Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2017/567

of 18 May 2016

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions

(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 Articles 2(2), 13(2), 15(5), 17(3), Article 19(2) and (3), and Articles 31(4), 40(8), 41(8), 42(7) and 45(10) thereof,

Whereas:

(1) This Regulation further specifies the criteria for the determination of 'liquid market' in accordance with Article 2(1)(17)(b) of Regulation (EU) No 600/2014. For this purpose it is necessary to specify the criteria for free float, average daily number of transactions and average daily turnover specifically for shares, depositary receipts, exchange traded funds and certificates to take into account the specificities of each of these financial instruments. Rules specifying how liquidity calculations should be performed during the initial stage after the financial instrument is admitted to trading are required to ensure a consistent and uniform application across the Union.

(2) The provisions in this Regulation are closely linked, since they deal with definitions and specify requirements in relation to pre- and post-trade transparency by systematic internalisers and data publication by trading venues and systematic internalisers, on the one hand, and the European Securities Markets Authority (ESMA) product intervention and position management powers, on the other. To ensure coherence between those provisions which should enter into force at the same time, and in order to facilitate a comprehensive view for stakeholders and, in particular, those subject to the obligations, it is necessary to include these provisions in a single Regulation.

(3) In order to allow for a minimum of liquid equity instruments to exist in all parts of the Union, the competent authority of a Member State where fewer than five liquid financial instruments for each of shares, depositary receipts, exchange traded funds and certificates are traded, should be able to designate one or more additional liquid financial instruments, provided that the total number of financial instruments which are

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considered to have a liquid market does not exceed five in each of these categories of financial instruments.

(4) In order to ensure that market data is provided on a reasonable commercial basis in a uniform manner in the Union, this Regulation specifies the conditions that market operators and investment firms operating trading venues and systematic internalisers must fulfil. These conditions are based on the objective to ensure that the obligation to provide market data on a reasonable commercial basis is sufficiently clear to allow for an effective and uniform application whilst taking into account different operating models and costs structures of market operators and investment firms operating a trading venue and systematic internalisers.

(5) To ensure that fees for market data are set at a reasonable level, the fulfilment of the obligation to provide market data on a reasonable commercial basis requires that fees be based on a reasonable relationship to the cost of producing and disseminating that data. Therefore, without prejudice to the application of competition rules, data providers should determine their fees on the basis of their costs whilst being allowed to obtain a reasonable margin based on factors such as the operating profit margin, the return on costs, the return on operating assets and the return on capital. Where data providers incur joint costs for data provision and the provision of other services, costs of market data provision may include an appropriate share of joint costs arising from any other relevant service provided. Since specifying exact costs is complex, cost allocation and cost apportionment methodologies should be specified instead, leaving the specification of those costs to the discretion of market data providers whilst having regard to the objective of ensuring that fees for market data are set at a reasonable level in the Union.

(6) Market data should be provided on a non-discriminatory basis, which requires that the same price and other terms and conditions should be offered to all customers who are in the same category according to published objective criteria.

(7) To allow data users to obtain market data without having to buy other services, market data should be offered unbundled from other services. To avoid data users being charged more than once for the same market data when buying data sets from trading venues and from other market data distributors, market data should be offered on a per user basis unless doing so would be disproportionate considering the cost of such way of offering that data in respect of the scale and the scope of the market data provided by the market operator or the investment firm operating a trading venue or the systematic internaliser.

(8) In order to allow for data users and competent authorities to effectively assess whether market data is provided on a reasonable commercial basis, it is necessary that the essential conditions for its provision are disclosed to the public. Data providers should therefore disclose information about their fees and the content of the market data, as well as the cost accounting methodologies used to determine their costs without having to disclose their actual costs.

(9) This Regulation further specifies the conditions which systematic internalisers must fulfil to comply with the obligation to make quotes public on a regular and continuous basis during normal trading hours and easily accessible to other market participants

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to ensure that market participants wishing to access the quotes may effectively access them.

(10) Where systematic internalisers publish quotes through more than one means of publication they should provide their quotes simultaneously through each arrangement to ensure that the quotes published are consistent and that market participants may access the information at the same time. Where systematic internalisers make quotes public through the arrangements of a regulated market or a Multilateral Trading Facility (MTF) or through a data reporting services provider they should disclose their identity in the quote in order to enable market participants to direct their orders to it.

(11) This Regulation further specifies various technical aspects of the scope of the transparency obligations of systematic internalisers in order to ensure a consistent and uniform application across the Union. It is necessary that the exception to systematic internalisers' obligation to make public their quotes on a regular and continuous basis be strictly limited to situations where the continued provision of firm prices to clients may be contrary to the prudent management of the risks the investment firm is exposed to in its capacity as systematic internalisers, having regard to other mechanisms which may provide additional safeguards against such risks.

(12) In order to ensure that the exception to systematic internalisers obligations to execute the orders at the quoted prices at the time of reception of the order in accordance with Article 15(2) of Regulation (EU) No 600/2014 is limited to transactions which by their nature do not contribute to price formation, this Regulation further specifies exhaustively the conditions for what constitutes transactions in several securities as part of one transaction and orders subject to conditions other than the current market prices.

