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

of 29.6.2016

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Under Articles 29(2) of Regulation (EU) No 600/2014 (MiFIR), trading venues, CCPs and clearing members shall have in place systems, procedures and arrangements to ensure that cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable. Article 29(2) also specifies the scope in terms of types of derivative transactions with a definition of ‘cleared derivatives’, which encompasses both OTC derivatives and exchange-traded derivatives subject to the clearing obligation, and all other derivatives that are otherwise agreed by the relevant parties to be cleared.

Under the same Article 29, the European Securities and Markets Authority (ESMA) is required to develop draft regulatory technical standards (RTS) to further specify the requirements to ensure that cleared derivative transactions concluded on a trading venue or on a bilateral basis are submitted and accepted for clearing as quickly as technologically practicable using automated systems.

The analysis that follows takes into account the responses received to the Discussion Paper (DP), Consultation Paper (CP) and the Cost Benefit Analysis questionnaire distributed by ESMA. The RTS were submitted to the Commission on 28 September 2015. In accordance with Article 10(1) of Regulation No (EU) 1095/2010 establishing ESMA (ESMA's Regulation), 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 RTS. A consultation paper was published on 19 December 2014 on ESMA's website and the consultation closed on 2 March 2015. In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of ESMA's Regulation. The SMSG chose not to provide advice on these issues due to the technical nature of the standards.

Together with the RTS, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has submitted its impact assessment, including the analysis of costs and benefits related to the draft standards. This analysis is available at http://www.esma.europa.eu/system/files/2015-esma-1464_annex_ii_-_cba_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This RTS specifies the requirements to ensure that cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable, also referred to as straight-through processing (STP).

The aim is to ensure that cleared derivative transactions concluded either on a trading venue or on a bilateral basis are processed, submitted and accepted for clearing quickly, thus facilitating clearing and trading certainty. In order to achieve these

objectives, the RTS lay down requirements for the transfer of information, pre-trade checks and timeframes for the transfer of such information for cleared derivative transactions concluded either on a trading venue or on a bilateral basis. It also provides rules on the treatment of cleared derivative transactions which are not accepted for clearing by the CCP.

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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 on markets in financial instruments and amending Regulation (EU) No 648/2012¹, and in particular Article 29(3) thereof,

Whereas:

- (1) In order to manage operational and other risks when transactions in cleared derivatives are submitted and accepted for clearing and to provide certainty to counterparties as soon as possible, it is important to determine whether a cleared derivative transaction will be accepted for clearing by a CCP at an early stage, and to the extent possible before the transaction is entered into, as well as the consequences of a CCP not accepting for clearing the derivative transaction submitted.
- (2) In order to apply scalable technical solutions ensuring that transactions in cleared derivatives can be submitted and accepted for clearing as quickly as technologically practicable, the information needed by a trading venue and a CCP to perform their tasks should be pre-determined and clearly set in the documentation of the trading venue and the CCP.
- (3) In order to appropriately price transactions in derivatives, counterparties take into account that centrally cleared transactions are subject to a different collateral regime than non-centrally cleared transactions, regardless of whether the transaction is cleared because it is mandated to be cleared or whether the transaction is cleared because the relevant parties have otherwise agreed for it to be cleared. Therefore, counterparties should benefit from having the same process and the same requirements for both mandatorily cleared and voluntarily cleared derivative transactions to ensure that cleared derivative transactions are submitted and accepted for clearing as soon as technologically practicable.
- (4) Where cleared derivative transactions are concluded on a trading venue, in order to identify before a transaction is entered into whether the transaction will be cleared by a CCP, the trading venue and the CCP should have rules to ensure that that transaction can be automatically cleared. Otherwise, the trading venue should provide the ability to clearing members of the CCP to check orders against the limits set for their clients.

