



Brussels, 17.1.2023
C(2023) 246 final

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

of 17.1.2023

amending the regulatory technical standards laid down in Delegated Regulation (EU) 2017/583 as regards certain transparency requirements applicable to transactions in non-equity instruments

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Regulation (MiFIR) 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') provides regulatory technical standards regarding transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives.

The delegated act amends RTS 2 and contains provisions to improve and further harmonise data quality of post-trade transparency reports, as well as to increase the level of pre-trade and post-trade transparency. In particular the following amendments are introduced:

- The concept of 'non-price forming transactions', which leads to the application of among other things the negotiated trade waiver as well as exemptions for post-trade transparency for off-exchange transactions has not been fully harmonised across these different provisions which has led to inconsistent publication of post-trade transparency information and flagging of transactions and eventually resulted in unsatisfactory quality of data reported. The delegated act harmonises the types of transactions considered as non-price forming.
- RTS 2 contains the data fields that should be provided for in post-trade transparency reports by approved publication arrangements (APAs) and trading venues (regulated markets or multilateral trading facilities) such as 'time', 'price' and 'quantity', as well as various 'flags' specifying the type of transaction, and prescribes how these fields should be populated for various different financial instruments. The poor quality of these post-trade transparency reports has led to criticism and is one of the main reasons identified by the European Commission and the European Securities and Markets Authority that a consolidated tape¹ has not been established. The delegated act contains amendments which aim at increasing clarity and harmonisation of the data standards.
- The act provides specifications on delivery of data to competent authorities in relation to calculations of various thresholds, such as the large in scale threshold and the size specific to the instrument threshold as well as the liquidity determination.
- Finally, the delegated act clarifies the legal status of so called 'hybrid systems' which are systems that combine aspects of different trading systems, such as central limit order book systems and request for quote systems and makes technical adjustments to the exact moment of the day at which a publication of which the deferral has lapsed should be published.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of Regulation (EU) No 1095/2010, ESMA has carried out a public consultation on the draft regulatory technical standards. A Consultation Paper which jointly dealt with the review of EU/2017/587 and EU/2017/583 was published on 9 July 2021 on the ESMA website. The Consultation period ended on 01 October and in total 58 replies

¹ See for the proposal of the European Commission on the consolidated tape: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0727>

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.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA submitted its assessment, including the analysis of costs and benefits related to the draft technical standards.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1(1) specifies that the minimum size of orders held in an order management facility should be based on the notional amount of the traded contracts.

Article 1(2) introduces harmonisation of non-price forming transactions for the purposes of identifying exemptions to post-trade transparency requirements for off-exchange transactions. It does so by limiting these exemptions to the transactions included in RTS 22 (EU/2017/590) on transaction reporting to competent authorities.

Article 1(3) specifies that data requests regarding calculations for liquidity determinations, large in scale thresholds and size specific to the instrument thresholds, should be answered using the new Annex V. Secondly it specifies that such calculations shall apply as of the first Monday of June each year. Finally it stipulates that quarterly calculations related to bonds shall apply as of the third Monday of February, May, August or November.

Article 1(4) introduces amendments to Annex I on descriptions of trading systems, adding 'hybrid trading systems' to the table.

Article 1(5) introduces amendments to Annex II regarding the details to be provided in post-trade transparency reports as well as on the applicable flags and the measurement of trading volume.

Article 1(6) introduces amendments to Annex III specifying the liquidity assessment, large in scale thresholds and size specific to the instrument thresholds for non-equity instruments.

Article 1(7) introduces amendments to Annex IV specifying reference data to be provided for the purposes of transparency calculations.

Article 1(8) adds a new Annex V specifying formats and standards for the purpose of transparency calculations.

Article 2 introduces a transitional provision.

Article 3 provides for the entry into force and the application date.

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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 648/2012², and in particular Article 9(5), third subparagraph, Article 11(4), third subparagraph, Article 14(7), third subparagraph, Article 21(5), third subparagraph, and Article 22(3), second subparagraph, thereof,

Whereas:

- (1) Taking into consideration the experience acquired with the application of Commission Delegated Regulation (EU) 2017/583³, the identification of inconsistent application of provisions that rely on whether or not a transaction is ‘non-price forming’ and taking into account the changes in trading practices due to technological developments and adaptations of behaviour of market participants which allow information to be published with a shorter delay, it is necessary to amend certain provisions of that Delegated Regulation.
- (2) The concept of non-price forming transactions, which is relevant for the application of the exemption of post-trade transparency requirements for bilateral transactions, has been interpreted differently by entities under supervision, which has led to inconsistent publication of post-trade transparency information in accordance with Article 21 of Regulation (EU) No 600/2014 of the European Parliament and of the Council⁴. To improve the transparency, data quality and ultimately to facilitate data aggregation, it is necessary to simplify and clarify the reporting regime applicable to non-equity transactions. To avoid diverging interpretation, the various provisions that rely on the concept of non-price forming transactions in both Delegated Regulation (EU)

² OJ L 173, 12.6.2014, p. 84.

³ 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 L87, 31.3.2017, p. 229).

⁴ 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 (OJ L 173, 12.6.2014, p. 84).

2017/587 and Commission Delegated Regulation (EU) 2017/590⁵, which deals with the reporting of transactions to competent authorities, should be aligned. Since the list of non-price forming transactions in Delegated Regulation (EU) 2017/590 contains all the transactions to be excluded from the reporting requirements, the separate transactions in Delegated Regulation (EU) 2017/587 should therefore be removed.

