassessment referred to in paragraph 3 in two consecutive years the thresholds for derogation or application of ESMA supervision are no longer met, the change into application or derogation of ESMA supervision shall take effect on 1 June in the following year.

Article 2

Criteria for identification of derogation from ESMA supervision

1. An APA or ARM shall be subject to a derogation from ESMA supervision where:
 - (a) the APA or ARM provides services to or on behalf of investment firms subject to the post trade disclosure requirements of Articles 20 and 21 of Regulation (EU) No 600/2014 or the reporting requirement of Article 26 of that Regulation, in maximum three different Member States, while at least 50% of those investment firms are authorised in the same Member State as the APA or ARM; and
 - (b) the number of trades reported to the public and the volume thereof by the APA in accordance with Article 20(1) of Regulation (EU) No 600/2014 regarding equity instruments amounts to less than 0,5% of the total number of trades or

volume reported by all APAs in accordance with Article 20(1) of that regulation and the number of trades reported to the public and the volume thereof by the APA in accordance with Article 21(1) of that regulation regarding non-equity instruments does not amount to more than 0,5% of the total number of trades or volume reported by all APAs in accordance with Article 21(1) of that regulation; and

- (c) the number of transactions reported by the ARM in accordance with Articles 26(1) and 26(7) of Regulation (EU) No 600/2014 does not amount to more than 0,5% of the total number of transactions reported by all ARMs in accordance with Articles 26(1) and 26(7) of that Regulation.
2. APAs and ARMs shall provide the competent authority on request data which allows the assessment of the criterion laid down in paragraph 1, point (a).

Article 3

Transitional provision

For the purposes of Article 1, ESMA shall perform the initial assessment of the derogation criteria listed in Article 2. Such initial assessment shall be based on data related to the first 6 months of 2021.

Article 4

Entry into force and date of application

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

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

Done at Brussels, 17.12.2021

For the Commission

The President

Ursula VON DER LEYEN