¹ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

- (5) The time granted to a trading venue to process a cleared derivative transaction should be shorter for electronically traded cleared derivative transactions than for non-electronically traded cleared derivative transactions as the level of automated processing should be higher in the former case.
- (6) A trading venue should send the information related to cleared derivative transactions to a CCP in a pre-agreed electronic format for both electronically traded and non-electronically traded cleared derivative transactions. Therefore, the time granted to a CCP to decide whether a cleared derivative transaction can be accepted for clearing should be the same for electronically traded and non-electronically traded cleared derivative transactions.
- (7) The processing of cleared derivative transactions entered into on a bilateral basis is usually less automated than the processing of cleared derivative transactions concluded on a trading venue. Therefore, the time granted to counterparties to submit a cleared derivative transaction entered into on a bilateral basis to a CCP should be longer than the time granted for a cleared derivative transaction concluded on a trading venue.
- (8) In order to manage the credit risks related to cleared derivative transactions that are entered into on a bilateral basis, a CCP should allow clearing members to review the transaction details of their clients and to decide whether to accept it. As the process between a CCP and a clearing member is usually automated, this process should require limited time.
- (9) CCPs as well as clearing members manage credit risk associated to the build-up of current exposures resulting from the clearing of cleared derivatives. Typically, this includes the setting of limits by the CCP or the clearing member per counterparty in order to mitigate the associated exposure risk, which can result in new requests to clear certain cleared derivative transactions not being accepted by the clearing member or by the CCP. Ensuring that cleared derivative transactions are submitted to clearing as quickly as technologically practicable does not therefore imply that all cleared derivative transactions will be accepted for clearing in all circumstances. Where cleared derivative transactions are not accepted for clearing, counterparties should have clarity on the treatment of those transactions in order to hedge their risk.
- (10) As the processing of a cleared derivative transaction concluded electronically on a trading venue and submitted for clearing to a CCP requires limited time, the time for the market to move, and for the value and the risk of the cleared derivative transaction to change, in between the order and the non-acceptance is also very limited. Since the damage potentially suffered by counterparties whose transactions are not accepted for clearing by the CCP is negligible, and in order to provide certainty to counterparties, cleared derivative transactions concluded electronically on a trading venue and not accepted for clearing by a CCP should be considered void.
- (11) As the processing of cleared derivative transactions other than cleared derivative transactions concluded electronically on a trading venue usually takes a longer time, this period of time may be sufficiently long for the market to have moved, and for the value and the risk of the cleared derivative transaction to have changed significantly, in the meantime. Therefore, voiding the transaction might not be the appropriate treatment for all transactions non-accepted by the CCP. To provide certainty on the treatment of cleared derivative transactions other than cleared derivative transactions concluded electronically on a trading venue and not accepted by a CCP for clearing, the rules of the trading venue, and the contractual arrangements between the

counterparties where appropriate, should clarify in advance how these transactions are to be treated.

- (12) When a cleared derivative transaction is not accepted for clearing for reasons other than credit-risk related reasons such as technical or clerical problems arising from the transmission of inaccurate or incomplete information, the counterparties may still want to clear that derivative transaction. Where both counterparties agree to re-submit the transaction, provided that the transaction is resubmitted within a relatively short period of time from the first submission and that resubmission allows the investigation and the resolution of the reason why the transaction was not accepted for clearing, a second submission in the form of a new cleared derivative transaction with the same economic terms may be allowed as it still ensures proper management of operational or other non-credit related risks.
- (13) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions laid down in this Regulation and the provisions laid down in Regulation (EU) No 600/2014 apply from the same date.
- (14) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (15) 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 by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²,

HAS ADOPTED THIS REGULATION:

Article 1

Arrangements to facilitate the transfer of information

1. A trading venue shall detail in its rules the information it needs from counterparties to a cleared derivative transaction in order to submit that transaction to a CCP for clearing, and the format in which that information shall be provided.
2. A CCP shall detail in its rules the information it needs from counterparties to a cleared derivative transaction and from trading venues in order to clear that transaction, and the format in which that information shall be provided.

Article 2

Pre-trade check for cleared derivative transactions concluded on a trading venue

1. Trading venues and clearing members shall subject orders for the conclusion of cleared derivative transactions on a trading venue to the requirements set out in paragraphs 2, 3 and 4, except where all the conditions set out in points (a), (b) and (c) of this paragraph are satisfied:
 - (a) the rules of the trading venue require that each member or participant of the trading venue, which is not a clearing member of a CCP through which the cleared derivative transaction is cleared, has a contractual arrangement with a

² 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).

- clearing member of the CCP under which the clearing member automatically becomes counterparty to the cleared derivative transaction;
- (b) the rules of the CCP provide that the cleared derivative transaction concluded on a trading venue is cleared automatically and immediately, with the clearing member referred to in point (a) becoming the counterparty to the CCP;
 - (c) the rules of the trading venue provide that the member or participant of the trading venue or its client becomes counterparty to the cleared derivative transaction, after the cleared derivative transaction is cleared, pursuant to direct or indirect clearing arrangements entered into with the clearing member.
2. A trading venue shall provide tools to ensure pre-conclusion screening on an order-by-order basis by each clearing member of the limits set and maintained by that clearing member for its client pursuant to Commission Delegated Regulation (EU)/.....³.
 3. A trading venue shall ensure before the conclusion of the order that the order of the client is within the limits applicable to this client in accordance with paragraph 2:
 - (a) within 60 seconds from the receipt of the order when the order is entered into electronically;
 - (b) within 10 minutes from the receipt of the order when the order is not entered into electronically.
 4. When the order is not within the limits applicable to the client in accordance with paragraph 2, the trading venue shall inform the client and the clearing member that the order cannot be concluded in accordance with the following timelines:
 - (a) where the order is entered into electronically, on a real time basis;
 - (b) where the order is not entered into electronically, within 5 minutes as from the moment when the order was checked against the applicable limits.

