



Brussels, 17.11.2017
C(2017) 7684 final

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

of 17.11.2017

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on the trading obligation for certain derivatives

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 28 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012¹ (MiFIR) introduces a trading obligation for derivatives. Pursuant to Article 28(1) of MiFIR, derivatives that are subject to the trading obligation may only be traded on a regulated market, multilateral trading facility, organised trading facility or third-country trading venue deemed to be equivalent by the Commission. Furthermore, Article 32(1) of MiFIR requires the European Securities and Markets Authority (ESMA) to develop regulatory technical standards specifying —amongst the derivatives already subject to the clearing obligation in accordance with Regulation (EU) No 648/2012²— the derivatives that should be subject to the trading obligation and the date or dates from which the trading obligation must take effect.

Therefore, the draft regulatory technical standards prepared by ESMA identify certain interest rate swaps (IRS) and Index Credit Default Swaps (CDS) that should be subject to the trading obligation. In particular, certain standardised fixed-to-float IRS denominated in EUR, GBP and USD and two CDS indices are identified as appropriate for being subject to the trading obligation, introducing the required level of detail within the description of those derivative contracts.

ESMA is required to submit draft regulatory technical standards to the Commission for endorsement, as provided for in Article 10(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) (the ‘ESMA Regulation’)³.

The draft regulatory technical standards were approved by the ESMA Board of Supervisors on 27 September 2017 and subsequently submitted to the European Commission. In accordance with the ESMA Regulation, the Commission has to decide within 3 months of receipt of the draft standards whether or not to endorse them. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of the ESMA Regulation, ESMA has carried out a public consultation on the draft regulatory technical standards. In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of the ESMA Regulation.

¹ OJ L 173, 12.6.2014, p. 84.

² Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1)

³ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This Regulation identifies certain IRS and Index CDS that should be subject to the trading obligation. As referred to in Article 1, certain standardised fixed-to-float IRS denominated in EUR, GBP and USD, and two index CDS, as specified in Tables 1 to 4 of the Annex to this Regulation, are subject to the trading obligation. Furthermore, Article 2 sets out the dates from which the trading obligation takes effect, while Article 3 lays down the entry-into-force of the Regulation.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012⁴, and in particular Article 32(1) thereof,

Whereas:

- (1) Regulation (EU) No 600/2014 provides for an obligation to trade on a regulated market, a multilateral trading facility, an organised trading facility or an equivalent third-country trading venue certain classes of derivatives, or relevant subsets thereof, which have been declared subject to the clearing obligation referred to in Article 4 of Regulation (EU) No 648/2012 of the European Parliament and of the Council⁵. That trading obligation should only apply to derivatives that are sufficiently liquid and available for trading on at least one trading venue.
- (2) For interest rate derivatives subject to the clearing obligation, liquidity is concentrated in derivative contracts which have the most standardised characteristics. Those characteristics should therefore be taken into consideration when establishing the classes of derivatives subject to the trading obligation.
- (3) Similarly, liquidity in interest rate derivatives subject to the clearing obligation is concentrated in derivative contracts having certain benchmark tenors. It is therefore appropriate to limit the trading obligation to the derivatives with those benchmark tenors. In order to distinguish derivative contracts starting immediately after the execution of the trade from derivative contracts starting at a predetermined date in the future, the tenor of a contract should be calculated based on the effective date at which the obligations under the contract come into effect. However, to adequately take into account the derivatives' liquidity pattern and to avoid circumvention of the trading obligation, it is important not to make use of benchmark tenors as strict thresholds but rather as points of reference for targeted intervals.
- (4) For credit derivatives, with respect to the two index credit default swaps that are subject to the clearing obligation, liquidity is concentrated in the current on-the-run

⁴ OJ L 173, 12.6.2014, p. 84.

⁵ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1)

series and the latest off-the-run series. It is therefore appropriate to limit the application of the trading obligation to derivatives belonging to those series only.

- (5) Commission Delegated Regulation (EU) 2015/2205⁶ (interest rate OTC derivatives) and Commission Delegated Regulation (EU) 2016/592⁷ (credit OTC derivatives) identify four categories of counterparty to which the clearing obligation applies. In order to accommodate the specific needs of each category of counterparty, a phased-in application of that clearing obligation has also been laid down in those Delegated Regulations. Given the link between the clearing obligation and the trading obligation, the trading obligation for each category of counterparty should only take effect once the clearing obligation for that category has already taken effect.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) This Regulation is adopted on the basis of the facts, and in particular the prevailing liquidity, at the time of its adoption and will be reviewed and amended as appropriate in accordance with market developments.
- (8) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁸.
- (9) In order to ensure the smooth functioning of the financial markets, this Regulation should enter into force as a matter of urgency and apply from the same date as the date of application of Regulation (EU) No 600/2014,

HAS ADOPTED THIS REGULATION:

Article 1

Derivatives subject to the trading obligation

The derivatives set out in the Annex shall be subject to the trading obligation referred to in Article 28 of Regulation (EU) No 600/2014.

A derivative referred to in Table 1, Table 2 and Table 3 of the Annex shall be deemed to have a tenor of 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 20 or 30 years where the period of time between the date at which the obligations under that contract come into effect and the termination date of that contract equals one of those periods of time, plus or minus five days.

⁶ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

⁷ Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 103, 19.4.2016, p. 5).

⁸ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 2

Dates from which the trading obligation takes effect

The trading obligation referred to in Article 28 of Regulation (EU) No 600/2014 shall, for each category of counterparties referred to in Article 3 of Delegated Regulation (EU) 2015/2205 and Article 3 of Delegated Regulation (EU) 2016/592, take effect from the later of the following dates:

- (a) 3 January 2018;
- (b) the date referred to in Article 3 of Delegated Regulation (EU) 2015/2205 or Article 3 of Delegated Regulation (EU) 2016/592 for that category of counterparties.

Article 3

Entry into force

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

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

Done at Brussels, 17.11.2017

For the Commission
The President
Jean-Claude JUNCKER