(13) The criterion specifying that a price falls within a public range close to market conditions reflects the need to ensure that execution by systematic internalisers contribute to price formation whilst not impeding on the possibility for systematic internalisers to offer price improvement in justified cases.

(14) In order to ensure that customers have access to systematic internalisers quotes in a non-discriminatory way but at the same time ensuring a proper risk management which takes into account the nature, scale and complexity of the activities of individual firms, it is necessary to specify that the number or volume of orders from the same client should be regarded as considerably exceeding the norm where a systematic internaliser cannot execute those orders without exposing itself to undue risk, something which should be defined in advance as a part of the firm's risk management policy and be based on objective factors and be stated in writing and made available to customers or potential customers.

(15) Since liquidity providers and systematic internalisers both trade on own account and incur comparable levels of risks, it is appropriate to determine the size specific to the instrument in a uniform way for these categories. Therefore, the size specific to the instrument for the purposes of Article 18(6) of Regulation (EU) No 600/2014 should be the size specific to the instrument determined in accordance with Article 9(5)(d) of Regulation (EU) No 600/2014 and as further specified in regulatory technical standards in accordance with this provision.

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(16) In order to specify the elements of portfolio compression, so as to delineate it from trading and clearing services, it is necessary to identify the process whereby derivatives are wholly or partially terminated and replaced by a new derivative, in particular the steps of the process, the content of the agreement and the legal documentation supporting the portfolio compression.

(17) To ensure that suitable transparency of portfolio compression performed by counterparties is achieved, it is necessary to specify the information which should be made public.

(18) It is necessary to specify certain aspects of the intervention powers of both the relevant competent authorities and, in exceptional cases, ESMA established and exercising its powers in accordance with Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(2)] and the European Banking Authority (EBA) established and exercising its powers in accordance with Regulation (EU) No 1093/2010 of the European Parliament and of the Council[(3)] as regards significant investor protection concern or threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of at least one Member State or respectively of the Union. The existence of a 'threat', one of the prerequisites of the intervention in the perspective of the orderly functioning and integrity of financial or commodity markets or stability of the financial system, would require the existence of a greater concern than a 'significant concern', which is the prerequisite of the intervention for investor protection.

(19) A list of criteria and factors to be taken into account by competent authorities, ESMA and EBA in determining when there is such a concern or threat should be established to ensure a consistent approach while permitting appropriate action to be taken where unforeseen adverse events or developments occur. The need to assess all criteria and factors that could be present in a specific factual situation should not prevent however the temporary intervention power from being used by competent authorities, ESMA and EBA where only one of the factors or criteria leads to such a concern or threat.

(20) It is necessary to specify the circumstances under which ESMA can use its position management powers in accordance with Regulation (EU) No 600/2014 in order to ensure a consistent approach while permitting appropriate action to be taken where unforeseen adverse events or developments occur.

(21) 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,

HAS ADOPTED THIS REGULATION:

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CHAPTER I

DETERMINING LIQUID MARKETS FOR EQUITY INSTRUMENTS

Article 1

Determining liquid markets for shares(Article 2(1)(17)(b) of Regulation (EU) No 600/2014)

1 For the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014, a share that is traded daily shall be considered to have a liquid market where all of the following conditions are satisfied:

a the free float of the share is:

(i) not less than EUR 100 million for shares admitted to trading on a regulated market;

(ii) not less than EUR 200 million for shares that are only traded on MTFs;

b the average daily number of transactions in the share is not less than 250;

c the average daily turnover for the share is not less than EUR 1 million.

2 For the purposes of paragraph 1(a), the free float of a share shall be calculated by multiplying the number of outstanding shares by the price per share, excluding individual holdings in that share that exceed 5 % of the total voting rights of the issuer, unless those holdings are held by a collective investment undertaking or a pension fund. Voting rights shall be calculated by reference to the total number of shares to which voting rights are attached, regardless of whether the exercise of the voting right is suspended.

3 For the purposes of paragraph 1(a)(ii), where no actual information is available in accordance with paragraph 2, the free float of a share that is only traded on MTFs shall be calculated by multiplying the number of outstanding shares by the price per share.

4 For the purposes of paragraph 1(c), the daily turnover of a share shall be calculated by aggregating the results of multiplying, for each transaction executed during a trading day, the number of shares exchanged between the buyer and the seller by the price per share.

5 During the six-week period commencing on the first trading day following the first admission of a share to trading on a regulated market or an MTF, that share shall be considered to have a liquid market for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014 where the sum obtained by multiplying the number of outstanding shares by the price at which the share stands at the start of the first trading day is estimated to be not less than EUR 200 million, and, where, according to estimated data for that period, the conditions set out in paragraph 1(b) and (c) are fulfilled.

6 Where fewer than five shares traded on the trading venues of a Member State and first admitted to trading in that Member State are considered to have a liquid market in accordance with paragraph 1, the competent authority of that Member State may designate one or more share first admitted to trading on those trading venues as share considered to have a liquid market, provided that the total number of shares first admitted to trading in that Member State and considered to have a liquid market does not exceed five.