Article 3

Timeframes for the transfer of information for cleared derivative transactions concluded on a trading venue

1. The trading venue, the CCP and the clearing member shall be subject to the requirements set out in paragraphs 2 to 5 of this Article except where all the conditions set out in points (a), (b) and (c) of Article 2(1) are met.
2. For cleared derivative transactions that are concluded on a trading venue electronically, the trading venue shall send the information related to each transaction to the CCP within 10 seconds from the conclusion of the transaction.
3. For cleared derivative transactions that are concluded on a trading venue non-electronically, the trading venue shall send the information related to each transaction to the CCP within 10 minutes from the conclusion of the transaction.
4. A CCP shall accept or not accept for clearing a cleared derivative transaction concluded on a trading venue within 10 seconds from receiving the information from

³ Commission Delegated Regulation (EU)/..... of supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (OJ)

the trading venue and inform the clearing member and the trading venue of any non-acceptance on a real time basis.

5. The clearing member and the trading venue shall inform the counterparty that concluded the cleared derivative transaction on the trading venue of the non-acceptance as soon as the CCP has informed them of a non-acceptance.

Article 4

Timeframes for the transfer of information for cleared derivative transactions concluded on a bilateral basis

1. For cleared derivative transactions concluded by counterparties on a bilateral basis, the clearing member shall:
 - (c) obtain evidence from its client of the conclusion timeframe of the transaction submitted for clearing;
 - (d) ensure that the counterparties send to the CCP the information referred to in Article 1(2) within 30 minutes from the conclusion of the transaction.
2. The CCP shall send to its clearing member the information referred to in point (b) of paragraph 1 related to the transaction within 60 seconds from receiving this information from the counterparties. The clearing member shall accept or not accept the transaction within 60 seconds from receiving the information from the CCP.
3. The CCP shall accept or not accept the clearing of a cleared derivative transaction concluded on a bilateral basis within 10 seconds from the receipt of the clearing member's acceptance or non-acceptance.
4. However, paragraphs 2 and 3 of this Article shall not apply where all the following conditions are met:
 - (a) the rules of the CCP ensure the setting and the maintenance on a regular basis of limits by a clearing member for its client pursuant to Commission Delegated Regulation (EU)/.....⁴;
 - (b) the rules of the CCP provide that a cleared derivative transaction that is within the limits in accordance with point (a) of this paragraph is cleared automatically by the CCP within 60 seconds from receiving the information on the cleared derivative transaction from the counterparties.
5. The CCP that does not accept for clearing a cleared derivative transaction concluded on a bilateral basis shall inform the clearing member of the non-acceptance on a real time basis. The clearing member shall inform of the non-acceptance the counterparty that concluded the transaction as soon as it is informed by the CCP.

Article 5

Treatment of cleared derivative transactions not accepted for clearing

1. Where a cleared derivative transaction that is concluded on a trading venue electronically is not accepted by the CCP, the trading venue shall void such contract.

⁴ Commission Delegated Regulation (EU)/..... of supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (OJ)

2. Where a cleared derivative transaction, other than a cleared derivative transaction concluded on a trading venue electronically, is not accepted by the CCP, the treatment of the transaction shall be governed by:
 - (a) the rules of the trading venue, where the contract is submitted for clearing in accordance with the rules of the trading venue;
 - (b) the agreement between the counterparties in all other situations.
3. Where the non-acceptance is due to a technical or clerical problem, the cleared derivative transaction can be submitted for clearing once more within one hour from the previous submission in the form of a new transaction but with the same economic terms, provided that both counterparties have agreed to the second submission. The trading venue on which the cleared derivative transaction was initially concluded shall not be subject to the requirements of Article 8 of Regulation (EU) No 600/2014 for the submission to clearing of the second cleared derivative transaction.

Article 6

Entry into force and application

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

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

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

Done at Brussels, 29.6.2016

For the Commission
The President
Jean-Claude JUNCKER