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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION DELEGATED REGULATION (EU) No …/.. of 14.8.2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to package orders

Delegations will find attached document C(2017) 5611 final.

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EUROPEAN
COMMISSION

Brussels, 14.8.2017
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COMMISSION DELEGATED REGULATION (EU) No …/..

of 14.8.2017

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to package orders

(Text with EEA relevance)

EN EN

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014, MiFIR) introduces pre-trade and post-trade transparency requirements in respect of bonds, structured finance products, emission allowances and derivatives, subject to certain conditions and to certain waivers. In particular, Article 9(1)(e) of MiFIR provides for a waiver specific to package orders: under certain conditions, package orders can be granted a waiver from pre-trade transparency, but the use of that waiver is more limited when the package order is considered liquid.

In this context, Article 9(6) of MiFIR empowers the Commission to adopt, following submission of a draft regulatory technical standard by the European Securities and Markets Authority (ESMA), and in accordance with Article 10 to 15 of Regulation No (EU) 1095/2010, a delegated Regulation establishing a methodology for determining those package orders for which there is a liquid market.

The draft regulatory technical standard was submitted to the Commission on 28 February 2017.

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 standard. A consultation paper was published on 10 November 2016 on the ESMA website and the consultation closed on 3 January 2017. In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of the ESMA Regulation. The SMSG chose not to provide advice on these issues due to the technical nature of the standards.

Together with the draft technical standards, 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 technical standards. This analysis is available at https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-21_final_report_package_orders.pdf

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt a delegated Regulation is provided for under Article 9(6) of MiFIR. Under this provision, the Commission is empowered to adopt a delegated Regulation to establish a methodology for determining those package orders for which there is a liquid market.

Article 1 sets out the general methodology for establishing for which package orders there is a liquid market as a whole.

Articles 2 to 5 specify the conditions under which a package order can fulfil the asset-specific criteria set out in Article 1(b), respectively for interest rate derivatives (Article 2), equity derivatives (Article 3), credit derivatives (Article 4) and commodity derivatives (Article 5).

COMMISSION DELEGATED REGULATION (EU) No …/..

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supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to package orders

(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) 648/2012[1], and in particular Article 9(6) thereof,

Whereas:

(1) Package orders are common in all asset classes and may include many different components within the same asset class or across different asset classes. Package orders may therefore comprise an unlimited number of combinations of components. Accordingly, it is appropriate to adopt a holistic approach in establishing qualitative criteria to identify those package orders which should be considered as standardised and frequently traded and therefore, as a whole, having a liquid market. To take into account the characteristics of the different types of package order, those qualitative criteria should include general criteria applicable across all asset classes, as well as specific criteria applicable to the different asset classes comprising a package order.

(2) The determination of the classes of derivative subject to the trading obligation under Regulation (EU) No 600/2014 requires derivatives within those classes to be standardised and sufficiently liquid. Therefore, it is appropriate to consider that there is a liquid market for the package order as a whole where all the components of that package order are of the same asset class and are subject to the trading obligation. However, package orders where all components are above a certain size or which include a large number of components are not considered as sufficiently standardised or liquid. It is therefore appropriate to specify that package orders where all components are subject to the trading obligation should be considered as having a liquid market where the package order is composed of no more than four components or where not all components within the package order are above a size that is large in scale compared to normal market size.

(3) The possibility to trade financial instruments on a trading venue demonstrates that those instruments are standardised and relatively liquid. It is therefore appropriate to

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

consider that where all components of a package order are available for trading on a trading venue, that package order as a whole potentially has as a liquid market. A package order should be considered as being available for trading where a trading venue offers it for trading to its members, participants or clients.

(4) While it is possible to trade package orders with many different components, liquidity is concentrated in packages consisting exclusively of components from the same asset class, such as interest rate derivatives, equity derivatives, credit derivatives or commodity derivatives. Therefore, package orders composed only of derivatives of one of those asset classes should be eligible for being considered as having a liquid market, whereas package orders composed of derivative components from more than one of those asset classes are not frequently traded and, as a consequence, do not have a liquid market. Furthermore, package orders including components of asset classes other than interest rate derivatives, equity derivatives, credit derivatives or commodity derivatives are not sufficiently standardised and consequently, are not considered as having a liquid market.

(5) It is therefore necessary to specify a methodology to determine whether there is a liquid market for the package order as a whole, including where one or more of the components of a package order are not considered as having a liquid market, or are large in scale compared to normal market size. However, package orders where none of the components have a liquid market, where all components are large in scale compared to normal market size, or which are a combination of components that do not have a liquid market and components that are large in scale compared to normal market size, are not considered as standardised or frequently traded and therefore should be determined as not having a liquid market for the package order as a whole.

(6) For package orders consisting of interest rate swaps, most transactions are concentrated in package orders where the components have certain benchmark tenors. It is therefore appropriate to consider only those package orders as being liquid as a whole. To reflect the characteristics of the different interest rate swaps, it is important to differentiate contracts starting immediately after the execution of the trade from contracts starting at a predetermined date in the future. The tenor of a contract should be calculated based on the date at which the obligations under the contract come into effect, that is, on the effective date. However, to take into account the liquidity pattern of those contracts as well as to avoid circumvention, those tenors should not be interpreted too strictly, but rather as targeted intervals around a benchmark tenor.

(7) Many market participants trade package orders consisting of two contracts with a different expiry date. In particular, roll forwards are highly standardised and frequently traded. Those package orders are used to replace a position in a contract that is nearest to expiry with a position in a contract expiring at the next maturity date, thereby allowing market participants to maintain an investment position beyond the initial expiration of a contract. It is therefore appropriate to consider that there is a liquid market for those package orders as a whole.

