EUROPEAN
COMMISSION

Brussels, 13.2.2019
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COMMISSION DELEGATED REGULATION (EU) …/...

of 13.2.2019

amending Delegated Regulation (EU) 2017/588 as regards the possibility to adjust the average daily number of transactions for a share where the trading venue with the highest turnover of that share is located outside the Union

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 49 of Directive 2014/65/EU obliges trading venues to adopt tick size rules for shares, depositary receipts, certain exchange traded funds, certificates and similar financial instruments. Tick sizes should be calibrated to reflect the liquidity of the financial instrument in the markets where the instrument is traded. The tick size needs to be determined for each financial instrument individually.

In this context, Article 49(3) of MiFID II requires ESMA to develop draft regulatory technical standards to further specify tick sizes or tick size regimes for the instruments mentioned above.

On 12 December 2018, ESMA submitted draft regulatory technical standards proposing amendments to Commission Delegated Regulation (EU) 2017/588. This draft amendment further specified the provisions to the calculation of the tick size for financial instruments traded or admitted to trading on an EU trading and a third country trading venue in cases where the most liquid trading venue by turnover is the trading venue located outside the Union.

In accordance with Article 10(1) of Regulation No (EU) 1095/2010 establishing ESMA, the Commission shall decide within three months of receipt of the draft standards whether 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 Regulation (EU) 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards. A consultation paper was published on 13 July 2018 on the ESMA website and the consultation closed on 7 September 2018. In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of the ESMA Regulation.

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

https://www.esma.europa.eu/sites/default/files/library/esma70-156-834_final_report_on_the_proposed_amendments_to_rts_11.pdf

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This amending Regulation lays down rules to further specify the calculation of the minimum tick sizes or tick size regimes for financial instruments, where necessary to ensure the orderly functioning of markets.

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THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU[1], and in particular Article 49(3) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) 2017/588[2] sets out the mandatory tick size regime for shares, depositary receipts and certain exchange-traded funds. In particular, under Delegated Regulation (EU) 2017/588 the minimum tick size applicable to shares and depositary receipts is calibrated on the basis of the average daily number of transactions on the most liquid trading venue in the Union. This metric is a good and simple liquidity indicator for the vast majority of those financial instruments. It is however not suited to shares that are admitted to trading or traded in the Union and a third country concurrently, where the trading venue with the highest turnover in those shares is located outside the Union. In that case, there is a risk that the mandatory tick size, determined on the basis of Union trading volumes alone, will be based only on a small subset of the overall trading volumes. It is therefore important that competent authorities are allowed to adjust the average daily number of transactions for such shares so as to reflect the overall liquidity profile of those shares. In order to alleviate constraints around data availability from third-country trading venues and allow for the possibility to use other public data, it is also important to provide competent authorities with sufficient flexibility as to the methodology used to take into account the liquidity available on those third-country trading venues.

(2) The mandatory tick size was introduced to harmonise price increments on trading venues in the Union and to preserve market depth, liquidity and the orderly functioning of equity trading in the Union. To achieve those objectives, it is important that information on the adjusted average daily number of transactions used for determining tick sizes applicable to a share is available to all trading venues that offer trading in that share at the same time and that those trading venues start applying any adjusted average daily number of transactions on the same day. To that end, all

[1] OJ L 173, 12.6.2014, p. 349.

[2] Commission Delegated Regulation (EU) 2017/588 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the tick size regime for shares, depositary receipts and exchange-traded funds (OJ L 87, 31.3.2017, p. 411).

competent authorities that supervise trading venues where the share concerned is traded should be informed about any adjustments to the average daily number of transactions for that share prior to the publication of those adjustments and trading venues should be given sufficient time to incorporate those adjustments in their systems.

(3) To ensure legal certainty and predictability of the mandatory tick size regime, it is important that all trading venues apply tick sizes based on the adjusted average daily number of transactions that reflects the overall liquidity at the same time.

(4) Delegated Regulation (EU) 2017/588 should therefore be amended accordingly.

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

(6) 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 Council[3],

HAS ADOPTED THIS REGULATION:

Article 1

In Article 3 of Delegated Regulation (EU) 2017/588, the following paragraphs 8, 9 and 10 are added:

> ‘8. The competent authority for a specific share may adjust the average daily number of transactions calculated or estimated by that competent authority for that share in accordance with the procedure set out in paragraphs 1 to 7 where all of the following conditions are met:
>
> (a) the trading venue with the highest turnover for that share is located in a third country;
>
> (b) where that average daily number of transactions has been calculated and published in accordance with the procedure set out in paragraphs 1 to 4, it is equal to or greater than one.
>
> When adjusting the average daily number of transactions for a share, the competent authority shall take into account the transactions executed on the third-country trading venue with the highest turnover for trading of that share.
>
> 9. The competent authority that adjusted the average daily number of transactions for a share in accordance with paragraph 8 shall ensure the publication of that adjusted average daily number of transactions. Prior to that publication, the competent authority shall communicate the adjusted average daily number of transactions for that share to the competent authorities of the other trading venues operating in the Union where that share is traded.

[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).

10. Trading venues shall apply the tick sizes of the liquidity band corresponding to the adjusted average daily number of transactions from the second calendar day after its publication.’.

Article 2

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

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

Done at Brussels, 13.2.2019

For the Commission
The President
Jean-Claude JUNCKER