



Brussels, 24.6.2016
C(2016) 3807 final

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

of 24.6.2016

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on clearing access in respect of trading venues and central counterparties

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Directive 2004/39/EC (MiFID) had limited provisions on access by investment firms to CCPs and clearing and settlement facilities.

The Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014, MiFIR) aims at removing the commercial barriers that may exist to prevent competition in the clearing of financial instruments and at avoiding discriminatory practices, both at the CCPs' and trading venues' levels. The purpose of open access is to promote greater competition among market infrastructures and ultimately reduce costs for end investors. However, MiFIR foresees that there may be circumstances under which the potential drawbacks of open access may outweigh its benefits. In addition, taking into account the challenges that full non-discriminatory access may entail, MiFIR establishes transitional arrangements for newly established CCPs in relation to transferable securities and money market instruments and for smaller trading venues in respect of exchange-traded derivatives.

In this context, MiFIR empowers the Commission to adopt, following submission of draft regulatory technical standards by the European Securities and Markets Authority (ESMA), a Delegated Regulation further specifying the conditions governing access in respect of CCPs and trading venues.

In accordance with Article 10(1) of Regulation No (EU) 1095/2010 establishing 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, ESMA sought the views of the Securities and Markets Stakeholder Group (MSG) established in accordance with Article 37 of the ESMA Regulation. The MSG 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

The power to adopt this Delegated Regulation is provided for under Article 35(6) and Article 36(6) of MiFIR. Under these provisions, the Commission is empowered to adopt a delegated Regulation to specify the conditions, under which trading venues and central counterparties may deny, or have to provide, trading respectively clearing

access in a non-discriminatory way, in order to allow for open and effective competition between market infrastructures.

Chapter 1 sets out the grounds for denial of access, having regard to the anticipated volume of transactions, operational risks and complexity or other factors creating significant undue risk. The CCP respectively the trading venue is required to assess the risk and shall deny access only where after making all reasonable effort to manage such risks, there remains a significant undue risk that cannot be managed.

Chapter 2 sets out the conditions under which access must be permitted, the purpose which is to ensure that the ongoing access arrangement is effective and non-discriminatory whilst ensuring that both parties comply with certain requirements by setting out requirements on rights and obligations as well as terms and conditions.

Chapter 3 sets out the requirements to ensure that clearing of contracts from different trading venues is done in a non-discriminatory manner. For this purpose, it provides specifications on what constitutes economically equivalent contracts and their treatment in terms of collateral and margin requirements as well as netting.

Chapter 4 further specifies the procedure and method of calculating thresholds applicable to transitional arrangements in relation to the access obligations for newly created CCPs or trading venues below a certain size.

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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 35(6) and Article 36(6) thereof,

Whereas:

- (1) To prevent distortion of competition, central counterparties (CCPs) as well as trading venues should only be able to deny a request for access to a CCP or a trading venue where they have made all reasonable efforts to manage the risk arising from granting that access but significant undue risk remains.
- (2) In accordance with Regulation (EU) No 600/2014 if a CCP or trading venue denies an access request it has to provide full reasons for that decision and this includes identifying how the relevant risks arising from granting access would in the particular situation be unmanageable and that there would be significant undue risk remaining. An appropriate way of doing this is for the party denying access to clearly outline the changes in risk management that would arise from granting access, how it would have to manage the risk associated with changes in consequence of granting access, and to explain the impact on its activities.
- (3) Regulation (EU) No 600/2014 does not distinguish between risks incurred by CCPs and trading venues when granting access and includes the same general categories of conditions to be considered by trading venues and CCPs when assessing access requests. However, due to the different nature of the activities of CCPs as compared to trading venues, risks stemming from granting access may in practice impact CCPs and trading venues differently, thus demanding an approach differentiating between CCPs and trading venues.
- (4) When a competent authority assesses whether access would threaten the smooth and orderly functioning of the markets or adversely affect systemic risk, it should consider whether the CCP or trading venue in question has adequate risk management procedures, including with respect to operational and legal risks, to avoid the access agreement creating significant undue risks to third parties that cannot be mitigated.
- (5) The terms under which access must be permitted should be reasonable and non-discriminatory so as not to undermine the purpose of non-discriminatory access.

