



Brussels, 13.7.2022
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COMMISSION DELEGATED REGULATION (EU) .../...

of 13.7.2022

supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards setting out a contractual template for liquidity contracts for the shares of issuers whose financial instruments are admitted to trading on an SME growth market

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2019/2115 on the promotion of the use of SME growth markets, mandates ESMA to submit to the EC a draft Regulatory Technical Standard (RTS) containing a contractual template for a liquidity contract available to issuers of financial instruments admitted to trading on an SME growth markets (GMs) and their liquidity providers. Article 13 of Regulation (EU) 596/2014 on market abuse (market abuse regulation or MAR) seeks to develop the conditions for SME issuers to enter into liquidity contracts that would benefit from a similar regime as those established in the framework of a MAR accepted market practice (AMP), according to Article 13(1) of MAR, without the need for national competent Authorities (NCAs) to adopt any such AMP.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA has conducted a public consultation between 6 May and 15 July 2020. ESMA has requested the advice of the Securities and Markets Stakeholder Group (MSG) set up in accordance with Articles 10(1) and 37(1) of Regulation (EU) No 1095/2010.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The RTS sets out the requirements that parties to a liquidity contract should comply with in order to make sure that such persons are not engaging in market manipulation. In particular, the Annex to the RTS contains a contractual template which sets out the requirements relevant to comply with the criteria established in Article 13(2) of MAR with which the parties to a liquidity contract concerning shares of an issuer listed on an SME GM should comply in order to be covered by the safe harbour pursuant to article 13 MAR.

Such contractual template includes the minimum requirements aiming at ensuring a level-playing field among issuers listed on SME GMs and investment firms, while safeguarding market integrity and while maintaining the necessary flexibility for market participants to adapt each contract to the specificities of each individual case. The template should be completed and, in some parts, adjusted by market participants according to the circumstances of the individual case. The following is a description of the main areas covered by the proposed RTS.

The liquidity account: the contractual template foresees the opening of a dedicated liquidity account for the performance of the liquidity contract. The liquidity account should be endowed by the issuer with an initially specified amount of resources, in terms of cash and shares, to be used by the liquidity provider to carry out his activity.

Limits on resources, in order to ensure the proper interplay of the forces of supply and demand, the contractual template sets limits on the maximum amount of resources which can be allocated to the liquidity account under the liquidity contract.

Independence of the liquidity provider. the liquidity contract specifies two aspects: (i) the independence of the liquidity provider from the issuer and (ii) the need for the liquidity provider to have in place mechanisms to ensure that trading decisions related to the liquidity

contract are independent from those taken from other trading desks, groups or units engaged in trading activities within the liquidity provider.

Trading of the liquidity provider: In addition to the limits to the resources, the contractual template contains provisions to make sure that the daily trading activity of the liquidity provider performed in the framework of the liquidity contract does not lead to artificial changes in the share prices but rather has a positive impact on market liquidity and efficiency as contemplated in Article 13(2) of MAR.

Obligations of the liquidity provider: In order to monitor compliance with the clauses specified by the liquidity contract, the template includes the duty for the liquidity provider to keep records of the transaction undertaken under the liquidity contract. Such transactions should be easily identifiable, and the related records should be kept for five years.

Fees structures and remuneration: The contractual template sets the remuneration of the liquidity provider, in a way that does not affect its independence. The remuneration will typically be composed of a fixed and a variable part, and the latter could pose risks as regards the liquidity provider's independence.

Transparency: the contractual template identifies the obligation to provide transparency on the liquidity contract towards the public before the contract enters into force, while the contract is performed and once it expires. To that end, the contract specifies the means for publication of the relevant information.

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(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 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC¹ and in particular Article 13(13), third subparagraph, thereof,

Whereas:

- (1) Article 13(12) of Regulation (EU) No 596/2014 provides that issuers of financial instruments admitted to trading on an SME growth market may enter into a liquidity contract for their shares where such contracts comply with, *inter alia*, the conditions for establishing accepted market practices laid down in Article 13(2) of that Regulation. These conditions ensure that liquidity contracts set a high degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand, have a positive impact on market liquidity and efficiency and do not create risks for the integrity of related markets. The contractual template for liquidity contracts provided therein which aims at ensuring compliance with these conditions, lays down the minimum elements that a liquidity contract should contain, including as regards transparency to the market and performance of the liquidity provisions. Parties are free to insert additional clauses to reflect the specificities of the individual case, in accordance with their freedom to contract.
- (2) The resources of an issuer of financial instruments that are admitted to trading on an SME growth market and that are allocated for the performance of a liquidity contract for the shares of that issuer should be immediately identifiable. The liquidity contract should therefore provide for the opening of a dedicated liquidity account. Such dedicated liquidity account is needed to monitor the performance of the liquidity contract and to ensure that the trading conducted for the purposes of the liquidity contract is separated from other trading activities carried out by the liquidity provider, thus minimising the risks of conflicts of interests. Such liquidity account should be endowed with an amount of resources in cash and shares that should be specified in the liquidity contract. Such resources should be used for the sole purpose of the performance of the liquidity contract.

¹ OJ L 173, 12.6.2014, p. 1.

- (3) The resources allocated to the liquidity contract ('resource limits') should be proportionate to the objectives laid down in Article 13(2) of Regulation (EU) No 596/2014. For the same reason, trading by the liquidity provider should be subject to price and volume limits, which would, together with resource limits, minimise the risk that the liquidity provision results in artificial changes in the share price and would, at the same time, promote regular trading of illiquid shares.
- (4) Under previous accepted market practices on liquidity contracts, competent authorities have analysed the average trading turnover of shares listed on SME growth markets. That analysis has shown that resource limits should depend on the liquidity profile of the shares concerned (liquid vs illiquid) and take into account the trading activity occurring on the market concerned. Based on that analysis, it is appropriate that the liquidity contract provides for resource limits that are set as a percentage of the average daily turnover for the share concerned, with such percentage being calibrated on the basis of the liquidity profile of the share and being capped to avoid any negative impact of the liquidity contract on market integrity and on the orderly functioning of the market. To allow for an effective liquidity provision where the average daily turnover is low, a single threshold for the resources of the liquidity contract should apply.
- (5) Price limits should ensure that the trading activity of the liquidity provider performed in the framework of the liquidity contract does not lead to artificial changes in the share prices when there is independent trading interest available.
- (6) Volume limits should ensure that trades performed by the liquidity provider do not exceed a maximum percentage of the average daily turnover for illiquid and liquid shares. It is appropriate that the calculation of such average daily turnover is based on the 20 trading days preceding the trading day. Such calculation appropriately represents trading in the share concerned, because it provides for a medium-term picture, absorbing the effect of trading peaks over a single or few trading sessions.
- (7) To diminish the risks of market abuse, in normal market circumstances, the liquidity contract should provide that the liquidity provider enter orders to trade on both sides of the order book, except in the exceptional cases impeding the normal functioning of the market. For the same reason, orders that are large in scale and negotiated transactions should be within the scope of the liquidity contract, provided that certain conditions concerning the execution of such orders are met and that those trades take place in exceptional situations. Such exceptional situations may occur where, at a specific point in time, the proportion between the resources in cash and shares available to the liquidity provider does not allow the latter to provide liquidity under the contract.
- (8) The liquidity contract should require the liquidity provider to perform its liquidity contract independently from the issuer of the share concerned and from the trading decisions of other trading desks, groups or units within the liquidity provider, engaging in trading activities on that share or on financial instruments the price or value of which depends or has an effect on the price or value of the share concerned. Such independence of the liquidity provider is necessary to avoid risks to market integrity.
- (9) To avoid any risks for the integrity and orderly functioning of the SME growth market concerned, the variable remuneration of the liquidity provider should be limited. In addition, to ensure a level playing field, such limits should apply in a consistent manner to all liquidity contracts entered into by issuers whose financial instruments are admitted to trading on an SME growth market. The maximum limits for the

variable part of the remuneration should however be fixed at a reasonable percentage of the total remuneration to allow for an incentive for the liquidity provider to properly perform the contract, without being so substantial as to incentivise behaviours which may pose a risk to the integrity and orderly functioning of the market concerned.

- (10) Transparency in respect of the liquidity contracts ensures market integrity and investor protection. To enable other market participants to make an informed decision about the shares subject to the liquidity contract, the liquidity contract should provide for transparency obligations covering the various stages of the provision of liquidity, namely before entry into force of the liquidity contract, during its duration and after its termination. In this respect, it is necessary to identify one party that will be in charge of the transparency obligations. To make it easier for the public to gather information on the shares concerned, that party should be the issuer, which should publish the relevant information on its website.
- (11) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (12) The European Securities and Markets Authority 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 advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²,

HAS ADOPTED THIS REGULATION:

Article 1

Template for a liquidity contract

For the purposes of entering into a liquidity contract as referred to in Article 13(12) of Regulation (EU) No 596/2014, issuers of financial instruments admitted to trading on one or more SME growth markets shall use the template set out in the Annex to this Regulation.

Article 2

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*.

² 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).

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

Done at Brussels, 13.7.2022

For the Commission
The President
Ursula VON DER LEYEN