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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 (Text with EEA relevance)

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

(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 648/2012[(1)], and in particular Article 4(6), Article 7(2), Article 14(7), Article 20(3), Article 22(4) and Article 23(3) thereof,

Whereas:

(1) A high degree of transparency is essential to ensure that investors are adequately informed as to the true level of actual and potential transactions in shares, depositary receipts, exchange-traded funds (ETFs), certificates and other similar financial instruments irrespective of whether those transactions take place on regulated markets, multilateral trading facilities (MTFs), and by systematic internalisers, or outside those facilities. This high degree of transparency should also ensure that the price discovery process in respect of particular financial instruments traded on different trading venues is not impaired by the fragmentation of liquidity, and investors are not thereby penalised.

(2) At the same time, it is essential to recognise that there may be circumstances where exemptions from pre-trade transparency or deferrals from post-trade transparency obligations should be provided to avoid the impairment of liquidity as an unintended consequence of obligations to disclose orders and transactions and thereby to make public risk positions. Therefore, it is appropriate to specify the precise circumstances under which waivers from pre-trade transparency and deferrals from post-trade transparency may be granted.

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(3) The provisions in this Regulation are closely linked since they deal with the transparency requirements applicable to trading venues and investment firms in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and efficient access for stakeholders, in particular those subject to the obligations, it is appropriate to include them in a single Regulation.

(4) Where competent authorities grant waivers in relation to pre-trade transparency requirements or authorise the deferral of post-trade transparency obligations, they should treat all regulated markets, multilateral trading facilities and investment firms trading outside of trading venues equally and in a non-discriminatory manner.

(5) It is appropriate to provide for clarification of a limited number of technical terms. Those technical definitions are necessary to ensure the uniform application in the Union of the provisions contained in this Regulation and, hence, contribute to the establishment of a single rulebook for financial markets in the Union. Those definitions are purely functional for the purpose of setting out the transparency obligations for equity and equity-like financial instruments and should be strictly limited to understanding this Regulation.

(6) Regulation (EU) No 600/2014 brings within the scope of the transparency regime equity-like instruments such as depositary receipts, ETFs and certificates, as well as shares and other equity-like instruments only traded on an MTF. It is necessary, in order to establish a comprehensive and uniform transparency regime, to calibrate the content of the pre-trade information to be made public by trading venues.

(7) A trading venue operating a request for quote (RFQ) system should at least make public the firm bids and offer prices or actionable indications of interest and the depth attached to those prices no later than at the time when the requester is able to execute a transaction under the system's rules. This is to ensure that members or participants who are providing their quotes to the requester first are not put at a disadvantage.

(8) The specific methodology and data necessary to perform calculations for the purpose of specifying the transparency regime applicable to equity and equity-like financial instruments should be applied in conjunction with the common elements with regard to the content and frequency of data requests to be addressed to trading venues, approved publication arrangements (APAs) and consolidated tape providers (CTPs) for the purposes of transparency and other calculations laid down in Commission Delegated Regulation (EU) 2017/577[(2)].

(9) The pre-trade and post-trade transparency regime established by Regulation (EU) No 600/2014 should be appropriately calibrated to the market and applied in a uniform manner throughout the Union. In particular, a static determination of the most relevant markets in terms of liquidity, the sizes of orders that are large in scale and standard market sizes would not adequately capture regular modifications of trading patterns affecting equity and equity-like instruments. Therefore, it is essential to lay down the necessary calculations to be performed, including the periods of time to be taken into

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account when making calculations and the periods of time during which the results of these calculations are applicable, methods of calculation as well as the identification of the competent authority responsible for performing the calculations in accordance with the determination of the relevant competent authority for the purpose of Article 26 of Regulation (EU) No 600/2014 as specified in Commission Delegated Regulation (EU) 2017/571[(3)]. In this respect, to avoid market distortion effects, the calculation periods should ensure that the relevant thresholds of the regime are updated at appropriate intervals to reflect market conditions. It is also appropriate to provide for the centralised publication of the results of the calculations so that they are made available to all financial market participants and competent authorities in the Union in a single place and in a user-friendly manner. To that end, competent authorities should notify ESMA of the results of their calculations and ESMA should publish those calculations on its website.

(10) In order to carry out the calculations for determining the requirements for the pre-trade and post-trade transparency in accordance with Article 22(1) of Regulation (EU) No 600/2014, the content, frequency of data requests and the formats and timeframe in which trading venues, APAs and CTPs must respond to such requests in accordance with Article 22(4) of Regulation (EU) No 600/2014 should be developed. The results of the calculations made on the basis of the data collected according to Article 22(1) of Regulation (EU) No 600/2014 need to be published in order to inform market participants of those results and achieve pre- and post-trade transparency in practice. It is also appropriate to provide for the centralised publication of the results of the calculations so that they are made available to all financial market participants and competent authorities in the Union in a single place and in a user-friendly manner. To that end, competent authorities should notify European Securities and Markets Authority (ESMA) of the results of their calculations and then ESMA should publish those calculations on its website.