¹ OJ L 173, 12.6.2014, p. 84.

Charging fees in a discriminatory way so as to deter access should not be permitted. However, fees could differ for objectively justified reasons, such as where the costs to implement the access arrangements are higher. When granting access CCPs and trading venues incur both one-off costs, such as assessing legal requirements, and ongoing costs. Since the scope of the access request and the associated costs for implementing the access agreement are likely to differ on a case-by-case basis, it is not appropriate to cover the specific allocation of costs between the CCP and the trading venue in this Regulation. However, the allocation of costs is an important element of an access agreement, therefore both parties should specify the coverage of costs in that agreement.

- (6) Pursuant to Regulation (EU) No 648/2012 of the European Parliament and of the Council², a CCP wishing to extend its business to additional services or activities not covered by the initial authorisation should submit a request for an extension of authorisation. An extension of authorisation is needed where a CCP intends to offer clearing services on financial instruments with a different risk profile or that have material differences from the CCP's existing product set. When a contract traded on a trading venue to which a CCP has granted access is in a class of financial instruments covered by the CCP's existing authorisation and has therefore similar risk characteristics to the contracts already cleared by the CCP, such a contract should be considered as economically equivalent.
- (7) In order to ensure that a CCP does not apply discriminatory collateral and margining requirements to economically equivalent contracts traded on a trading venue that has been granted access to the CCP, any change to the margining methodology and operational requirements regarding margining and netting applied to economically equivalent contracts already cleared by the CCP should be subject to a review by the risk committee of the CCP and be considered as a significant change to the models and parameters for the purpose of the review procedure provided in Regulation (EU) No 648/2012. Such a review should validate that the new models and parameters are non-discriminatory and based on relevant risk considerations.
- (8) Regulation (EU) No 648/2012 prevents competitive distortions by requiring non-discriminatory access to CCPs offering clearing of over-the-counter (OTC) derivatives to trading venues. In turn, Regulation (EU) No 600/2014 recognises the need to introduce similar requirements for regulated markets. Given that a CCP may clear both OTC and exchange-traded derivatives, non-discriminatory treatment of economically equivalent contracts traded on a trading venue requesting access to a CCP should take into account all relevant contracts cleared by that CCP, irrespective of where the contracts are traded.
- (9) A notification by a relevant competent authority to the CCP college and the European Securities and Markets Authority (ESMA) about the approval of CCP transitional arrangements in accordance with Article 35 of Regulation (EU) No 600/2014 should be made without undue delay in order to assist other relevant competent authorities to understand the impact this will have on the CCP and any trading venues that are connected by close links to that CCP. The notification should contain all relevant information necessary to enable the CCP college and ESMA to understand the decision and to enhance transparency.

² 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).

- (10) Clear requirements about the information to be provided by CCPs and trading venues when notifying competent authorities and ESMA that they wish to benefit from transitional arrangements in accordance with Articles 35 and 36 of Regulation (EU) No 600/2014 should contribute to a transparent and harmonised application of the notification procedure. It is therefore necessary for the notification procedure to include uniform templates for the notifications so as to enable consistent and uniform supervisory practices.
- (11) It is important to avoid the risk of larger trading venues using calculation methods that minimise their annual notional amount with the aim of benefiting from the opt-out mechanism to the access provisions. Where there are equally accepted alternative approaches to calculating notional amount, using the calculation which gives the higher value helps avoiding that risk. The methods used for calculating notional amount for the purposes of Regulation (EU) No 600/2014 should enable genuinely smaller trading venues that have not yet acquired the technological capability to engage on an equal footing with the majority of the post-trade infrastructure market to make use of the opt-out mechanism. It is also important for the methods prescribed to be straightforward and unambiguous in order to contribute to consistent and uniform supervisory practices.
- (12) It is important for trading venues to be consistent about calculating their notional amount for the purposes of Regulation (EU) No 600/2014 so that the access provisions can be applied fairly by trading venues. This is particularly relevant for certain types of exchange-traded derivatives, traded in units, such as barrels or tons.
- (13) 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 provisions laid down in Regulation (EU) No 600/2014 apply from the same date. However, to ensure that CCPs and trading venues may benefit from the transitional arrangements provided for in Article 35(5) and Article 36(5) of Regulation (EU) No 600/2014, certain provisions of this Regulation should apply from the date of its entry into force.
- (14) The provisions in this Regulation are closely linked, since they deal with the denial and granting of access to CCPs and trading venues, including the procedure for CCPs and trading venues to opt out from the access requirements set out in this Regulation. To ensure coherence between those provisions, most of which should apply at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, it is desirable to include the regulatory technical standards required by Article 35(6) and Article 36(6) in a single Regulation.
- (15) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.
- (16) 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 Council³,

