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Commission Delegated Regulation (EU) 2017/581 of 24 June 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)

COMMISSION DELEGATED REGULATION (EU) 2017/581

of 24 June 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)

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 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

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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. 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 Council[(2)], 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

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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.

(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) of Regulation (EU) 600/2014 in a single Regulation.

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(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 Council[3],

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.

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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 any of the following conditions are met:

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.