

Brussels, 12.12.2018
C(2018) 8390 final

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

of 12.12.2018

**amending and correcting Delegated Regulation (EU) 2017/587 to specify the
requirement for prices to reflect prevailing market conditions and to update and correct
certain provisions**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Regulation (Regulation (EU) 600/2014 'MiFIR') introduced pre-trade and post-trade requirements on regulated markets (RMs) and multilateral trading facilities (MTFs) offering trading in shares and on systematic internalisers in shares traded on a trading venue. It also introduced post-trade transparency requirements on investment firms for shares traded on a trading venue. In addition, MiFIR introduced an on-venue trading obligation for shares, except where there are legitimate reasons for some transactions to be excluded from this obligation.

In this context, Articles 4(6), 7(2), 14(7), 20(3), 22(4) and 23(3) of MiFIR empower the Commission to adopt, following submission of a draft regulatory technical standard by the European Securities and Markets Authority (ESMA), and in accordance with Article 10 to 15 of Regulation No (EU) 1095/2010, a delegated Regulation further specifying the pre-trade and post-trade transparency obligations to be met by trading venues and systematic internalisers, including the characteristics of the trades excluded from the trading obligation. Accordingly, the Commission adopted Regulation (EU) 2017/587 on 14 July 2016.

On 26 March 2018, ESMA submitted draft regulatory technical standards proposing amendments to Commission Delegated Regulation (EU) 2017/587. This draft amendment, which further specified the notion of "prices reflecting prevailing market conditions", aimed to address concerns of an unlevel playing field between trading venues and systematic internalisers, and thus on efficient price formation, by introducing respect of the minimum tick size increments when systematic internalisers quote prices in equity financial instruments listed in MiFIR Article 14. In addition, the draft amendment aimed to correct divergences and inconsistencies with the draft technical standards originally submitted by ESMA.

On 10 August 2018, the Commission notified ESMA of its intention to endorse this draft amending regulation subject to a number of changes in accordance with Article 10(1) of Regulation No (EU) 1095/2010. The reasons for the requested changes can be summarised as follows:

- The co-legislators did not provide that quotes of systematic internalisers would need to respect tick size increments. Technical standards can therefore not be employed to achieve this result.
- There is evidence that not applying tick sizes to shares and depositary receipts risks negative repercussions on the liquidity in those two asset classes. Quoting prices outside the tick size increments might also hinder the efficient valuation and pricing of shares and depositary receipts. As efficient price formation is an important feature underpinning the introduction of tick size increments, systematic internalisers quoting prices for shares and depositary receipts below the standard market size should respect tick size increments in order to accurately reflect prevailing market conditions.

- Confining the proposed amendments to shares and depositary receipts addresses concerns about efficient price formation while remaining in line with the legislative intent not to introduce a general obligation that all quotes by systematic internalisers have to respect the tick size increments.

On 21 September 2018, ESMA submitted to the Commission a formal opinion on the Commission letter and a revised draft technical standard reflecting the proposed changes set out in the Commission letter.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of Regulation (EU) 1095/2010, ESMA has carried out a public consultation on the draft regulatory technical standards. A consultation paper was published on 9 November 2017 on the ESMA website and the consultation closed on 25 January 2018. In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (MSG) established in accordance with Article 37 of the ESMA Regulation.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) 1095/2010, ESMA submitted its impact assessment, including the analysis of costs and benefits related to the draft technical standards. This analysis is available at:

https://www.esma.europa.eu/sites/default/files/library/esma70-156-354_final_report_rts_1_amendment.pdf.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt a delegated Regulation is provided for under Articles 4(6), 7(2), 14(7), 20(3), 22(4) and 23(3) of MiFIR. Under these provisions, the Commission is empowered to adopt a delegated Regulation to further specify pre-trade and post-trade transparency obligations for trading venues, systematic internalisers and investment firms trading outside a trading venue, including the characteristics of the trades excluded from the trading obligation.

This delegated act is based on several empowerments, following the approach chosen in, and the substantive link with, Commission Delegated Regulation (EU) 2017/587 that this delegated act seeks to amend.

This amending Regulation further specifies the notion of “prices reflecting prevailing market conditions” in Article 10 of Regulation (EU) 2017/587. It also removes the reference to securities financing transactions in Articles 2 and 6 of Regulation (EU) 2017/587 and addresses a few inconstancies and errors in Articles 2, 3, 6, 11 and 17 of Regulation (EU) 2017/587.