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:

CHAPTER I
NON-DISCRIMINATORY ACCESS TO CCPs AND TRADING VENUES

SECTION 1
NON-DISCRIMINATORY ACCESS TO CCPs

Article 1

Conditions on the denial of access by a CCP

1. A CCP shall assess whether granting access would create any of the risks specified in Articles 2, 3 and 4 and may deny access only if, after making all reasonable efforts to manage its risks, the CCP concludes that there are significant undue risks that cannot be managed.
2. If a CCP denies access, it shall identify which risks specified in Articles 2, 3 and 4 would result from granting access and explain why those risks cannot be managed.

Article 2

Denial of access by a CCP based on the anticipated volume of transactions

A CCP may deny an access request on grounds of the anticipated volume of transactions arising from such access only where this would result in one of the following:

- (a) the scalable design of the CCP being exceeded to such an extent that the CCP cannot adapt its systems so as to deal with the anticipated volume of transactions;
- (b) the planned capacity of the CCP being exceeded in a way that the CCP would not be able to acquire the required extra capacity to clear the anticipated volume of transactions.

Article 3

Denial of access by a CCP based on operational risk and complexity

A CCP may deny an access request on grounds of operational risk and complexity.

Operational risks and complexity shall include any of the following:

- (a) incompatibility of CCP and trading venue IT systems impeding the CCP to provide for connectivity between the systems;
- (b) lack of human resources with the necessary knowledge, skills and experience to perform the CCP's functions regarding the risk stemming from additional financial instruments where these differ from financial instruments already cleared by the CCP or inability to deploy such human resources.

Article 4

Denial of access by a CCP based on other factors creating significant undue risks

1. A CCP may deny an access request on grounds of significant undue risks where:
 - (a) the CCP does not offer clearing services in respect of the financial instruments for which access is being requested and would not be able with reasonable

efforts to launch a clearing service consistent with the requirements set out in Titles II, III and IV of Regulation (EU) No 648/2012;

- (b) granting access would threaten the economic viability of the CCP or its ability to meet minimum capital requirements under Article 16 of Regulation (EU) No 648/2012;
 - (c) there are legal risks;
 - (d) there is an incompatibility of CCP rules and trading venue rules that the CCP cannot remedy in cooperation with the trading venue.
2. A CCP may refuse an access request based on legal risk as referred to in point (c) of paragraph 1, where as a result of granting access, the CCP would not be able to enforce its rules relating to close out netting and default procedures or would not be able to manage the risks arising from the simultaneous use of different trade acceptance models.

SECTION 2 NON-DISCRIMINATORY ACCESS TO TRADING VENUES

Article 5

Conditions on the denial of access by a trading venue

- 1. A trading venue shall assess whether granting access would create any of the risks specified in Articles 6 and 7 and may deny access only if, after making all reasonable efforts to manage its risks, the trading venue concludes that there are significant undue risks that cannot be managed.
- 2. If a trading venue denies access, it shall identify which risks specified in Articles 6 and 7 would result from granting access and why those risks cannot be managed.

Article 6

Denial of access by a trading venue based on operational risk and complexity

A trading venue may deny an access request on grounds of operational risk and complexity arising from such access only if there is a risk of incompatibility of CCP IT systems and trading venue IT systems, impeding the trading venue to provide for connectivity between those systems.

Article 7

Denial of access by a trading venue based on other factors creating significant undue risks

A trading venue may deny an access request on grounds of significant undue risks in any of the following cases:

- (a) threat to the economic viability of the trading venue or its ability to meet minimum capital requirements under Article 47(1)(f) of Directive 2014/65/EU of the European Parliament and of the Council⁴;

⁴ 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 (OJ L 173, 12.6.2014, p. 349).