(11) For ETFs, and contrary to shares, depositary receipts, certificates and other similar financial instruments, the average daily turnover does not appear as an appropriate proxy for the calibration of the large-in-scale thresholds. For these instruments, the measure of actual liquidity is not adequately captured by the average daily turnover since the creation and redemption mechanisms inherent to ETFs allow to access additional and non-displayed liquidity. In order to reduce the risk of circumvention, it is also important that two ETFs on the same underlying have the same large-in-scale thresholds regardless of whether they have similar average daily turnover or not. Therefore, a single large-in-scale threshold for all ETFs should be established which should apply regardless of their underlying or of their liquidity.

(12) Information which is required to be made available as close to real time as possible should be made available as instantaneously as technically possible, assuming a reasonable level of efficiency and of expenditure on systems on the part of the person concerned. The information should only be published close to the prescribed maximum time limit in exceptional cases where the systems available do not allow for publication in a shorter period of time.

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(13) Investment firms should make public the details of transactions executed outside a trading venue through an APA. Therefore, the way investment firms report the details of the transactions to APAs should be laid down and those provisions should apply in conjunction with the requirements applicable to APAs specified in Delegated Regulation (EU) 2017/571.

(14) Investors need to have reliable and timely information about the level of trading interest in financial instruments. Information on certain types of transactions such as the transfer of financial instruments as collateral would not provide meaningful information to investors in respect of the level of genuine trading interest in a financial instrument. Requiring investment firms to make public those transactions would cause significant operational challenges and costs without improving the price formation process. Therefore, post-trade transparency obligations in respect of transactions executed outside a trading venue should only apply in the case of a purchase or sale of a share, depositary receipt, ETF, certificate or other similar financial instrument. It is essential that certain transactions such as those involving the use of any such instruments for collateral lending or other purposes where the exchange is determined by factors other than the current market valuation should not be published as they do not contribute to the price discovery process and would risk leading to investor confusion and hinder best execution.

(15) In respect of transactions executed outside the rules of a trading venue, it is essential to clarify which investment firm is to make public a transaction in cases where both parties to the transaction are investment firms established in the Union in order to ensure the publication of transactions without duplication. Therefore, the responsibility to make a transaction public should always fall on the selling investment firm unless only one of the counterparties is a systematic internaliser and it is the buying firm.

(16) Where only one of the counterparties is a systematic internaliser in a given financial instrument and it is also the buying firm for that instrument, it should be responsible for making the transaction public as its clients would expect it to do so and it is better placed to fill in the reporting field mentioning its status of systematic internaliser. To ensure that a transaction is only published once, the systematic internaliser should inform the other party that it is making the transaction public.

(17) It is important to maintain current standards for the publication of transactions carried out as back-to-back trades to avoid the publication of a single transaction as multiple trades and to provide legal certainty on which investment firm is responsible for publishing a transaction. Therefore, two matching trades entered at the same time and for the same price with a single party interposed should be published as a single transaction.

(18) To ensure that the new transparency regulatory regime can operate effectively, it is appropriate to provide for the collection of certain data and for an early publication of the most relevant markets in terms of liquidity, the sizes of orders that are large in scale, the deferred publication thresholds and standard market sizes.

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(19) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions of this Regulation and the provisions laid down in Regulation (EU) No 600/2014 apply from the same date. However, to ensure that the new transparency regulatory regime can operate effectively, certain provisions of this Regulation should apply from the date of its entry into force.

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

(21) 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[(4)],

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL

Article 1

Definitions

For the purposes of this Regulation, the following definitions apply:

(1) 'portfolio trade' means transactions in five or more different financial instruments where those transactions are traded at the same time by the same client and as a single lot against a specific reference price;

(2) 'give-up transaction' or 'give-in transaction' means a transaction where an investment firm passes a client trade to, or receives a client trade from, another investment firm for the purpose of post-trade processing;

(3) 'securities financing transaction' means a securities financing transaction as defined in Article 3(6) of Delegated Regulation (EU) 2017/577;

(4) 'systematic internaliser' means an investment firm as defined in Article 4(1)(20) of Directive 2014/65/EU of the European Parliament and of the Council[(5)].

Article 2

Transactions not contributing to the price discovery process(Article 23(1) of Regulation (EU) No 600/2014)

A transaction in shares does not contribute to the price discovery process where any of the following circumstances apply: