Brussels, 18.5.2016
C(2016) 2860 final

COMMISSION DELEGATED REGULATION (EU) …/...

of 18.5.2016

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions

(Text with EEA relevance)

EXPLANATORY MEMORANDUM -

1. CONTEXT OF THE DELEGATED ACT

1.1 General background and objectives

Regulation (EU) No 600/2014 (commonly referred to as 'MiFIR') is due to become applicable on 3 January 2017 and together with Directive 2014/65/EU ('MiFID II') replace Directive 2004/39/EC (MiFID I). The Commission has proposed to postpone the entry into application of both MiFID II and MiFIR by one year. MiFIR and MiFID II provide an updated harmonised legal framework governing, amongst others, the requirements applicable to investment firms, trading venues, data reporting services providers and third country firms providing investment services or activities in the Union.

MiFIR and MiFID II aim to enhance the efficiency, resilience and integrity of financial markets, notably by:

- Achieving greater transparency through the introduction of a pre- and post-trade transparency regime for non-equities and strengthening and broadening of the existing equities trade transparency regime;
- Bringing more trading onto regulated venues through the creation of a new category of platforms to trade derivatives and bonds - the Organised Trading Facilities - and of a trading obligation for shares on regulated venues;
- Fulfilling the Union's G20 commitments on derivatives through the mandatory trading of derivatives on regulated venues, introduction of position limits and reporting requirements for commodity derivatives, broadening the definition of investment firm to capture firms trading commodity derivatives as a financial activity;
- Facilitating access to capital for SMEs through the introduction of the SME Growth Market label;
- Strengthening the protection of investors through the enhancement of the rules on inducements, a ban on inducements for independent advice and new product governance rules;
- Keeping pace with technological developments through regulating high-frequency trading (HFT) by imposing requirements on trading venues and on firms using HFT;
- Introducing provisions on non-discriminatory access to trading and post-trading services in trading of financial instruments notably for exchange-traded derivatives;
- Strengthening and harmonising sanctions and ensuring effective cooperation between the relevant competent authorities.

Finally, the overarching aim of the MiFID II/MiFIR regulatory package is to level the playing field in financial markets and to enable the markets to work for the benefit of the economy, supporting jobs and growth.

This Delegated Regulation aims at specifying, in particular, the rules relating to determining liquidity for equity instruments, the rules on the provision of market data on a reasonable commercial basis, the rules on publication, order execution and transparency obligations for systematic internalisers, and the rules on supervisory measures on product intervention by ESMA, EBA and national authorities, as well as on position management powers by ESMA.

1.2 Legal background

This Delegated Regulation is based on a total of 11 empowerments in MiFIR.

This Delegated Regulation should be read together with the MiFID II Delegated Directive and the MiFID II Delegated Regulation. The issue of subsidiarity was covered in the impact assessment for the MiFID II/MiFIR and the Union's and the Commission’s right of action in the impact assessment accompanying these delegated measures. The empowerments upon which this Delegated Regulation is based are "shall" empowerments.

Other MiFID II/MiFIR empowerments enable the European Securities and Markets Authority (ESMA) to develop draft regulatory and implementing technical standards which are to be adopted accordingly by the Commission as delegated and implementing regulations.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Commission requested ESMA to provide it with technical advice on possible delegated acts concerning MiFID II and MiFIR. On 23 April 2014, the Commission services sent a formal request for technical advice (the "Mandate") to ESMA on the contents of the delegated and implementing acts concerning MiFID II/MiFIR. On 16 May 2014, EBA had received a similar mandate with respect to possible delegated acts concerning criteria and factors to be taken into consideration by EBA or national authorities when using product intervention powers in relation to structured deposits. On 22 May 2014 ESMA published a consultation paper with regard to its technical advice on the relevant delegated acts. ESMA received 330 responses by 1 August 2014. ESMA and EBA (concerning the product intervention powers) delivered their technical advice on 19 and respectively 11 December 2014. This Delegated Regulation is based on the technical advice provided by ESMA and EBA.

The Commission services have had numerous meetings with various stakeholders to discuss the potential content of these delegated acts throughout 2014 and the first half of 2015. The Commission services have also had several exchanges with Members of the ECON Committee of the European Parliament, and have held several meetings of the relevant expert group (Expert Group of the European Securities Committee), during which the delegated measures were discussed among experts from the finance ministries and supervisory authorities of Member States, involving observers from the European Parliament and ESMA. This consultation process has brought a broad consensus on the draft Delegated Regulation.

3. IMPACT ASSESSMENT

The extensive process of consultation described above has been complemented by an Impact Assessment report. The Impact Assessment Board delivered a positive opinion on 24 April 2015.

Given the number of delegated measures covered by this Delegated Regulation (and the MiFID II Delegated Directive and MiFID II Delegated Regulation), which covers numerous and technical aspects of MiFIR (and respectively MiFID II), the Impact Assessment report does not discuss elements in the Delegated Regulation with limited scope or impact, or elements that have been consensual for a long time in the in-depth consultation process described above. Instead, the Impact Assessment report rather concentrates on the measures with greater impact or scope for Commission choice. In particular, these concern transparency requirements or the obligation to provide market data on a reasonable commercial basis.

3.1 Analysis of costs and benefits

The costs of the choices made by the Commission for the package of MiFID II/MiFIR Delegated Directive and Regulations described in the impact assessment fall almost entirely on market participants (trading venues, systematic internalisers, organised trading facilities, SME growth markets, high frequency traders) who will incur costs in setting up trade data publication, in some instances applying for authorisation (in particular for SIs, SME GMs, high frequency traders) and for implementing the enhanced organisational and conduct of business rules. The Impact Assessment provides further estimations of the compliance costs triggered by the delegated acts.

By ensuring a harmonised implementation and application of MiFID II and MiFIR the delegated acts make sure that the objectives of the text adopted by the European Parliament and the Council can be achieved without imposing inordinate additional burden on stakeholders. Overall, the impacts of the delegated acts are relatively minor as the scope of possible action has already been determined in MiFID II and MiFIR.

The benefits concern investment firms and other entities subject to MiFID II and MiFIR requirements but also investors and society more widely. This includes the benefits from increased market integration, efficient and transparent financial markets, enhanced competition and availability of services or increased investor protection. The suggested measures should make financial markets more transparent and more secure and improve investor confidence and participation in financial markets. In addition, by contributing to reducing markets' disorder and systemic risks, these options should improve the stability and reliability of financial markets. These benefits are considered to considerably outweigh the costs.

There is no effect on the EU budget.

3.2 Proportionality

Proportionality is duly taken into account across all of the Delegated Regulation. For instance, the rules on the provision of market data on a reasonable commercial basis are calibrated to impose a principle based obligation (cost based data provision) instead of introducing unduly prescriptive rules on the appropriate level of costs. The delegated regulation also introduces a de minimis threshold for the calculation of whether or not an investment firm qualifies as a systematic internaliser in order to make it easier for smaller investment firms to gauge whether they will qualify, as well as proportionality (higher thresholds) aimed at SME shares, i.e. for shares only traded on multilateral trading facilities, in the assessment of whether there is a liquid market for these shares.

4. LEGAL ELEMENTS OF THE DELEGATED ACT

Chapter I: determination of liquid market for equity instruments

This Chapter contains further specifications in relation to the determination of liquid market for shares, depositary receipts, exchange traded funds and certificates together with general provisions on calculations necessary for the purposes of liquidity determination. In particular the relevant thresholds and periodicity of liquidity calculations are set out in this chapter. The determination of a liquid market of equity instruments is a factor which determines the degree of pre and post trade transparency in relation to these instruments under Regulation (EU) No 600/2014).

Chapter II: data provision obligations for trading venues and systematic internalisers

This chapter contains specifications for the purposes of specifying the obligation of trading venues and systematic internalisers to provide market data on a reasonable commercial basis, which is part of the transparency framework under Regulation (EU) No 600/2014). These specifications concern the requirement that fees are set on the basis of cost and may include a reasonable margin, non-discriminatory provision of market data, the obligation to unbundle and disaggregate data and a transparency to the public obligation around the fees, other conditions as well as around cost accounting methodologies. The same rules are also applicable to APAs and CTPs as provided for in the delegated act under MIFID II.