- (b) incompatibility of trading venue rules and CCP rules that the trading venue cannot remedy in cooperation with the CCP.

Article 8

Conditions under which access is deemed to threaten the smooth and orderly functioning of markets or adversely affect systemic risk

In addition to liquidity fragmentation, as defined in Article 2(1)(45) of Regulation (EU) No 600/2014, for the purposes of Articles 35(4)(b) and 36(4)(b) of that Regulation, granting access shall be deemed to threaten the smooth and orderly functioning of the markets, or adversely affect systemic risk, where the competent authority can provide reasons for the denial, including evidence that the risk management procedures of one or both of the parties to the access request are insufficient to prevent the granting of access from creating significant undue risks to third parties, and there is no remedial action that would sufficiently mitigate those risks.

CHAPTER II

CONDITIONS UNDER WHICH ACCESS MUST BE PERMITTED

Article 9

Conditions under which access must be permitted

1. The parties shall agree on their respective rights and obligations arising from the access granted, including the applicable law governing their relationships. The terms of the access agreement shall:
 - (a) be clearly defined, transparent, valid and enforceable;
 - (b) where two or more CCPs have access to the trading venue specify the way in which transactions on the trading venue will be allocated to the CCP that is party to the agreement;
 - (c) contain clear rules concerning the moment of entry of transfer orders, construed pursuant to Directive 98/26/EC of the European Parliament and of the Council⁵, into relevant systems and the moment of irrevocability;
 - (d) contain rules regarding the termination of the access agreement by any of the parties, which shall:
 - (i) provide for termination in an orderly manner that does not unduly expose other entities to additional risks, including clear and transparent arrangements for the management and orderly run-off of contracts and positions made under the access agreement that were open at the point of termination;
 - (ii) ensure that the relevant party is given a reasonable amount of time to remedy any breach that does not give rise to immediate termination;
 - (iii) allow the termination, if risks increase in a way that would have justified denial of access in the first instance;
 - (e) specify the financial instruments being subject to the access agreement;

⁵ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

- (f) specify the cover of the one-off and ongoing costs caused by the access request;
 - (g) contain provisions for claims and liabilities stemming from the access agreement.
2. The terms of the access agreement shall require that the parties to the agreement put in place adequate policies, procedures and systems to ensure the following:
- (a) timely, reliable and secure communication between the parties;
 - (b) prior consultation to the other party where changes to either party's operations are likely to have a material impact on the access agreement or on the risks to which the other party is exposed;
 - (c) timely notification to the other party before a change is implemented, in the cases not covered by point (b);
 - (d) resolution of disputes;
 - (e) identification, monitoring and management of the potential risks arising from the access agreement;
 - (f) reception by the trading venue of all necessary information to fulfil its obligations regarding the monitoring of open interest;
 - (g) acceptance by the CCP of delivery of physically settled commodities.
3. The relevant parties to the access agreement shall ensure the following:
- (a) that proper risk management standards are maintained when granting access;
 - (b) that information provided in the request for access is kept up-to-date throughout the duration of the access agreement, including information about material changes;
 - (c) that non-public and commercially sensitive information including information provided during the development phase of a financial instrument may only be used for the specific purpose for which it is conveyed and may only be acted upon for the specific purpose agreed by the parties.

Article 10

Non-discriminatory and transparent clearing fees charged by CCPs

1. A CCP shall only charge fees for clearing transactions executed on a trading venue to which it has granted access on the basis of objective criteria, applicable to all clearing members and, where relevant, clients. For this purpose, a CCP shall make all clearing members and, where relevant, clients subject to the same schedule of fees and rebates and its fees shall not depend on the trading venue where the transaction takes place.
2. A CCP shall only charge fees to a trading venue in relation to access on the basis of objective criteria. For this purpose, the same fees and rebates shall apply to all trading venues accessing the CCP with regard to the same or similar financial instruments, unless a different fee schedule can be objectively justified.
3. In accordance with Article 38 of Regulation (EU) No 648/2012 a CCP shall ensure that the fee schedules referred to in paragraphs 1 and 2 of this Article are easily

accessible, adequately identified per service provided and sufficiently granular in order to ensure that fees charged are predictable.