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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 4(6), Article 14(7), Article 22(4) and Article 23(3) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2017/587² sets out transparency requirements for trading venues and systematic internalisers in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments. In particular, Delegated Regulation (EU) 2017/587 specifies that prices quoted by systematic internalisers reflect prevailing market conditions, as required by Article 14(3) of Regulation (EU) No 600/2014, where those prices are close in price, at the time of publication, to quotes of equivalent sizes for the same financial instrument on the most relevant market in terms of liquidity. Systematic internalisers may therefore provide quotes that are not subject to the minimum price increment ('tick size') with which trading venues are to comply.
- (2) The ability of systematic internalisers to provide quotes using price increments smaller than those available to trading venues may result in marginally better prices available to investors. Those quotes, however, undermine the overall quality of the liquidity available, the efficient valuation and pricing of financial instruments, and the level playing field between trading venues and systematic internalisers. This is most relevant for shares and depositary receipts which are subject to a wider range of tick sizes than other financial instruments.
- (3) To ensure effective price formation, the overall quality of the liquidity available and the efficient valuation of shares and depositary receipts, prices quoted by systematic internalisers for those instruments should only be deemed to reflect prevailing market conditions where those prices are subject to minimum price increments corresponding to the tick sizes applicable to prices published by trading venues.

¹ OJ L 173, 12.6.2014, p. 84.

² 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 (OJ L 87, 31.3.2017, p.387).

- (4) Regulation (EU) 2016/1033 of the European Parliament and of the Council³ removes securities financing transactions from the scope of the transparency provisions for trading venues and systematic internalisers. It is therefore necessary to remove references to securities financing transactions from Delegated Regulation (EU) 2017/587.
- (5) Delegated Regulation (EU) 2017/587 should therefore be amended accordingly.
- (6) A number of provisions of Delegated Regulation (EU) 2017/587 diverge from the draft regulatory technical standards on which that Regulation is based⁴. To the extent that those divergences are errors that affect the substance of those provisions, they should be corrected.
- (7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority ('ESMA') to the Commission.
- (8) In accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁵, 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,

HAS ADOPTED THIS REGULATION:

Article 1
Amendments to Delegated Regulation (EU) 2017/587

Delegated Regulation (EU) 2017/587 is amended as follows:

- (1) in Article 2, point (h) is deleted;
- (2) in Article 6, point (h) is deleted;
- (3) Article 10 is replaced by the following:

‘Article 10

Prices reflecting prevailing market conditions

(Article 14(3) of Regulation (EU) No 600/2014)

The prices published by a systematic internaliser shall be deemed to reflect prevailing market conditions where they are close in price, at the time of publication, to quotes of equivalent sizes for the same financial instrument on the most relevant market in terms of liquidity as determined in accordance with Article 4 for that financial instrument.

However, the prices published by a systematic internaliser in respect of shares and depositary receipts shall be deemed to reflect prevailing market conditions

³ Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) No 596/2014 on market abuse and Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories (OJ L 175, 30.6.2016, p. 1).

⁴ Final Report "Draft Regulatory and Implementing Technical Standards MiFID II/MiFIR" of 28 September 2015 (ESMA/2015/1464).

⁵ 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).

only where those prices meet the requirements set out in the first paragraph of this Article and respect minimum price increments corresponding to the tick sizes specified in Article 2 of Commission Delegated Regulation (EU) No 2017/588 (*).

(*) Commission Delegated Regulation (EU) 2017/588 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the tick size regime for shares, depositary receipts and exchange-traded funds (OJ L 87, 31.3.2017, p. 411).’

Article 2

Corrections to Delegated Regulation (EU) 2017/587

Delegated Regulation (EU) 2017/587 is corrected as follows:

- (1) in Article 2, point (b) is replaced by the following:
‘(b) the transaction is part of a portfolio trade which includes five or more different shares.’;
- (2) in Article 3, paragraph 2 is replaced by the following:
‘2. The transparency requirements referred to in paragraph 1 shall also apply to any 'actionable indication of interest' as defined in Article 2(1)(33) of Regulation (EU) No 600/2014 and pursuant to Article 3 of that Regulation.’;
- (3) in Article 11, paragraphs 4 and 5 are replaced by the following:
‘4. Before a share, depositary receipt, ETF, certificate or other similar financial instrument is traded for the first time on a trading venue in the Union, the competent authority shall estimate the average value of transactions for that financial instrument taking into account any previous trading history of that financial instrument and of other financial instruments that are considered to have similar characteristics, and ensure publication of that estimate;
5. The estimated average value of transactions laid down in paragraph 4 shall be used to determine the standard market size for a share, depositary receipt, ETF, certificate or other similar financial instrument during a six-week period following the date that the share, depositary receipt, ETF, certificate or other similar financial instrument was first admitted to trading or first traded on a trading venue.’;
- (4) in Article 17, paragraph 2 is replaced by the following:
‘2. Competent authorities, market operators and investment firms including investment firms operating a trading venue shall use the information published in accordance with paragraph 1 from 1 April of the year in which the information is published.’

Article 3

Entry into force

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

Done at Brussels, 12.12.2018

For the Commission
The President
Jean-Claude JUNCKER