Chapter III: publication, order execution and transparency obligations for systematic internalisers

This chapter contains specifications on the scope of the obligations of systematic internalisers in relation to publication, order execution and transparency and for this purpose it defines or further specifies the following concepts:

- the obligation to make quotes public on a regular and continuous basis during normal trading hours,
- the arrangements systematic internalisers must have in place to make their quotes easily available to the public,
- the exceptional market conditions under which systematic internalisers are exempt from providing firm prices,
- the definition of a price which falls within a public range close to market conditions for the purposes of determining the scope of the right, in justified cases, to execute orders at a better price,
- the definitions of transactions where execution in several securities is part of one transaction and of orders that are subject to conditions other than the current market price, for the purposes of determining the scope of the right of systematic internalisers to execute transactions received from professional clients at a price different from the quotes price,
- the definition of orders considerably exceeding the norm, in which case a systematic internaliser shall be allowed to limit on a non-discriminatory basis the total number of transactions from the same client,
- the size specific to the instrument in respect of instruments traded on request for quote, voice, hybrid or other trading systems, at or below which systematic internalisers must publish firm quotes and enter into transactions under the published conditions with any other client to whom the quote is made available.

Chapter IV: Derivatives

This chapter contains specifications on the elements of portfolio compression such as the obligation to consider participant's criteria for risk tolerance, the obligation to allow for the application of the relevant risk framework, the obligation and the publication requirements applicable to firms providing such service, and the obligation to establish links between transactions submitted for compression. It also contains specifications on the required documentation of portfolio compression and method for determining whether the combined notional value following compression is less than the combined notional value before compression. Furthermore it contains specifications on the publication requirements in relation to portfolio compression.

Chapter V: Supervisory measures on product intervention and position management

This chapter sets out criteria and factors to be taken into account by ESMA, EBA and national competent authorities when intending to use their product intervention powers in case of significant investor protection concern or threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of the Union or respectively of at least one Member State. It also clarifies the circumstances under which ESMA can use its position management powers.

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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 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 2(2), Article 13(2), Article 15(5), Article 17(3), Article 19(2), Article 19(3), Article 31(4), Article 40(8), Article 41(8), Article 42(7) and Article 45(10) thereof,

Whereas:

(1) This Regulation further specifies the criteria for the determination of 'liquid market' in accordance with Article 2(1)(17)(b) of Regulation (EU) No 600/2014. For this purpose it is necessary to specify the criteria for free float, average daily number of transactions and average daily turnover specifically for shares, depositary receipts, exchange traded funds and certificates to take into account the specificities of each of these financial instruments. Rules specifying how liquidity calculations should be performed during the initial stage after the financial instrument is admitted to trading are required to ensure a consistent and uniform application across the Union.

(2) The provisions in this Regulation are closely linked, since they deal with definitions and specify requirements in relation to pre- and post-trade transparency by systematic internalisers and data publication by trading venues and systematic internalisers, on the one hand, and the European Securities Markets Authority (ESMA) product intervention and position management powers, on the other. To ensure coherence between those provisions which should enter into force at the same time, and in order to facilitate a comprehensive view for stakeholders and, in particular, those subject to the obligations, it is necessary to include these provisions in a single Regulation.

(3) In order to allow for a minimum of liquid equity instruments to exist in all parts of the Union, the competent authority of a Member State where fewer than five liquid financial instruments for each of shares, depositary receipts, exchange traded funds and certificates are traded, should be able to designate one or more additional liquid financial instruments, provided that the total number of financial instruments which are considered to have a liquid market does not exceed five in each of these categories of financial instruments.

(4) In order to ensure that market data is provided on a reasonable commercial basis in a uniform manner in the Union, this Regulation specifies the conditions that market

[1] OJ L 173, 12.6.2014, p. 84

operators and investment firms operating trading venues and systematic internalisers must fulfil. These conditions are based on the objective to ensure that the obligation to provide market data on a reasonable commercial basis is sufficiently clear to allow for an effective and uniform application whilst taking into account different operating models and costs structures of market operators and investment firms operating a trading venue and systematic internalisers.

(5) To ensure that fees for market data are set at a reasonable level, the fulfilment of the obligation to provide market data on a reasonable commercial basis requires that fees be based on a reasonable relationship to the cost of producing and disseminating that data. Therefore, without prejudice to the application of competition rules, data providers should determine their fees on the basis of their costs whilst being allowed to obtain a reasonable margin based on factors such as the operating profit margin, the return on costs, the return on operating assets and the return on capital. Where data providers incur joint costs for data provision and the provision of other services, costs of market data provision may include an appropriate share of joint costs arising from any other relevant service provided. Since specifying exact costs is complex, cost allocation and cost apportionment methodologies should be specified instead, leaving the specification of those costs to the discretion of market data providers whilst having regard to the objective of ensuring that fees for market data are set at a reasonable level in the Union.

(6) Market data should be provided on a non-discriminatory basis, which requires that the same price and other terms and conditions should be offered to all customers who are in the same category according to published objective criteria.

(7) To allow data users to obtain market data without having to buy other services, market data should be offered unbundled from other services. To avoid data users being charged more than once for the same market data when buying data sets from trading venues and from other market data distributors, market data should be offered on a per user basis unless doing so would be disproportionate considering the cost of such way of offering that data in respect of the scale and the scope of the market data provided by the market operator or the investment firm operating a trading venue or the systematic internaliser.

(8) In order to allow for data users and competent authorities to effectively assess whether market data is provided on a reasonable commercial basis, it is necessary that the essential conditions for its provision are disclosed to the public. Data providers should therefore disclose information about their fees and the content of the market data, as well as the cost accounting methodologies used to determine their costs without having to disclose their actual costs.

(9) This Regulation further specifies the conditions which systematic internalisers must fulfil to comply with the obligation to make quotes public on a regular and continuous basis during normal trading hours and easily accessible to other market participants to ensure that market participants wishing to access the quotes may effectively access them.

(10) Where systematic internalisers publish quotes through more than one means of publication they should provide their quotes simultaneously through each arrangement to ensure that the quotes published are consistent and that market participants may access the information at the same time. Where systematic internalisers make quotes public through the arrangements of a regulated market or a Multilateral Trading

Facility (MTF) or through a data reporting services provider they should disclose their identity in the quote in order to enable market participants to direct their orders to it.

(11) This Regulation further specifies various technical aspects of the scope of the transparency obligations of systematic internalisers in order to ensure a consistent and uniform application across the Union. It is necessary that the exception to systematic internalisers' obligation to make public their quotes on a regular and continuous basis be strictly limited to situations where the continued provision of firm prices to clients may be contrary to the prudent management of the risks the investment firm is exposed to in its capacity as systematic internalisers, having regard to other mechanisms which may provide additional safeguards against such risks.

(12) In order to ensure that the exception to systematic internalisers obligations to execute the orders at the quoted prices at the time of reception of the order in accordance with Article 15(2) of Regulation (EU) No 600/2014 is limited to transactions which by their nature do not contribute to price formation, this Regulation further specifies exhaustively the conditions for what constitutes transactions in several securities as part of one transaction and orders subject to conditions other than the current market prices.

(13) The criterion specifying that a price falls within a public range close to market conditions reflects the need to ensure that execution by systematic internalisers contribute to price formation whilst not impeding on the possibility for systematic internalisers to offer price improvement in justified cases.

(14) In order to ensure that customers have access to systematic internalisers quotes in a non-discriminatory way but at the same time ensuring a proper risk management which takes into account the nature, scale and complexity of the activities of individual firms, it is necessary to specify that the number or volume of orders from the same client should be regarded as considerably exceeding the norm where a systematic internaliser cannot execute those orders without exposing itself to undue risk, something which should be defined in advance as a part of the firm's risk management policy and be based on objective factors and be stated in writing and made available to customers or potential customers.

(15) Since liquidity providers and systematic internalisers both trade on own account and incur comparable levels of risks, it is appropriate to determine the size specific to the instrument in a uniform way for these categories. Therefore, the size specific to the instrument for the purposes of Article 18(6) of Regulation (EU) No 600/2014 should be the size specific to the instrument determined in accordance with Article 9(5)(d) of Regulation (EU) No 600/2014 and as further specified in regulatory technical standards in accordance with this provision.

(16) In order to specify the elements of portfolio compression, so as to delineate it from trading and clearing services, it is necessary to identify the process whereby derivatives are wholly or partially terminated and replaced by a new derivative, in particular the steps of the process, the content of the agreement and the legal documentation supporting the portfolio compression.

(17) To ensure that suitable transparency of portfolio compression performed by counterparties is achieved, it is necessary to specify the information which should be made public.

