Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2016/2020. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details)EUR 2016 No. 2020 may be subject to amendment by EU Exit Instruments made by the Financial Conduct Authority under powers set out in The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), regs. 2, 3, Sch. Pt. 1. These amendments are not currently available on legislation.gov.uk. Details of relevant amending instruments can be found on their website/s. (See end of Document for details) View outstanding changes*

Commission Delegated Regulation (EU) 2016/2020 of 26 May 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 criteria for determining whether derivatives subject to the clearing obligation should be subject to the trading obligation (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2016/2020

of 26 May 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 criteria for determining whether derivatives subject to the clearing obligation should be subject to the trading obligation

(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 32(6) thereof,

Whereas:

(1) This Regulation contributes to the specification of the criteria for the determination of sufficient third-party buying and selling interest in a class of derivatives or a relevant subset of a class of derivatives. Where the European Securities and Markets Authority (ESMA) has established that a class of derivatives should be subject to the clearing obligation under Regulation (EU) No 648/2012 of the European Parliament and of the Council[(2)] and that the derivatives are admitted to trading or traded on a trading venue, ESMA should follow the criteria in this Regulation to determine whether the derivatives or subset thereof are considered sufficiently liquid to trade exclusively on trading venues.

(2) Regulation (EU) No 648/2012 sets out that derivatives are considered to be executed on an OTC basis when they are not traded on, or not subject to the rules of, a regulated market, whereas the definition of derivatives executed over-the-counter (OTC) under Directive 2014/65/EU of the European Parliament and of the Council[(3)] is narrower, comprising derivatives not traded on, or not subject to the rules of, a regulated market, multilateral trading facility (MTF) or organised trading facility (OTF). ESMA should therefore assess the extent to which trades are executed already on trading venues in a class of derivatives or a relevant subset thereof and compare this to the level of trading not executed on a trading venue. The prevalence of trading outside a trading venue should not, however, automatically establish that a class of derivatives or a relevant subset thereof is not suitable for the trading obligation. ESMA should have regard also

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to the anticipated impact of the trading obligation considering both the possibility to promote liquidity and market integrity through increased transparency and availability of the financial instruments, as well as the potential negative consequences of such a decision.

(3) Given the similarity of the definition of a liquid market for non-equities under point 17(a) of Article 2(1) of Regulation (EU) No 600/2014 to the criteria for determining whether a class of derivatives or subset thereof is sufficiently liquid under Article 32(3) of that Regulation, the assessment undertaken for one should be taken into consideration for the other to promote consistency in the treatment of instruments. However, a class of derivatives or subset thereof deemed to have a liquid market for transparency purposes should not be deemed automatically to be sufficiently liquid for the trading obligation. The quantitative thresholds and qualitative weightings may differ, taking into account the different objectives of the assessments.

(4) Given the wide range of instruments potentially affected by the trading obligation for derivatives and their specific characteristics, the constant evolution of financial markets and the variety of national markets involved, it is not possible to determine for each and every derivative type an exhaustive list specifying the elements relevant to an assessment of third-party buying and selling interest or the weighting to be given to any particular element.

(5) However, a degree of clarity should be provided for the determination of a class of derivatives or relevant subset thereof which is sufficiently liquid, in particular, through specifying the criteria with respect to average frequency of trades, average size of trades, number and type of active market participants and average size of spreads, which together indicate the level of third-party buying and selling interest.

(6) The observation period for determining whether a class of derivatives or relevant subset thereof is sufficiently liquid to trade exclusively on trading venues should vary depending on the class of derivatives or relevant subset thereof concerned. It should be sufficiently long to ensure that the data collected is not skewed by any type of events that may cause unusual trading patterns. In any circumstance the observation period should not be shorter than three months.

(7) The criteria described in this Regulation should be designed so that the assessment of one derivative or classes of derivatives may be compared with other derivatives or classes of derivatives with similar characteristics. The identification of classes of derivatives with similar characteristics may include a number of elements such as the currency in which they are traded, maturity dates, the starting term of the contracts' tenor, whether they follow a standard convention or not, and whether they are on-the-run contracts.

(8) ESMA should refer to historical data indicating shifts in liquidity to determine both whether the class of derivatives or subset thereof is sufficiently liquid to trade only on venues and whether it is only sufficiently liquid in transactions below a certain size. The thresholds for these assessments may vary between classes of derivatives or subsets thereof where the characteristics and the notional size of the classes or subsets vary. In its assessment of spreads, ESMA should have regard to both the average size and

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the availability of spreads, balancing the consideration that a lack of or wide spreads indicate insufficient liquidity against the possibility that spreads may become narrower through increased transparency and the availability of the financial instruments if the trading obligation is introduced.

(9) In its assessment, ESMA should remove from its calculations those trades which are clearly identifiable as post-trade risk reduction trades which reduce non-market risks in derivatives portfolios. To include such transactions in the assessment for the trading obligation may otherwise result in an inflated view of the level of third party buying and selling interest.

(10) ESMA should also take into consideration the need or otherwise to permit package transactions during its assessment. Investment firms often conduct, on their own account or on behalf of clients, transactions in derivatives and other financial instruments that comprise a number of interlinked trades which are contingent on one another. Given that package transactions enable investment firms and their clients to manage their risks and improve the resiliency of financial markets, it may be desirable to continue to permit the execution of some package transactions which comprise one or more derivatives subject to the trading obligation to be executed, on a bilateral basis, outside a trading venue.

(11) Criteria should also be set out to enable ESMA to determine whether an existing trading obligation for a class of derivatives or a relevant subset thereof should be amended, suspended or revoked, unless the class of derivatives or a relevant subset thereof is no longer traded on at least one trading venue.

(12) For reasons of consistency and legal certainty, it is necessary that the provisions of this Regulation and the provisions laid down in Directive 2014/65/EU and Regulation (EU) No 600/2014 apply from the same date.

(13) This Regulation is based on the draft regulatory technical standards submitted by the ESMA to the Commission.

(14) 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:

Article 1

Sufficient third party buying and selling interest

When establishing whether a class of derivatives or relevant subset thereof has sufficient third-party buying and selling interest to be considered sufficiently liquid for the trading obligation, ESMA shall apply the criteria in Article 32(3) of Regulation (EU) No 600/2014, as further specified in Articles 2 to 5 below.