- (3) Market participants have been interpreting the pre-trade transparency requirements for hybrid trading systems differently, which has resulted in inconsistent pre-trade transparency disclosed by operators of such systems. Hybrid systems are systems which combine two or more trading systems. To ensure that those operators disclose appropriate pre-trade transparency information in a consistent manner across the Union, pre-trade transparency requirements should be introduced for hybrid trading systems which ensure that pre-trade transparency requirements are aligned with those of the individual systems of which the hybrid system consists.
- (4) In public reports on transactions in financial instruments certain key elements, such as price, quantity and notional amount have been expressed inconsistently. The expression of those elements should be in line with the market conventions in relation to the individual instruments. With regard to bonds, the price should be expressed in percentage, unless the market convention dictates that the price of a specific type of bond is expressed differently. For Credit Default Swaps the price should be expressed in basis points received by the seller of the credit protection.
- (5) Trades where several different bonds, or other financial instruments, are simultaneously sold to a single client, including counterparties, as a portfolio trade against a single price for the entire lot, are not recognisable as such in the public reports. Without accurate identification of such portfolio trades the public reports display several individual transactions against a price that does not reflect the market price. Therefore, it is necessary to add in Table 3 of Annex II to Delegated Regulation (EU) 2017/587 a flag for portfolio trades identifying such transactions.
- (6) Trading venues, approved publication arrangements (APAs) and investment firms have not interpreted the requirements related to the disclosure of post-trade transparency information to the public and the information to be provided to the European Securities and Markets Authority (ESMA) and competent authorities for the purpose of the transparency calculations consistently. As a result, such information is incomplete, inaccurate or inconsistent. This undermines the usability of such information and the quality and accuracy of the transparency calculations based on the submitted data. In order to promote the consistent application of the post-trade transparency requirements across the Union, it is necessary to further specify how details, such as price and notional amount, should be disclosed with regard to different financial instruments by trading venues, APAs and investment firms and for the reporting of reference data and quantitative data to ESMA and competent authorities.
- (7) The liquidity of commodity derivatives varies significantly depending on the characteristics of the instruments. The format under which certain characteristics of commodity and freight derivatives are reported is currently not sufficiently specified in Delegated Regulation (EU) 2017/583. To achieve a consistent reporting of those characteristics and enhance data quality, those formats should rely on existing market standards and should be specified.

⁵ Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities (OJ L 87, 31.3.2017, p. 449).

- (8) Delegated Regulation (EU) 2017/583 should therefore be amended accordingly.
- (9) To allow trading venues, APAs and investment firms to implement the required changes into their systems, certain amendments introduced by this Regulation should apply from 1 January 2024. In order to ensure legal certainty and continuity for transactions executed before 1 January 2024 but which are published or amended after that date, Article 12 of and Annex I, II and IV to Delegated Regulation (EU) 2017/583 as applicable on 31 December 2023 should continue to apply to transactions executed before 1 January 2024.
- (10) This Regulation is based on the draft regulatory technical standards submitted to the Commission by ESMA.
- (11) 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 Council⁶,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2017/583

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

- (1) in Article 4, the following paragraph 4 is added:
‘4. For the purposes of paragraph 2, point (a), the size of orders held in an order management facility shall be measured by the notional amount of the traded contracts as referred to in Annex II, table 2, field 10.’;
- (2) Article 12 is replaced by the following:

Article 12

Application of post-trade transparency to certain transactions executed outside a trading venue

(Article 21(1) of Regulation (EU) No 600/2014)

The obligations set out in Article 21(1) of Regulation (EU) No 600/2014 shall not apply to transactions listed in Article 2(5) of Commission Delegated Regulation (EU) 2017/590*.

* Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities, C/2016/4733 (OJ L 87, 31.3.2017, p. 449).’;

- (3) Article 13 is amended as follows:
 - (a) in paragraph 5, the following subparagraph is added:

⁶ 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).

‘The data referred to in the first subparagraph shall be collected in accordance with Annex V.’;

(b) paragraphs 17 and 18 are replaced by the following:

‘17. Competent authorities shall ensure the publication of the results of the calculations referred to under paragraph 5 for each financial instrument and class of financial instrument by 30 April of the year following the date of application of Regulation (EU) No 600/2014 and by 30 April of each year thereafter. The results of the calculations shall apply from the first Monday of June each year following publication until the day before the first Monday of June of the subsequent year.

18. For the purposes of the calculations referred to in paragraph 1, point (b)(i) and by way of derogation from paragraphs 7, 15 and 17, competent authorities shall, in respect of bonds except ETCs and ETNs, ensure the publication of the calculations referred to under paragraph 5, point (a) on a quarterly basis, on the first Monday of February, May, August and November following the date of application of Regulation (EU) No 600/2014 and on the first Monday of February, May, August and November each year thereafter. The calculations shall include transactions executed in the Union during the preceding calendar quarter and shall apply from the third Monday of February, May, August and November each year until the calculations of the subsequent quarterly period apply.’;

- (4) Annex I is replaced by the text in Annex I to this Regulation;
- (5) Annex II is amended in accordance with Annex II to this Regulation;
- (6) Annex III is amended in accordance with Annex III to this Regulation;
- (7) Annex IV is amended in accordance with Annex IV to this Regulation;
- (8) The text set out in Annex V to this Regulation is added as Annex V.

Article 2

Transitional provision

Article 12 of and Annex I, II and IV to Delegated Regulation (EU) 2017/583 as applicable on 31 December 2023 shall continue to apply to transactions executed before 1 January 2024.

Article 3

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 1, points (2), (4), (5), and (7) shall apply from 1 January 2024.

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

Done at Brussels, 17.1.2023

For the Commission
The President
Ursula VON DER LEYEN