(18) It is necessary to specify certain aspects of the intervention powers of both the relevant competent authorities and, in exceptional cases, ESMA established and exercising its

powers in accordance with Regulation (EU) No 1095/2010 of the European Parliament and of the Council and the European Banking Authority (EBA) established and exercising its powers in accordance with Regulation (EU) No 1093/2010 of the European Parliament and of the Council as regards significant investor protection concern or threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of at least one Member State or respectively of the Union. The existence of a "threat", one of the prerequisites of the intervention in the perspective of the orderly functioning and integrity of financial or commodity markets or stability of the financial system, would require the existence of a greater concern than a "significant concern", which is the prerequisite of the intervention for investor protection.

(19) A list of criteria and factors to be taken into account by competent authorities, ESMA and EBA in determining when there is such a concern or threat should be established to ensure a consistent approach while permitting appropriate action to be taken where unforeseen adverse events or developments occur. The need to assess all criteria and factors that could be present in a specific factual situation should not prevent however the temporary intervention power from being used by competent authorities, ESMA and EBA where only one of the factors or criteria leads to such a concern or threat.

(20) It is necessary to specify the circumstances under which ESMA can use its position management powers in accordance with Regulation No 600/2014 in order to ensure a consistent approach while permitting appropriate action to be taken where unforeseen adverse events or developments occur.

(21) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions of this Regulation and the provisions laid down in Regulation (EU) No 600/2014 apply from the same date. However, to ensure that the new transparency regulatory regime can operate effectively, certain provisions of this Regulation should apply from the date of its entry into force,

HAS ADOPTED THIS REGULATION:

CHAPTER I
Determining liquid markets for equity instruments

Article 1

Determining liquid markets for shares

(Article 2(1)(17)(b) of Regulation (EU) No 600/2014)

1. For the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014, a share that is traded daily shall be considered to have a liquid market where all of the following conditions are satisfied:

   (a) the free float of the share is:

      (i) not less than EUR 100 million for shares admitted to trading on a regulated market;

      (ii) not less than EUR 200 million for shares that are only traded on MTFs;

   (b) the average daily number of transactions in the share is not less than 250;

   (c) the average daily turnover for the share is not less than EUR 1 million.

2. For the purposes of paragraph 1(a), the free float of a share shall be calculated by multiplying the number of outstanding shares by the price per share, excluding individual holdings in that share that exceed 5% of the total voting rights of the issuer, unless those holdings are held by a collective investment undertaking or a pension fund. Voting rights shall be calculated by reference to the total number of shares to which voting rights are attached, regardless of whether the exercise of the voting right is suspended.

3. For the purposes of paragraph 1(a)(ii), where no actual information is available in accordance with paragraph 2, the free float of a share that is only traded on MTFs shall be calculated by multiplying the number of outstanding shares by the price per share.

4. For the purposes of paragraph 1(c), the daily turnover of a share shall be calculated by aggregating the results of multiplying, for each transaction executed during a trading day, the number of shares exchanged between the buyer and the seller by the price per share.

5. During the six-week period commencing on the first trading day following the first admission of a share to trading on a regulated market or an MTF, that share shall be considered to have a liquid market for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014 where the sum obtained by multiplying the number of outstanding shares by the price at which the share stands at the start of the first trading day is estimated to be not less than EUR 200 million, and, where, according to estimated data for that period, the conditions set out in paragraph 1(b) and (c) are fulfilled.

6. Where fewer than five shares traded on the trading venues of a Member State and first admitted to trading in that Member State are considered to have a liquid market in accordance with paragraph 1, the competent authority of that Member State may designate one or more share first admitted to trading on those trading venues as share considered to have a liquid market, provided that the total number of shares first admitted to trading in that Member State and considered to have a liquid market does not exceed five.

Article 2

Determining liquid markets for depositary receipts

(Article 2(1)(17)(b) of Regulation (EU) No 600/2014)

1. For the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014, a depositary receipt that is traded daily shall be considered to have a liquid market where all of the following conditions are satisfied:

   (a) the free float is not less than EUR 100 million;

   (b) the average daily number of transactions in the depositary receipt is not less than 250;

   (c) the average daily turnover for the depositary receipt is not less than EUR 1 million.

2. For the purposes of paragraph 1(a), the free float of a depositary receipt shall be calculated by multiplying the number of outstanding units of the depositary receipt by the price per unit.

3. For the purposes of paragraph 1(c), the daily turnover of a depositary receipt shall be calculated by aggregating the results of multiplying, for each transaction executed during a trading day, the number of units of the depositary receipt exchanged between the buyer and the seller by the price per unit.

4. For the six-week period commencing on the first day of trading following the first admission of a depositary receipt to trading on a trading venue, that depositary receipt shall be considered to have a liquid market for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014 where the estimated free float at the start of the first day of trading stands at not less than EUR 100 million and, where, according to estimated data for that period, the conditions set out in paragraph 1(b) and (c) are fulfilled.

5. Where fewer than five depositary receipts traded on the trading venues of a Member State and first admitted to trading in that Member State are considered to have a liquid market in accordance with paragraph 1, the competent authority of that Member State may designate one or more depositary receipt first admitted to trading on those trading venues as depositary receipt considered to have a liquid market, provided that the total number of depositary receipts first admitted to trading in that Member State and considered to have a liquid market does not exceed five.

Article 3

Determining liquid markets for exchange traded funds

(Article 2(1)(17)(b) of Regulation (EU) No 600/2014)

1. For the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014, an exchange traded fund that is traded daily shall be considered to have a liquid market where all of the following conditions are satisfied:

   (a) the free float is not less than 100 units;

   (b) the average daily number of transactions in the exchange traded fund is not less than 10;

   (c) the average daily turnover for the exchange traded fund is not less than EUR 500,000.

2. For the purposes of paragraph 1(a), the free float of an exchange traded fund shall be the number of units issued for trading.

3. For the purposes of paragraph 1(c), the daily turnover for the exchange traded fund shall be calculated by aggregating the results of multiplying, for each transaction executed during a trading day, the number of units of the exchanged traded fund exchanged between the buyer and the seller by the price per unit.

4. During the six-week period commencing on the first trading day following the first admission of an exchange traded fund to trading on a trading venue, that exchange traded fund shall be considered to have a liquid market for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014 where the estimated free float at the start of the first trading day stands at not less than 100 units and, where, according to estimated data for that period, the conditions set out in paragraph 1(b) and (c) are fulfilled.

5. Where fewer than five exchange traded funds traded on the trading venues of a Member State and first admitted to trading in that Member State are considered to have a liquid market in accordance with paragraph 1, the competent authority of that

Member State may designate one or more exchange traded fund first admitted to trading on those trading venues as exchange traded fund considered to have a liquid market, provided that the total number of exchange traded funds first admitted to trading in that Member State and considered to have a liquid market does not exceed five.

Article 4

Determining liquid markets for certificates

(Article 2(1)(17)(b) of Regulation (EU) No 600/2014)

1. For the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014, a certificate that is traded daily shall be considered to have a liquid market where all of the following conditions are satisfied:

   (a) the free float is not less than EUR 1 million;

   (b) the average daily number of transactions in the certificate is not less than 20;

   (c) the average daily turnover for the certificate is not less than EUR 500,000.

2. For the purposes of paragraph 1(a), the free float of a certificate shall be the issuance size irrespective of the number of units issued.

3. For the purposes of paragraph 1(c), the daily turnover for the certificate shall be calculated by aggregating the results of multiplying, for each transaction executed during a trading day, the number of units of the certificate exchanged between the buyer and the seller by the price per unit.

4. During the six-week period commencing on the first trading day following the first admission of a certificate to trading on a trading venue, that certificate shall be considered to have a liquid market for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014 where the estimated free float at the start of the first trading day stands at not less than EUR 1 million, and, where, according to estimated data for that period, the conditions set out in paragraph 1(b) and (c) are fulfilled.

5. Where fewer than five certificates traded on the trading venues of a Member State and first admitted to trading in that Member State are considered to have a liquid market in accordance with paragraph 1, the competent authority of that Member State may designate one or more certificate first admitted to trading on those trading venues as certificate considered to have a liquid market, provided that the total number of certificates first admitted to trading in that Member State and considered to have a liquid market does not exceed five.

Article 5

Assessment of liquidity of equity instruments by the competent authorities

(Article 2(1)(17)(b) of Regulation (EU) No 600/2014)

1. The competent authority of the most relevant market in terms of liquidity as specified in Article 16 of Commission Delegated Regulation (EU) xxx/20xx[2] shall assess whether a share, depositary receipt, exchange traded fund or a certificate has a liquid market for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014 in accordance with Articles 1 to 4 in each of the following scenarios:

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[2] Commission Delegated Regulation (EU) xxx/20xx on reporting obligations under Article 26 of Regulation (EU) 600/2014.

