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COMMISSION DELEGATED REGULATION (EU) …/...

of 12.1.2022

amending the regulatory technical standards laid down in Delegated Regulation (EU) 2017/583 as regards adjustment the liquidity thresholds and trade percentile used to determine the size specific to the instrument applicable to certain non-equity instruments

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Regulation (MiFIR)[1] introduced comprehensive pre trade and post trade transparency requirements with regard to trades in both equities (such as shares) and non-equities (such as bonds and derivatives). Several of these requirements are supplemented by regulatory technical standards drafted by the European Securities Markets Authority (ESMA). Delegated Regulation (EU) 2017/583 ('RTS 2')[2] provides regulatory technical standards regarding transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives.

In particular it provides the methodology to assess the liquidity of bonds and the size specific to the instrument ('SSTI'). Both liquidity and SSTI are relevant for the application of transparency waivers and deferrals. Illiquid instruments are eligible for pre-trade transparency waivers based on Art 9(1)(c) of MiFIR and for post-trade transparency deferrals based on Art 11(1)(b) of MiFIR. When the size of an order is above the SSTI then, based on Article 9(1)(b) of MiFIR a pre-trade waiver is available in case the order is placed through a so called 'request-for-quote' or 'voice trading' system, and, based on Article 11(1)(c), a post-trade deferral, regardless of the trading systems that is being used.

With regard to both the methodology to calculate the liquidity of bonds and, with regard to pre-trade transparency, the SSTI of non-equity instruments, including bonds, RTS 2 introduced a phased approach in which ESMA assesses annually, for four years, if a move to the next –stricter– phase is warranted. After adopting the move from phase 1 to phase 2 this year, currently phase 2 is active.

ESMA submitted its second annual assessment[3] on 23 July 2021 and recommends to move to phase three in order to make progress towards a more transparent trading environment for bonds. It should be noted that with regard to the SSTI, ESMA again only assessed a move to phase three with regard to bonds, not with regard to other non-equity. This is because ESMA does not yet have enough data for these other classes of instruments.

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 11 May 2021 on the ESMA website. The Consultation period ended on 11 June and in total 16 replies were received. In addition ESMA sought the views of the Securities and Markets Stakeholders Group established in accordance with Article 37 of the ESMA regulation.

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1 Regulation (EU) 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 (MiFIR) (OJ L 173, 12.6.2014, p. 84).

2 Commission Delegated Regulation (EU) 2017/583 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 bonds, structured finance products, emission allowances and derivatives (RTS 2) (OJ L 87, 31.3.2017, p. 229-349).

3 The full document can be found here: https://www.esma.europa.eu/sites/default/files/library/esma70-156-4596_mifid_ii_mifir_annual_report_2021.pdf.

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 assessment, including the analysis of costs and benefits related to the draft technical standards.[4]

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Firstly, the draft Delegated Regulation aims to realize a move to phase 3 with regard to the liquidity assessment of bonds. Currently bonds are deemed to be liquid if: the average daily notional amount traded is at least EUR 100.000; the average daily number of trades (ADNT) is at least 10; and if at least on 80% of the days during the last quarter trading took place. Only the ADNT is subject to the phase-in. The four stages correspond to 15 (S1), 10 (S2), 7 (S3) and 2 (S4). Within these parameters the amount of liquid bonds between 2020Q1 and 2020Q4 was between 1.57% and 2.58% of the total bond landscape, UK excluded. The move to phase 3 means that the ADNT will be decreased from 10 to 7, resulting in an expected increase of these numbers to between 2.31% and 3.44%. This is done by replacing Article 17(1) of RTS 2 to this effect.

Secondly, the draft Delegated Regulation aims to realize a move to phase 3 with regard to the SSTI. The SSTI is either a fixed threshold of the daily notional amount traded (of EUR 200.000 or 300.000 depending on the type of bond) or the amount that lies above the 40^{th} (S2) percentile of the actual daily notional amount traded, whichever is higher. For corporate bonds this meant, based on 2020 data excluding the UK, that the pre-trade SSTI waiver applies for tickets of EUR 400.000 or higher. For sovereign bonds this figure is EUR 900.000. Moving to phase 3 means that the 40th percentile will be replaced by the 50th percentile, thus increasing the threshold above which a pre-trade transparency waiver is available respectively to EUR 600.000 and to EUR 1.500.000. This is done by replacing Article 17(3) of RTS 2 to this effect.