4. Paragraphs 1 to 3 shall apply to fees charged to cover one-off and ongoing costs.

Article 11

Non-discriminatory and transparent fees charged by trading venues

1. A trading venue shall only charge fees in relation to access on the basis of objective criteria. For this purpose, the same schedule of fees and rebates shall apply to all CCPs accessing the trading venue with regard to the same or similar financial instruments, unless a different fee schedule can be objectively justified.
2. A trading venue shall ensure that the fee schedules referred to in paragraph 1 are easily accessible, that the fees are adequately identified per service provided and sufficiently granular in order to ensure that the arising fees are predictable.
3. Paragraphs 1 and 2 shall apply to all fees related to access, including those that are charged to cover one-off and ongoing costs.

CHAPTER III

CONDITIONS FOR NON-DISCRIMINATORY TREATMENT OF CONTRACTS

Article 12

Collateral and margining requirements of economically equivalent contracts

1. The CCP shall determine whether contracts traded on the trading venue to which it has granted access are economically equivalent to contracts with similar risk characteristics already cleared by the CCP.
2. For the purposes of this article, a CCP shall consider all contracts traded on the trading venue to which it has granted access, which are in the class of financial instruments covered by the CCP's authorisation referred to in Article 14 of Regulation (EU) No 648/2012, or by any subsequent extension of authorisation referred to in Article 15 of that Regulation, as economically equivalent to the contracts in the respective class of financial instruments already cleared by the CCP.
3. A CCP may consider a contract traded on the trading venue to which it has granted access, which presents a significantly different risk profile or material differences from the contracts already cleared by the CCP in the respective class of financial instruments, as non-economically equivalent where the CCP had obtained an extension of the authorisation pursuant to Article 15 of Regulation (EU) No 648/2012 with respect to that contract and in connection with that trading venue's access request.
4. A CCP shall apply to economically equivalent contracts referred to in paragraph 1 the same margin and collateral methodologies, irrespective of where the contracts are traded. A CCP shall subject the clearing of an economically equivalent contract referred to in paragraph 1 to the adoption of changes to the CCP's risk models and parameters, only if necessary in order to mitigate the risk factors in relation to that trading venue or the contracts traded thereon. Such changes shall be considered as significant changes to the CCP's models and parameters referred to in Articles 28 and 49 of Regulation (EU) No 648/2012.

Article 13

Netting of economically equivalent contracts

1. A CCP shall apply to economically equivalent contracts referred to in Article 12(1) of this Regulation the same netting procedures irrespective of where the contracts were traded, provided that any netting procedure it applies is valid and enforceable in accordance with Directive 98/26/EC and applicable insolvency law.
2. A CCP considering that the legal risk or the basis risk related to a netting procedure it applies to an economically equivalent contract is not sufficiently mitigated, shall subject the clearing of such a contract to the adoption of changes to that netting procedure excluding the netting of such contract. Such changes shall be considered as significant changes to the CCP's risk models and parameters referred to in Article 28 and 49 of Regulation (EU) No 648/2012.
3. For the purpose of paragraph 2, "basis risk" shall mean the risk arising from less than perfectly correlated movements between two or more assets or contracts cleared by the CCP.

Article 14

Cross-margining of correlated contracts cleared by the same CCP

Where a CCP calculates margins with respect to cross-margining of correlated contracts cleared by the same CCP (portfolio margining) in accordance with Article 41 of Regulation (EU) No 648/2012 and Article 27 of Commission Delegated Regulation (EU) No 153/2013⁶, the CCP shall apply its portfolio margining approach to all relevant correlated contracts irrespective of where the contracts are traded. Contracts with a significant and reliable correlation, or an equivalent statistical parameter of dependence, shall benefit from the same offsets or reductions.

CHAPTER IV

TRANSITIONAL ARRANGEMENTS AND FINAL PROVISIONS

Article 15

Notification procedure from the CCP to its competent authority

Where a CCP applies for permission to avail itself of transitional arrangements referred to in Article 35(5) of Regulation (EU) No 600/2014, it shall submit a notification to its competent authority in written form, using Form 1 set out in the Annex to this Regulation.

Article 16

Notification procedure from the competent authority to ESMA and the CCP college

Relevant competent authorities shall notify ESMA and the CCP college of every decision to approve a transitional arrangement in accordance with Article 35(5) of Regulation (EU) No 600/2014 in writing without undue delay and no later than one month from the decision, using Form 2 set out in the Annex to this Regulation.

⁶ Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties (OJ L 52, 23.2.2013, p. 41).

Article 17

Notification procedure from the trading venue to its competent authority regarding the initial transitional period

Where a trading venue does not wish to be bound by Article 36 of Regulation (EU) No 600/2014, it shall submit a notification to its competent authority and ESMA in written form, using Forms 3.1 and 3.2 set out in the Annex to this Regulation.

Article 18

Notification procedure from the trading venue to its competent authority regarding an extension of the transitional period

Where a trading venue wishes to continue not to be bound by Article 36 of Regulation (EU) No 600/2014 for a further thirty months, it shall submit a notification to its competent authority and ESMA in written form, using Forms 4.1 and 4.2 set out in the Annex to this Regulation.

Article 19

Further specifications for the calculation of notional amount

1. In accordance with Article 36(5) of Regulation (EU) No 600/2014, a trading venue that does not wish to be bound by Article 36 of that Regulation for a period of thirty months from the date of application of Regulation (EU) No 600/2014 shall include in its calculation of its annual notional amount all transactions in exchange-traded derivatives concluded in the calendar year preceding the application under its rules.
2. For the purposes of calculating its annual notional amount in accordance with Article 36(5) of Regulation (EU) No 600/2014 for the year preceding the year of entry into application, a trading venue shall use actual figures for the period for which they are available.

Where, in respect of the year preceding the year of entry into application of Regulation (EU) No 600/2014, a trading venue has available data for less than 12 months, it shall produce an estimated figure for that year using the following three inputs:

- (a) actual data for the longest possible period commencing at the beginning of the year preceding the year of entry into application of Regulation (EU) No 600/2014, including at least the first eight months;
- (b) actual data for the equivalent period during the year before the year referred to in point (a) of this paragraph;
- (c) actual data for the entire year before the year referred to in point (a) of this paragraph.

The estimated figure for the annual notional amount shall be calculated by multiplying the inputs referred to in point (a) of the second subparagraph by the inputs referred to in point (c) of the second subparagraph and by dividing them by the inputs referred to in point (b) of the second subparagraph.

3. Where a trading venue wishes to continue not to be bound by Article 36 of Regulation (EU) No 600/2014 for a further thirty month period at the end of the first, or any further, 30 month period, it shall include in its calculation of its annual notional amount in accordance with Article 36(5) of Regulation (EU) No 600/2014

all transactions in exchange-traded derivatives concluded under its rules in each of the first two rolling years of the previous thirty month period.

4. Where there are acceptable alternatives to calculating the annual notional amount for certain types of instruments, but there are notable differences in the values to which such calculation methods give rise, the calculation which gives the higher value shall be used. In particular for derivatives, such as futures or options, including all types of commodity derivatives which are designated in units, the annual notional amount shall be the full value of the derivative's underlying assets at the relevant price at the time at which the transaction is concluded.

Article 20

Approval and verification method by ESMA

1. For the purposes of verification in accordance with Article 36(6)(d) of Regulation (EU) No 600/2014, the trading venue shall submit to ESMA on request all facts and figures on which the calculation is based.
2. When verifying the submitted annual notional amount figures, ESMA shall also consider relevant post-trade data and annual statistics.
3. ESMA shall approve or reject the opt-out within three months of the reception of all relevant information for the notification in accordance with either Article 16 or 17, including the information specified in Article 19.

Article 21

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 referred to in the second paragraph of Article 55 of Regulation (EU) No 600/2014.

However, Articles 15, 16, 17, 19 and 20 shall apply from the entry into force of this Regulation.

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

Done at Brussels, 24.6.2016

For the Commission
The President
Jean-Claude JUNCKER