(a) before the financial instrument is first traded on the trading venue, as specified in Article 1(5), Article 2(4), Article 3(4) and Article 4(4) ;

(b) between the end of the first four weeks of trading and the end of the first six weeks of trading of the financial instrument. The assessment for this scenario shall be based on the free float as at the last trading day of the first four weeks of trading, the average daily number of transactions and the average daily turnover taking into consideration all transactions executed in the Union for that financial instrument during the first four weeks of trading;

(c) between the end of every calendar year and before 1 March of the following year for financial instruments traded on a trading venue before 1 December of the relevant calendar year. The assessment for this scenario shall be based on the free float as at the last trading day of the relevant calendar year, the average daily number of transactions and the average daily turnover taking into consideration all transactions executed in the Union for that financial instrument in that year;

(d) immediately after the moment where, following a corporate action, any previous assessment has changed.

Competent authorities shall ensure that the result of their assessment is published immediately upon completion of the assessment.

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:

(a) for a period of six weeks commencing on the first day of trading of the financial instrument where the assessment is carried out pursuant to paragraph 1(a) of this Article;

(b) for a period commencing six weeks after the first day of trading of that financial instrument and ending on 1 April of the year of publication of the information in accordance with paragraph 1(c) of this Article where the assessment is carried out pursuant to paragraph 1(b) of this Article;

(c) for a period of one year commencing on 1 April following the date of publication where the assessment is carried out pursuant to paragraph 1(c) of this Article.

Where the information referred to in this paragraph is replaced by new information pursuant to paragraph 1(d) of this Article, competent authorities, market operators and investment firms including investment firms operating a trading venue shall use that new information for the purposes Article 2(1)(17)(b) of Regulation (EU) No 600/2014.

3. For the purposes of paragraph 1, trading venues shall submit to competent authorities the information set out in the Annex within the following timeframes:

(a) for financial instruments which are admitted to trading for the first time, before the day on which the financial instrument is first traded;

(b) for financial instruments already admitted to trading, in all the following timeframes:

(i) no later than three days after the end of the first four weeks of trading;

(ii) after the end of every calendar year but no later than 3 January of the following year;

(iii) immediately after the moment where, following a corporate action, the information previously submitted to the competent authority has changed.

CHAPTER II
Data provision obligations for trading venues and systematic internalisers

Article 6
Obligation to provide market data on a reasonable commercial basis
(Article 13(1), 15(1) and 18(8) of Regulation (EU) No 600/2014)

1. For the purposes of making market data containing the information set out in Articles 3, 4, 6 to 11, 15 and 18 of Regulation (EU) No 600/2014 available to the public on a reasonable commercial basis, market operators and investment firms operating a trading venue and systematic internalisers shall, in accordance with Article 13(1), Article 15(1) and 18(8) of Regulation (EU) No 600/2014, comply with the obligations set out in Articles 7 to 11 of this Regulation.

2. Articles 7, 8(2), 9, 10(2) and 11 shall not apply to market operators or investment firms operating trading venues or to systematic internalisers that make market data available to the public free of charge.

Article 7
Obligation to provide market data on the basis of cost
(Article 13(1), 15(1) and 18(8) of Regulation (EU) No 600/2014)

1. The price of market data shall be based on the cost of producing and disseminating such data and may include a reasonable margin.

2. The cost of producing and disseminating market data may include an appropriate share of joint costs for other services provided by market operators or investment firms operating a trading venue or by systematic internalisers.

Article 8
Obligation to provide market data on a non-discriminatory basis
(Article 13(1), 15(1) and 18(8) of Regulation (EU) No 600/2014)

1. Market operators and investment firms operating a trading venue and systematic internalisers shall make market data available at the same price and on the same terms and conditions to all customers falling within the same category in accordance with published objective criteria.

2. Any differentials in prices charged to different categories of customers shall be proportionate to the value which the market data represents to those customers, taking into account:

(a) the scope and scale of the market data including the number of financial instruments covered and their trading volume;

(b) the use made by the customer of the market data, including whether it is used for the customer's own trading activities, for resale or for data aggregation.

3. For the purposes of paragraph 1, market operators and investment firms operating a trading venue and systematic internalisers shall have scalable capacities in place to ensure that customers obtain timely access to market data at all times on a non-discriminatory basis.

Article 9

Obligations in relation to per user fees

(Article 13(1), 15(1) and 18(8) of Regulation (EU) No 600/2014)

1. Market operators and investment firms operating a trading venue and systematic internalisers shall charge for the use of market data according to the use made by the individual end-users of the market data ('per user basis'). Market operators and investment firms operating a trading venue and systematic internalisers shall put arrangements in place to ensure that each individual use of market data is charged only once.

2. By way of derogation from paragraph 1, market operators and investment firms operating a trading venue and systematic internalisers may decide not to make market data available on a per user basis where to charge on a per user basis is disproportionate to the cost of making that data available, having regard to the scale and scope of the data.

3. Market operators and investment firms operating a trading venue and systematic internalisers shall provide grounds for the refusal to make market data available on a per user basis and shall publish those grounds on their webpage.

Article 10

Obligation to keep data unbundled and to disaggregate market data

(Article 13(1), 15(1) and 18(8) of Regulation (EU) No 600/2014)

1. Market operators and investment firms operating a trading venue and systematic internalisers shall make market data available without being bundled with other services.

2. Prices for market data shall be charged on the basis of the level of market data disaggregation provided for in Article 12(1) of Regulation (EU) No 600/2014.

Article 11

Transparency obligation

(Article 13(1), 15(1) and 18(8) of Regulation (EU) No 600/2014)

1. Market operators and investment firms operating a trading venue and systematic internalisers shall disclose the price and other terms and conditions for the provision of the market data in a manner which is easily accessible to the public.

2. The disclosure shall include the following:

(a) current price lists, including:

– fees per display user;

– non-display fees;

– discount policies;

– fees associated with licence conditions;

– fees for pre-trade and for post-trade market data;

– fees for other subsets of information, including those required in accordance with [reference to the regulatory technical standards pursuant to Article 12(2) of Regulation (EU) No 600/2014];

– other contractual terms and conditions regarding the current price list;

(b) advance disclosure with a minimum of 90 days' notice of future price changes;

(c) information on the content of the market data including:

(i) the number of instruments covered;

(ii) the total turnover of instruments covered;

(iii) pre-trade and post-trade market data ratio;

(iv) information on any data provided in addition to market data;

(v) the date of the last licence fee adaption for market data provided;

(d) revenue obtained from making market data available and the proportion of that revenue compared to the total revenue of the market operator and investment firm operating a trading venue or systematic internalisers;

(e) information on how the price was set, including the cost accounting methodologies used and the specific principles according to which direct and variable joint costs are allocated and fixed joint costs are apportioned, between the production and dissemination of market data and other services provided by market operators and investment firms operating a trading venue or systematic internalisers.

CHAPTER III
Data publication obligations for systematic internalisers

Article 12

Obligation for systematic internalisers to make quotes public on a regular and continuous basis during normal trading hours

(Article 15(1) of Regulation (EU) No 600/2014)

For the purposes of Article 15(1) of Regulation (EU) No 600/2014, a systematic internaliser shall be considered to make public its quotes on a regular and continuous basis during normal trading hours only where the systematic internaliser makes the quotes available at all times during the hours which the systematic internaliser has established and published in advance as its normal trading hours.

Article 13

Obligation for systematic internalisers to make quotes easily accessible

(Article 15(1) of Regulation (EU) No 600/2014)

1. Systematic internalisers shall specify and update on their website's homepage which of the publication arrangements set out in Article 17(3)(a) of Regulation (EU) No 600/2014 they use to make public their quotes.

2. Where systematic internalisers make their quotes public through the arrangements of a trading venue or an APA, the systematic internaliser shall disclose their identity in the quote.

3. Where systematic internalisers employ more than one arrangement to make public their quotes, publication of the quotes shall occur simultaneously.

4. Systematic internalisers shall make public their quotes in a machine-readable format. Quotes shall be considered to be published in a machine-readable format where the publication meets the criteria set out in the [Regulatory Technical Standard adopted in accordance with Article 9(5) of Regulation No 600/2014, on machine readability under Articles 64(6) and 65(6) of Directive 2014/65/EU.

5. Where systematic internalisers make public their quotes through proprietary arrangements only, the quotes shall also be made public in a human-readable format. Quotes shall be considered to be published in a human-readable format where:

(a) the content of the quote is in a format which can be understood by the average reader;

(b) the quote is published on the systematic internaliser's website and the website's homepage contains clear instructions for accessing the quote.