(8) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that this Regulation and the provisions laid down in Regulation (EU) No 600/2014 apply from the same date.

(9) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(10) 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 Council[2],

HAS ADOPTED THIS REGULATION:

Article 1

Package orders for which there is a liquid market as a whole

There shall be a liquid market for a package order as a whole where either of the following conditions is satisfied:

(a) the package order consists of no more than four components that belong to classes of derivative that have been declared subject to the trading obligation for derivatives in accordance with the procedure described in Article 32 of Regulation (EU) No 600/2014**,** unless one of the following applies:

  (i) all the components of the package order are large in scale compared to normal market size;

  (ii) the components of the package order do not exclusively belong to one of the asset classes as referred to Annex III to Commission Delegated Regulation (EU) 2017/583[3];

(b) the package order meets all of the following conditions:

  (i) all components of the package order are available for trading on the same trading venue;

  (ii) all components of the package order are subject to the clearing obligation in accordance with Article 5 of Regulation (EU) No 648/2012 of the European Parliament and of the Council[4] or the clearing obligation in accordance with Article 29(1) of Regulation (EU) No 600/2014;

  (iii) at least one of the components of the package order has a liquid market or is not large in scale compared to normal market size;

[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).

[3] Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (OJ L 87, 31.3.2017, p. 229).

[4] 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).

(iv) the package order meets the criteria applicable to the relevant asset class and laid down in Articles 2, 3, 4 or 5.

Article 2

Asset-class specific criteria for package orders consisting exclusively of interest rate derivatives

The asset-class specific criteria referred to in Article 1(b)(iv) for package orders consisting exclusively of interest rates derivatives as referred to in Section 5 of Annex III of Delegated Regulation (EU) 2017/583 shall be the following:

(a) the package order has no more than three components;

(b) all components of the package order belong to the same sub-asset class as referred to in in Section 5 of Annex III to Commission Delegated Regulation (EU) 2017/583;

(c) all components of the package order are denominated in the same notional currency of either EUR, USD or GBP;

(d) where the package order consists of interest rate swaps, the components of that package order have a tenor of 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 20 or 30 years;

(e) where the package order consists of interest rate future components, those components are either of the following:

(i) contracts with a maturity not exceeding 6 months for interest rate futures based on 3 months interest rate;

(ii) contracts with the expiration date closest to the current date for interest rate futures based on 2, 5 and 10 year interest rates;

(f) where the package order consists of bond futures, the package order replaces a position in a contract that is nearest to expiry with a position in a contract with the same underlying expiring at the next maturity date.

For the purpose of point (d), a component of a package order 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 effective date of the contract and the termination date of the contract equals one of the time periods mentioned in point (d), plus or minus five days.

Article 3

Asset-class specific criteria for package orders consisting exclusively of equity derivatives

The asset-class specific criteria referred to in Article 1(b)(iv) for package orders consisting exclusively of equity derivatives, as referred to in Section 6 of Annex III to Delegated Regulation (EU) 2017/583, shall be the following:

(a) the package order has no more than two components;

(b) all components of the package order belong to the same sub-asset class as referred to in Section 6 of Annex III to Delegated Regulation (EU) 2017/583;

(c) all components of the package order are denominated in the same notional currency of either EUR, USD or GBP;

(d) all components of the package order have the same underlying index;

(e) the expiry date of all components of the package order does not exceed 6 months ;

(f) where the package order contains options, all options have the same expiry date.

Article 4

Asset-class specific criteria for package orders consisting exclusively of credit derivatives

The asset-class specific criteria referred to in Article 1(b)(iv) for package orders consisting exclusively of credit derivatives as referred to in in Section 9 of Annex III to Delegated Regulation (EU) 2017/583 shall be the following:

(a) the package order has no more than two components;

(b) all components of the package order are index credit default swaps as referred to in Section 9 of Annex III to Delegated Regulation (EU) 2017/583;

(c) all components of the package order are denominated in the same notional currency of either EUR or USD;

(d) all components of the package order have the same underlying index;

(e) all components of the package order have a tenor of 5 years;

(f) the package order replaces a position in a next-to-recent version of an index series (latest off-the-run) with a position in the most recent version (on-the-run).

Article 5

Asset-class specific criteria for package orders consisting exclusively of commodity derivatives

The asset-class specific criteria referred to in Article 1(b)(iv) for package orders consisting exclusively of commodity derivative as referred to in Section 7 of Annex III to Delegated Regulation (EU) 2017/583 shall be the following:

(a) the package order has no more than two components;

(b) all components of the package order are commodity derivative futures as referred to in Section 7 of Annex III to Delegated Regulation (EU) 2017/583;

(c) all components of the package order have the same underlying commodity defined at the most granular level as specified in Table 2 of the Annex to Commission Delegated Regulation (EU) 2017/585[5];

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[5] Commission Delegated Regulation (EU) 2017/585 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in

(d) all components of the package order are denominated in the same notional currency of either EUR, USD or GBP;

(e) the package order replaces a position in a contract that is nearest to expiry with a position in a contract expiring at the next maturity date.

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*.

It shall apply from 3 January 2018.

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

Done at Brussels, 14.8.2017

For the Commission
The President
Jean-Claude JUNCKER

relation to arrangements to be made by the European Securities and Markets Authority and competent authorities (OJ L 87, 31.3.2017, p. 368).