[4] See footnote 3.

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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 648/2012[5], and in particular Article 9(5), third subparagraph thereof,

Whereas:

(1) Commission Delegated Regulation (EU) 2017/583[6] sets out the transparency requirements applicable to bonds, structured finance products, emission allowances and derivatives. In order to ensure a smooth implementation of those requirements, that Delegated Regulation has introduced an annual phase-in of application of certain transparency thresholds over the course of four years, starting from 2019. That phase-in allows gradual broadening of the application of corresponding transparency obligations. This concerns, in particular, the 'average daily number of trades' criterion used for the determination of bonds for which there is a liquid market and as the trade percentiles used for the determination of the size specific to the instrument (SSTI) which allows for pre-trade transparency obligations to be waived.

(2) Under that phased-in approach, moving to the next stage is not automatic. The European Securities and Markets Authority (ESMA) is required to submit to the Commission its annual assessment of the appropriateness of the move to the next stage. The ESMA’s assessment has to analyse the evolution of trading volumes for the concerned financial instruments under the current stage and to anticipate the possible impact a move to the next stage could have on both available liquidity and market participants. If appropriate, ESMA is required to submit, together with its report, a revised regulatory standard adjusting the threshold to the next stage.

(3) ESMA submitted its assessment and revised regulatory standards to the Commission on 22 July 2021. ESMA concludes that between 1,57 % and 2,58 % of bonds traded between the first and the fourth quarter of 2020 were considered liquid following the

5 OJ L 173, 12.6.2014, p. 84.

6 Commission Delegated Regulation (EU) 2017/583 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 bonds, structured finance products, emission allowances and derivatives (OJ L 87, 31.3.2017, p. 229–349).

criteria that apply in stage S2. Moving to stage S3 means an increase of approximately 40 %.

(4) With regard to the SSTI, ESMA concludes that moving from stage S2 to S3 will mostly affect trading in sovereign bonds and other public bonds, since for those instruments the increase will be the largest. Those instruments, however, typically are traded in the range of EUR 3 million to EUR 6 million. ESMA considers therefore that a move to stage S3 would keep the pre-trade SSTI sufficiently low to protect liquidity providers from market impact stemming from large orders, while ensuring that more liquid bonds would be subject to pre-trade transparency.

(5) Taking into account the assessment undertaken by ESMA and the limited level of transparency in the bond markets, the limited effects to competition in the market and the fact that the threshold would still be sufficiently low to protect liquidity providers from potential market impact stemming from large orders, it is appropriate to move to stage S3 for bonds for which there is a liquid market and for the SSTI for bonds. The move to stage S3 should increase the level of transparency available in the bond market without a negative impact on liquidity.

(6) Delegated Regulation (EU) 2017/583 should therefore be amended accordingly.

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

(8) 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 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 Council[7],

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2017/583

Article 17 of Delegated Regulation (EU) 2017/583 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. For determining the bonds for which there is not a liquid market for the purposes of Article 6 and according to the methodology specified in Article 13(1), point (b), the approach for the liquidity criterion “average daily number of trades” shall be taken applying the “average daily number of trades” corresponding to stage S3 (7 daily trades).’;

(b) paragraph 3 is replaced by the following:

‘3. For determining the size specific to the financial instrument for the purposes of Article 5 and according to the methodology specified under Article 13(2), point (b)(i), the approach for the trade percentile to be applied shall be used applying the trade percentile corresponding to the stage S3 (50th percentile).

7 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).

For determining the size specific to the financial instrument for the purposes of Article 5 and according to the methodology specified under Article 13(2), points (b)(ii) to (iv), the approach for the trade percentile to be applied shall be used applying the trade percentile corresponding to the stage S1 (30th percentile).’.

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*.

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

Done at Brussels, 12.1.2022

For the Commission
The President
Ursula VON DER LEYEN