6. Quotes shall be published using the standards and specifications set out in [reference to the Regulatory Technical Standard adopted in accordance with Article 17(3) of Regulation No 600/2014].

Article 14

Execution of orders by systematic internalisers

(Article 15(1), 15(2) and 15(3) of Regulation (EU) No 600/2014)

1. For the purposes of Article 15(1) of Regulation (EU) No 600/2014, exceptional market conditions are considered to exist where to impose on a systematic internaliser an obligation to provide firm quotes to clients would be contrary to prudent risk management and, in particular, where:

(a) the trading venue where the financial instrument was first admitted to trading or the most relevant market in terms of liquidity halts trading for that financial instrument in accordance with Article 48(5) of Directive 2014/65/EU;

(b) the trading venue where the financial instrument was first admitted to trading or the most relevant market in terms of liquidity allows market making obligations to be suspended;

(c) in the case of an exchange traded fund, a reliable market price is not available for a significant number of instruments underlying the ETF or the index;

(d) a competent authority prohibits short sales in that financial instrument according to Article 20 of Regulation (EU) No 236/2012.

2. For the purposes of Article 15(1) of Regulation (EU) No 600/2014, a systematic internaliser may update its quotes at any time, provided at all times that the updated quotes are the consequence of, and consistent with, genuine intentions of the systematic internaliser to trade with its clients in a non-discriminatory manner.

3. For the purposes of Article 15(2) of Regulation (EU) No 600/2014, a price falls within a public range close to market conditions where the following conditions are fulfilled:

(a) the price is within the bid and offer quotes of the systematic internaliser;

(b) the quotes referred to in point (a) reflect prevailing market conditions for the relevant financial instrument in accordance with reference to Commission delegated regulation providing regulatory technical standards in accordance with Article 14(7) of MiFIR.

4. For the purposes of Article 15(3) of Regulation (EU) No 600/2014, execution in several securities shall be considered part of one transaction where the criteria laid down in [delegated regulation adopted in accordance with Article 4(6)(d) of Regulation No 600/2014] are fulfilled.

5. For purposes of Article 15(3) of Regulation (EU) No 600/2014, an order shall be considered subject to conditions other than the current market price where the criteria laid down in [delegated regulation adopted in accordance with Article 4(6)(d) of Regulation No 600/2014, setting out criteria for negotiated transactions other than the current market price are fulfilled.

Article 15

Orders considerably exceeding the norm

(Article 17(2) of Regulation EU 600/2014)

1. For the purposes of Article 17(2) of Regulation (EU) No 600/2014, the number or volume of orders shall be considered to considerably exceed the norm where a systematic internaliser cannot execute the number or volume of those orders without exposing itself to undue risk.

2. Investment firms acting as systematic internalisers shall determine in advance and in a manner that is objective and consistent with their risk management policy and procedures referred to in Article 23 of [COMMISSION DELEGATED REGULATION (EU) …/... of XXX supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive], when the number or volume of orders sought by clients is considered to expose the firm to undue risk.

3. For the purposes of paragraph 2, a systematic internaliser shall establish, maintain and implement as part of its risk management policy and procedures, a policy for identifying the number or volume of orders that it can execute without being exposed to undue risk, taking into account both the capital that the firm has available to cover the risk for that type of trade and the prevailing conditions in the market.

4. In accordance with Article 17(2) of Regulation (EU) No 600/2014, the policy referred to in paragraph 3 shall be non-discriminatory to clients.

Article 16

Size specific to the instrument

(Article 18(6) of Regulation (EU) No 600/2014)

For the purposes of Article 18(6) of Regulation (EU) No 600/2014, the size specific to the instrument in respect of instruments traded on request for quote, voice, hybrid or other trading forms shall be as set out in Annex III to the Commission Delegated Regulation …/...adopted in accordance with Article 9(5) of Regulation No 600/2014.

CHAPTER IV
Derivatives

Article 17
Elements of Portfolio compression
(Article 31(4) of Regulation (EU) No 600/2014)

1. For the purposes of Article 31(1) of Regulation (EU) No 600/2014, investment firms and market operators providing portfolio compression shall fulfil the conditions in paragraphs 2 to 6.

2. Investment firms and market operators shall conclude an agreement with the participants to the portfolio compression providing for the compression process and its legal effects, including identifying the point in time at which each portfolio compression becomes legally binding.

3. The agreement referred to in paragraph 2 shall include all relevant legal documentation describing how derivatives submitted for inclusion in the portfolio compression are terminated and how they are replaced by other derivatives.

4. Before each compression process is initiated, investment firms and market operators providing portfolio compression shall:

   (a) require each participant to the portfolio compression to specify the participant's risk tolerance including specifying a limit for counterparty risk, a limit for market risk and a cash payment tolerance. Investment firms and market operators shall respect the risk tolerance specified by the participants in the portfolio compression;

   (b) link the derivatives submitted for portfolio compression and submit to each participant a portfolio compression proposal that includes the following information:

      (i) the identification of the counterparties affected by the compression,

      (ii) the related change to the combined notional value of the derivatives,

      (iii) the variation of the combined notional amount compared to the risk tolerance specified.

5. In order to adjust the compression to the risk tolerance set by the participants to the portfolio compression and in order to maximise the efficiency of the portfolio compression, investment firms and market operators may grant participants additional time to add derivatives eligible for termination or reduction.

6. Investment firms and market operators shall only perform the portfolio compression once all participants to the portfolio compression have agreed to the portfolio compression proposal.

Article 18
Publication requirements for Portfolio compression
(Article 31(4) of Regulation (EU) No 600/2014)

1. For the purposes of Article 31(2) of Regulation (EU) No 600/2014 investment firms and market operators shall make the following information public through an APA for each portfolio compression cycle:

(a) a list of derivatives submitted for inclusion in the portfolio compression,

(b) a list of derivatives replacing the terminated derivatives,

(c) a list of derivatives changed or terminated as a result of the portfolio compression,

(d) the number of derivatives and their value expressed in terms of notional amount.

The information referred to in the first subparagraph shall be disaggregated per type of derivative and per currency.

2. Investment firms and market operators shall make public the information referred to in paragraph 1 as close to real-time as is technically possible and no later than the close of the following business day after a compression proposal becomes legally binding in accordance with the agreement referred to in Article 17(2).

CHAPTER V
Supervisory measures on product intervention and position management

SECTION 1
PRODUCT INTERVENTION

Article 19

Criteria and factors for the purposes of ESMA temporary product intervention powers

(Article 40(2) of Regulation (EU) No 600/2014)

1. For the purposes of Article 40(2)(a) of Regulation No 600/2014, ESMA shall assess the relevance of all factors and criteria listed in paragraph 2, and take into consideration all relevant factors and criteria in determining when the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features or a type of financial activity or practice creates a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of the Union.

For the purposes of the first subparagraph, ESMA may determine the existence of a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of the Union based on one or more of those factors and criteria.

2. The factors and criteria to be assessed by ESMA to determine whether there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of the Union shall be the following:

(a) the degree of complexity of the financial instrument or type of financial activity or practice in relation to the type of clients, as assessed in accordance with point (c), involved in the financial activity or financial practice, or to whom the financial instrument is marketed or sold, taking into account, in particular:

– the type of the underlying or reference assets and the degree of transparency of the underlying or reference assets;

– the degree of transparency of costs and charges associated with the financial instrument, financial activity or financial practice and, in particular, the lack of transparency resulting from multiple layers of costs and charges;

– the complexity of the performance calculation, taking into account in particular whether the return is dependent on the performance of one or more underlying or reference assets which are in turn affected by other factors or whether the return depends not only on the values of the underlying or reference assets at the initial and maturity dates, but also on the values during the lifetime of the product;

– the nature and scale of any risks;

– whether the instrument or service is bundled with other products or services; or

– the complexity of any terms and conditions;

(b) the size of potential detrimental consequences, considering in particular:

– the notional value of the financial instrument;

– the number of clients, investors or market participants involved;

– the relative share of the product in investors' portfolios;

– the probability, scale and nature of any detriment, including the amount of loss potentially suffered;

– the anticipated duration of the detrimental consequences;

– the volume of the issuance;

– the number of intermediaries involved;

– the growth of the market or sales; or

– the average amount invested by each client in the financial instrument;

(c) the type of clients involved in a financial activity or financial practice or to whom a financial instrument is marketed or sold, taking into account, in particular:

– whether the client is a retail client, a professional client or an eligible counterparty;

– clients' skills and abilities, including the level of education, experience with similar financial instruments or selling practices;

– clients' economic situation, including their income and wealth;

– clients' core financial objectives, including pension saving and home ownership financing; or

– whether the instrument or service is being sold to clients outside the intended target market or whether the target market has not been adequately identified;

(d) the degree of transparency of the financial instrument or type of financial activity or practice, taking into account, in particular:

– the type and transparency of the underlying;

– any hidden costs and charges;

– the use of techniques drawing clients' attention but not necessarily reflecting the suitability or overall quality of the financial instrument, financial activity or financial practice;

– the nature of risks and transparency of risks; or

– the use of product names or terminology or other information that imply a greater level of security or return than those which are actually possible or likely, or which imply product features that do not exist;

(e) the particular features or components of the financial instrument, financial activity or financial practice, including any embedded leverage, taking into account, in particular:

– the leverage inherent in the product;

– the leverage due to financing;

– the features of securities financing transactions; or

– the fact that the value of any underlying is no longer available or reliable;

(f) the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the financial instrument, financial activity or financial practice, taking into account, in particular:

– the structuring costs of such financial instrument, activity or practice and other costs;

– the disparity in relation to the issuer's risk retained by the issuer; or

– the risk/return profile;

(g) the ease and cost with which investors are able to sell the relevant financial instrument or switch to another financial instrument, taking into account, in particular:

– the bid/ask spread;

– the frequency of trading availability;

– the issuance size and size of the secondary market;

– the presence or absence of liquidity providers or secondary market makers;

– the features of the trading system; or

– any other barriers to exit;

(h) the pricing and associated costs of the financial instrument, financial activity or financial practice, taking into account, in particular:

– the use of hidden or secondary charges; or

– charges that do not reflect the level of service provided;

(i) the degree of innovation of a financial instrument, a financial activity or a financial practice, taking into account, in particular:

– the degree of innovation related to the structure of the financial instrument, financial activity or financial practice, including embedding and triggering;

– the degree of innovation relating to the distribution model or length of the intermediation chain;

– the extent of innovation diffusion, including whether the financial instrument, financial activity or financial practice is innovative for particular categories of clients;

– innovation involving leverage;

– the lack of transparency of the underlying; or

– the past experience of the market with similar financial instruments or selling practices;

(j) the selling practices associated with the financial instrument, taking into account, in particular:

– the communication and distribution channels used;

– the information, marketing or other promotional material associated with the investment;

– the assumed investment purposes; or

– whether the decision to buy is secondary or tertiary following an earlier purchase;

(k) the financial and business situation of the issuer of a financial instrument, taking into account, in particular:

– the financial situation of the issuer or any guarantor; or

– the transparency of business situation of the issuer or guarantor;

(l) whether there is insufficient, or unreliable, information about a financial instrument, provided either by the manufacturer or the distributors, to enable market participants at whom it is targeted to make an informed decision, taking into account the nature and type of the financial instrument;

(m) whether the financial instrument, financial activity or financial practice poses a high risk to the performance of transactions entered into by participants or investors in the relevant market;

(n) whether the financial activity or financial practice would significantly compromise the integrity of the price formation process in the market concerned, such that the price or value of the financial instrument in question is no longer determined according to legitimate market forces of supply and demand, or such that market participants are no longer able to rely on the prices formed in that market or in the volumes of trading as a basis for their investment decisions;

(o) whether the characteristics of a financial instrument make it particularly susceptible to being used for the purposes of financial crime and, in particular

whether those characteristics could potentially encourage the use of the financial instrument for:

– any fraud or dishonesty;

– misconduct in, or misuse of information in relation to a financial market;

– handling the proceeds of crime;

– the financing of terrorism; or

– facilitating money laundering;

(p) whether the financial activity or financial practice poses a particularly high risk to the resilience or smooth operation of markets and their infrastructure;

(q) whether a financial instrument, financial activity or financial practice could lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;

(r) whether the financial instrument, financial activity or financial practice poses a high risk of disruption to financial institutions deemed to be important to the financial system of the Union;

(s) the relevance of the distribution of the financial instrument as a funding source for the issuer;

(t) whether a financial instrument, financial activity or financial practice poses particular risks to the market or payment systems infrastructure, including trading, clearing and settlement systems; or

(u) whether a financial instrument, financial activity or financial practice may threaten investors' confidence in the financial system.

Article 20

Criteria and factors for the purposes of EBA temporary product intervention powers

(Article 41(2) of Regulation (EU) No 600/2014)

1. For the purposes of Article 41(2)(a) of Regulation No 600/2014, EBA shall assess the relevance of all factors and criteria listed in paragraph 2, and take into consideration all relevant factors and criteria in determining when the marketing, distribution or sale of certain structured deposits or structured deposits with certain specified features or a type of financial activity or practice creates a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union.

For the purposes of the first subparagraph, EBA may determine the existence of a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system of the Union based on one or more of those factors and criteria.

2. The factors and criteria to be assessed by EBA to determine whether there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union shall be the following:

(a) the degree of complexity of a structured deposit or type of financial activity or practice in relation to the type of clients, as assessed in accordance with point

(c), involved in the financial activity, or financial practice, taking into account, in particular:

– the type of the underlying or reference assets and the degree of transparency of the underlying or reference assets;

– the degree of transparency of costs and charges associated with the structured deposit, financial activity or financial practice and, in particular, the lack of transparency resulting from multiple layers of costs and charges;

– the complexity of the performance calculation, taking into account in particular whether the return is dependent on the performance of one or more underlying or reference assets which are in turn affected by other factors or whether the return depends not only on the values of the underlying or reference assets at the initial and maturity or interest payment dates, but also on the values during the lifetime of the product;

– the nature and scale of any risks;

– whether the structured deposit or service is bundled with other products or services; or

– the complexity of any terms and conditions;

(b) the size of potential detrimental consequences, considering, in particular:

– the notional value of an issuance of structured deposits;

– the number of clients, investors or market participants involved;

– the relative share of the product in investors' portfolios;

– the probability, scale and nature of any detriment, including the amount of loss potentially suffered;

– the anticipated duration of the detrimental consequences;

– the volume of the issuance;

– the number of institutions involved;

– the growth of the market or sales;

– the average amount invested by each client in the structured deposit; or

– the coverage level defined in Directive 2014/49/EU;

(c) the type of clients involved in a financial activity or financial practice or to whom a structured deposit is marketed or sold, taking into account, in particular:

– whether the client is a retail client, a professional client or an eligible counterparty;

– clients' skills and abilities, including level of education, experience with similar financial products or selling practices;

– clients' economic situation, including income, wealth;

– clients' core financial objectives, including pension saving, home ownership financing;

- whether the product or service is being sold to clients outside the intended target market or where the target market has not been adequately identified; or
- the eligibility for coverage by a deposit guarantee scheme;

(d) the degree of transparency of the structured deposit or type of financial activity or financial practice, taking into account, in particular:

- the type and transparency of the underlying;
- any hidden costs and charges;
- the use of techniques drawing clients' attention but not necessarily reflecting the suitability or overall quality of the product or service;
- the type and transparency of risks;
- the use of product names or of terminology or other information that is misleading by implying product features that do not exist; or
- whether the identity of deposit takers which might be responsible for the client's deposit, is disclosed;

(e) the particular features or components of the structured deposit or financial activity or financial practice, including any embedded leverage, taking into account, in particular:

- the leverage inherent in the product;
- the leverage due to financing; or
- the fact that the value of any underlying is no longer available or reliable;

(f) the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the structured deposit, financial activity or financial practice, taking into account, in particular:

- the structuring costs of such structured deposits, activity or practice and other costs;
- the disparity in relation to the issuer's risk retained by the issuer; or
- the risk-return profile;

(g) the costs of and ease with which investors are able to exit a structured deposit, in particular considering:

- the fact that early withdrawal is not allowed; or
- any other barriers to exit;

(h) the pricing and associated costs of the structured deposit, financial activity or financial practice, taking into account, in particular:

- the use of hidden or secondary charges; or
- charges that do not reflect the level of service provided;

(i) the degree of innovation of a structured deposit, a financial activity or a financial practice, taking into account, in particular:

- the degree of innovation related to the structure of the structured deposit, financial activity or financial practice, including embedding and triggering;
- the degree of innovation relating to the distribution model or length of the intermediation chain;
- the extent of innovation diffusion, including whether the structured deposit, financial activity or financial practice is innovative for particular categories of clients;
- innovation involving leverage;
- the lack of transparency of the underlying; or
- the past experience of the market with similar structured deposits or selling practices;

(j) the selling practices associated with the structured deposit, taking into account, in particular:

- the communication and distribution channels used;
- the information, marketing or other promotional material associated with the investment;
- the assumed investment purposes; or
- whether the decision to buy is a secondary or tertiary following an earlier purchase;

(k) the financial and business situation of the issuer of a structured deposit, taking into account, in particular:

- the financial situation of the issuer or any guarantor; or
- the transparency of the business situation of the issuer or guarantor;

(l) whether there is insufficient or unreliable information about a structured deposit, provided either by the manufacturer or the distributors, to enable market participants at whom it is targeted to make an informed decision, taking into account the nature and type of the structured deposit;

(m) whether the structured deposit, the financial activity or the financial practice poses a high risk to the performance of transactions entered into by participants or investors in the relevant market;

(n) whether the structured deposit, the financial activity or the financial practice would leave the Union economy vulnerable to risks;

(o) whether the characteristics of a structured deposit make it particularly susceptible to being used for the purposes of financial crime and, in particular whether those characteristics could potentially encourage the use of structured deposits for:

- any fraud or dishonesty;
- misconduct in, or misuse of information, in relation to a financial market;
- handling the proceeds of crime;
- the financing of terrorism; or

– facilitating money laundering;

(p) whether the financial activity or financial practice poses a particularly high risk to the resilience or smooth operation of markets and their infrastructure;

(q) whether a structured deposit, a financial activity or a financial practice could lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;

(r) whether the structured deposit, a financial activity or a financial practice poses a high risk of disruption to financial institutions deemed to be important to the financial system of the Union, in particular considering the hedging strategy pursued by financial institutions in relation to the issuance of the structured deposit, including the mispricing of the capital guarantee at maturity or the reputational risks posed by the structured deposit or practice or activity to the financial institutions;

(s) the relevance of the distribution of structured deposit as a funding source for the financial institution;

(t) whether a structured deposit, financial practice or financial activity poses particular risks to the market or payment systems infrastructure; or

(u) whether a structured deposit or financial practice or financial activity could threaten investors' confidence in the financial system.

Article 21

Criteria and factors to be taken into account by competent authorities for the purposes of product intervention powers

(Article 42(2) of Regulation (EU) No 600/2014)

1. For the purposes of Article 42(2)(a) of Regulation No 600/2014, competent authorities shall assess the relevance of all factors and criteria listed in paragraph 2, and take into consideration all relevant factors and criteria in determining when the marketing, distribution or sale of certain financial instruments or structured deposits or financial instruments or structured deposits with certain specified features or a type of financial activity or practice creates a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system within at least one Member State.

   For the purposes of the first subparagraph, competent authorities may determine the existence of a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system within at least one Member State based on one or more of those factors and criteria.

2. The factors and criteria to be assessed by competent authorities to determine whether there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system within at least one Member State shall include the following:

   (a) the degree of complexity of the financial instrument or type of financial activity or practice in relation to the type of clients, as assessed in accordance with point (c), involved in the financial activity or financial practice, or to

whom the financial instrument or structured deposit is marketed or sold, taking into account, in particular:

- the type of the underlying or reference assets and the degree of transparency of the underlying or reference assets;
- the degree of transparency of costs and charges associated with the financial instrument, structured deposit, financial activity or financial practice, and, in particular, the lack of transparency resulting from multiple layers of costs and charges;
- the complexity of the performance calculation, taking into account whether the return is dependent on the performance of one or more underlying or reference assets which are in turn affected by other factors or whether the return depends not only on the values of the underlying or reference assets at the initial and maturity dates, but also on the values during the lifetime of the product;
- the nature and scale of any risks;
- whether the product or service is bundled with other products or services;
- the complexity of any terms and conditions;

(b) the size of potential detrimental consequences, considering in particular:

- the notional value of the financial instrument or of an issuance of structured deposits;
- the number of clients, investors or market participants involved;
- the relative share of the product in investors' portfolios;
- the probability, scale and nature of any detriment, including the amount of loss potentially suffered;
- the anticipated duration of the detrimental consequences;
- the volume of the issuance;
- the number of intermediaries involved;
- the growth of the market or sales;
- the average amount invested by each client in the financial instrument or structured deposit; or
- the coverage level defined in Directive 2014/49/EU, in the case of structured deposits;

(c) the type of clients involved in a financial activity or financial practice or to whom a financial instrument or structured deposit is marketed or sold, taking into account, in particular:

- whether the client is a retail client, a professional client or an eligible counterparty;
- clients' skills and abilities, including the level of education, experience with similar financial instruments or structured deposits or selling practices;
- clients' economic situation, including their income, and wealth;

- clients’ core financial objectives, including pension saving and home ownership financing;
- whether the product or service is being sold to clients outside the intended target market or where the target market has not been adequately identified; or
- the eligibility for coverage by a deposit guarantee scheme, in the case of structured deposits;

(d) the degree of transparency of the financial instrument, structured deposit or type of financial activity or practice, taking into account, in particular:

- the type and transparency of the underlying;
- any hidden costs and charges;
- the use of techniques drawing clients’ attention but not necessarily reflecting the suitability or overall quality of the product, the financial activity or the financial practice;
- the nature of risks and transparency of risks;
- the use of product names or terminology or other information that is misleading by implying a greater level of security or return than those which are actually possible or likely, or which imply product features that do not exist; or
- in case of structured deposits, whether the identity of deposit takers which might be responsible for the client’s deposit, is disclosed;

(e) the particular features or components of the structured deposit, financial instrument, financial activity or financial practice, including any embedded leverage, taking into account, in particular:

- the leverage inherent in the product;
- the leverage due to financing;
- the features of securities financing transactions; or
- the fact that the value of any underlying is no longer available or reliable;

(f) the existence and degree of disparity between the expected return or profit for investors and the risk of loss in relation to the financial instrument, structured deposit, financial activity or financial practice, taking into account, in particular:

- the structuring costs of such financial instrument, structured deposit, financial activity or financial practice and other costs;
- the disparity in relation to the issuer’s risk retained by the issuer; or
- the risk-return profile;

(g) the costs and ease with which investors are able to sell the relevant financial instrument or switch to another financial instrument, or exit a structured deposit, taking into account, in particular, where applicable depending on whether the product is a financial instrument or structured deposit:

- the bid-ask spread;

- the frequency of trading availability;
- the issuance size and size of the secondary market;
- the presence or absence of liquidity providers or secondary market makers;
- the features of the trading system; or
- any other barriers to exit or the fact that early withdrawal is not allowed;

(h) the pricing and associated costs of the financial instrument, financial activity or financial practice, taking into account, in particular:

- the use of hidden or secondary charges; or
- charges that do not reflect the level of service provided;

(i) the degree of innovation of a financial instrument or structured deposit, a financial activity or financial practice, taking into account, in particular:

- the degree of innovation related to the structure of the financial instrument, structured deposit, financial activity or financial practice, including embedding and triggering;
- the degree of innovation relating to the distribution model or length of the intermediation chain;
- the extent of innovation diffusion, including whether the financial instrument, structured deposit, financial activity or financial practice is innovative for particular categories of clients;
- innovation involving leverage;
- the lack of transparency of the underlying; or
- the past experience of the market with similar financial instruments, structured deposits or selling practices;

(j) the selling practices associated with the financial instrument or structured deposit, taking into account, in particular:

- the communication and distribution channels used;
- the information, marketing or other promotional material associated with the investment;
- the assumed investment purposes; or
- whether the decision to buy is secondary or tertiary decision following an earlier purchase;

(k) the financial and business situation of the issuer of a financial instrument or structured deposit, taking into account, in particular:

- the financial situation of the issuer or any guarantor; or
- the transparency of the business situation of the issuer or guarantor;

(l) whether there is insufficient, or unreliable, information about a financial instrument or structured deposit, provided either by the manufacturer or the distributors, to enable market participants at whom it is targeted to make an informed decision, taking into account the nature and type of the financial instrument or the structured deposit;

(m) whether the financial instrument, structured deposit, financial activity or financial practice poses a high risk to the performance of transactions entered into by participants or investors in the relevant market;

(n) whether the financial activity or financial practice would significantly compromise the integrity of the price formation process in the market concerned such that the price or value of the financial instrument or structured deposit in question is no longer determined according to legitimate market forces of supply and demand, or such that market participants are no longer able to rely on the prices formed in that market or in the volumes of trading as a basis for their investment decisions;

(o) whether a financial instrument, structured deposit, financial activity or practice would leave the national economy vulnerable to risks;

(p) whether the characteristics of a financial instrument or structured deposit make it particularly susceptible to being used for the purposes of financial crime and, in particular whether the characteristics could potentially encourage the use of the financial instrument or structured deposit for:

- any fraud or dishonesty;
- misconduct in, or misuse of information, in relation to a financial market;
- handling the proceeds of crime;
- the financing of terrorism; or
- facilitating money laundering;

(q) whether a financial activity or a financial practice poses a particularly high risk to the resilience or smooth operation of markets and their infrastructure;

(r) whether a financial instrument, structured deposit, financial activity or financial practice could lead to a significant and artificial disparity between prices of a derivative and those in the underlying market;

(s) whether the financial instrument, structured deposit, financial activity or financial practice poses a high risk of disruption to financial institutions deemed to be important to the financial system of the Member State of the relevant competent authority, in particular considering the hedging strategy pursued by financial institutions in relation to the issuance of the structured deposit, including the mispricing of the capital guarantee at maturity or the reputational risks posed by the structured deposit or practice or activity to the financial institutions;

(t) the relevance of the distribution of the financial instrument or structured deposit as a funding source for the issuer or financial institutions;

(u) whether a financial instrument, structured deposit, financial activity or financial practice poses particular risks to the market or payment systems infrastructure, including trading, clearing and settlement systems; or

(v) whether a financial instrument, structured deposit, financial activity or financial practice would threaten investors' confidence in the financial system.

SECTION 2
POSITION MANAGEMENT POWERS

Article 22
Position management powers of ESMA
(Article 45 of Regulation (EU) No 600/2014)

1. For the purposes of Article 45(2)(a) of Regulation (EU) No 600/2014, the criteria and factors determining the existence of a threat to the orderly functioning and integrity of financial markets, including commodity derivative markets in accordance with the objectives listed in Article 57(1) of Directive 2014/65/EU and in relation to delivery arrangements for physical commodities, or to the stability of the whole or part of the financial system in the Union shall be the following:

   (a) the existence of serious financial, monetary or budgetary problems which could lead to the financial instability of a Member State or a financial institution deemed important to the global financial system, including credit institutions, insurance companies, market infrastructure providers and asset management companies operating within the Union, provided that these problems could threaten the orderly functioning and integrity of financial markets or the stability of the financial system within the Union;

   (b) a rating action or a default by a Member State or a credit institution or other financial institution deemed important to the global financial system, such as insurance companies, market infrastructure providers and asset management companies operating within the Union, that causes or may reasonably be expected to cause severe uncertainty about their solvency;

   (c) substantial selling pressures or unusual volatility causing significant downward spirals in any financial instrument related to any credit institution or other financial institutions deemed important to the global financial system, such as insurance companies, market infrastructure providers and asset management companies operating within the Union and sovereign issuers;

   (d) any damage to the physical structures of important financial issuers, market infrastructures, clearing and settlement systems or competent authorities which may adversely and significantly affect markets in particular where such damage results from a natural disaster or a terrorist attack;

   (e) a disruption in any payment system or settlement process, in particular where it is related to interbank operations, which causes or may cause significant payments or settlement failures or delays within the Union payment systems, especially when these may lead to the propagation of financial or economic stress in a credit institution or other financial institutions deemed important to the global financial system, such as insurance companies, market infrastructure providers and asset management companies or in a Member State;

   (f) a significant and abrupt decrease in the supply of a commodity or an increase in the demand of a commodity, which disrupts the supply and demand balance;

   (g) a significant position in a certain commodity held by one person, or by several persons acting in concert, in one or several trading venues, through one or several market members;

(h) an inability of a trading venue to exercise its own position management powers due to a business continuity event.

2. For the purposes of Article 45(1) (b) of Regulation (EU) No 600/2014 the criteria and factors determining the appropriate reduction of a position or exposure shall be the following:

(a) the nature of the holder of the position, including producers, consumers or financial institution;

(b) the maturity of the financial instrument;

(c) the size of the position relative to the size of the relevant commodity derivative market;

(d) the size of the position relative to the size of the market for the underlying commodity;

(e) the direction of the position (short or long) and delta or ranges of delta;

(f) the purpose of the position, in particular whether the position serves hedging purposes or whether it is held for financial exposure;

(g) the experience of a position holder in holding positions of a given size, or in making or taking delivery of a given commodity;

(h) the other positions held by the person in the underlying market or in different maturities of the same derivative;

(i) the liquidity of the market and the impact of the measure on other market participants;

(j) the method of delivery.

3. For the purposes of Article 45(3)(b) of Regulation (EU) No 600/2014, the criteria specifying the situations where a risk of regulatory arbitrage may arise shall be the following:

(a) whether the same contract is traded in a different trading venue or OTC;

(b) whether a substantially equivalent contract is traded on a different venue or OTC (similar and interrelated, but not considered part of the same fungible open interest);

(c) the effects of the decision on the market of the underlying commodity;

(d) the effects of the decision on markets and participants not subject to ESMA's position management powers; and

(e) the likely effect on the orderly functioning and integrity of the markets absent ESMA action.

4. For the purposes of Article 45(2)(b) of Regulation (EU) No 600/2014, ESMA shall apply the criteria and factors set out in paragraph 1 of this Article taking into account whether the envisaged measure responds to a failure to act by a competent authority or to an additional risk which the competent authority is not able to sufficiently address pursuant to Article 69(2)(j) or (o) of Directive 2014/65/EU.

For the purposes of the first subparagraph, a competent authority shall be considered as failing to act where, based on the powers conferred to it, it has at its disposal

sufficient regulatory powers to fully address the threat at the time of the event without the assistance of any other competent authority, but fails to take such action.

A competent authority shall be considered as being unable to sufficiently address a threat where one or more of the factors referred to in Article 45(10)(a) of Regulation (EU) No 600/2014 occur within the jurisdiction of a competent authority and in one or more additional jurisdictions.

CHAPTER VI
Final provisions

Article 23
Transitional provisions

1. By way of derogation from Article 5(1), from the date of entry into force of this Regulation until the date of application thereof, competent authorities shall carry out liquidity assessments and shall publish the result of those assessments immediately upon their completion in accordance with the following timeframe:

   (a) where the date on which financial instruments are traded for the first time on a trading venue within the Union is a date not less than ten weeks prior to the date of application of Regulation (EU) No 600/2014, competent authorities shall publish the result of the assessments no later than four weeks prior to the date of application of Regulation (EU) No 600/2014;

   (b) where the date on which financial instruments are traded for the first time on a trading venue within the Union is a date falling within the period commencing ten weeks prior to the date of application of Regulation (EU) No 600/2014 and ending on the day preceding the date of application of Regulation (EU) No 600/2014, competent authorities shall publish the result of the assessments no later than the date of application of Regulation (EU) No 600/2014.

2. The assessments referred to in paragraph 1 shall be carried out as follows:

   (a) where the date on which financial instruments are traded for the first time on a trading venue within the Union is a date not less than sixteen weeks prior to the date of application of Regulation (EU) No 600/2014, the assessments shall be based on data available for a forty-week reference period commencing fifty-two weeks prior to the date of application of Regulation (EU) No 600/2014;

   (b) where the date on which financial instruments are traded for the first time on a trading venue within the Union is a date within the period commencing sixteen weeks prior to the date of application of Regulation (EU) No 600/2014 and ending ten weeks prior to the date of application of Regulation (EU) No 600/2014, the assessments shall be based on data available for the first four week trading period of the financial instrument.

   (c) where the date on which financial instruments are traded for the first time on a trading venue within the Union is a date falling within the period commencing ten weeks prior to the date of application of Regulation (EU) No 600/2014 and ending on the day preceding the date of application of Regulation (EU) No 600/2014, the assessments shall be based on the trading history of the financial instruments or other financial instruments considered to have similar characteristics to those financial instruments.

3. Competent authorities, market operators and investment firms including investment firms operating a trading venue shall use the information published in accordance with paragraph 1 for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014 until 1 April of the year following the date of application of that Regulation.

4. During the period referred to in paragraph 3, competent authorities shall ensure the following with regard to the financial instruments referred to in points (b) and (c) of paragraph 2:

   (a) that the information published in accordance with paragraph 1 remains appropriate for the purposes of Article 2(1)(17)(b) of Regulation (EU) No 600/2014;

   (b) that the information published in accordance with paragraph 1 is updated on the basis of a longer trading period and a more comprehensive trading history, where necessary.

Article 24

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*.

It shall apply from the date referred to in the second paragraph of Article 55 of Regulation (EU) No 600/2014.

However, Article 23 shall apply from the date of entry into force of this Regulation.

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

Done at Brussels, 18.5.2016

For the Commission
The President
Jean-Claude JUNCKER