

Brussels, 6.6.2016
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COMMISSION DELEGATED REGULATION (EU) .../...

of 6.6.2016

**supplementing Directive 2014/65/EU of the European Parliament and of the Council on
markets in financial instruments with regard to regulatory technical standards on
requirements to ensure fair and non-discriminatory co-location services and fee
structures**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Under Articles 48(8) and (9) of Directive 2014/65/EU in Markets in Financial Instruments (MiFID II), trading venues have to ensure that their rules on co-location and fee structures are transparent, fair and non-discriminatory.

In this context, Article 48(12)(d) of MiFID II, empowers the Commission to adopt, following submission of draft regulatory technical standards by the European Securities and Markets Authority (ESMA), a Delegated Regulation further specifying the requirements to ensure that co-location services and fee structures are fair, non-discriminatory and do not create incentives for disorderly trading conditions or market abuse.

The draft regulatory technical standards were submitted to the Commission on 28 September 2015. In accordance with Article 10(1) of Regulation No (EU) 1095/2010 establishing the 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 19 December 2014 on ESMA website and the consultation closed on 2 March 2015. In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (MSG) established in accordance with Article 37 of the ESMA Regulation. The MSG 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 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

The right to adopt a delegated Regulation is provided for under Article 48(12)(d) of MiFID II. According to this provision, the Commission is empowered to adopt a delegated Regulation to specify the conditions to identify when co-location and fee structures used by trading venues may be considered fair and non-discriminatory.

Article 1 to 3 of this Delegated Regulation specifies the types of co-location services covered and requirements for the purposes of fair and non-discriminatory treatment in terms of services and fees.

Articles 2 and 4 sets out the transparency requirements.

Article 5 specifies the prohibited fee structures, which by their nature are considered to be conducive to disorderly trading conditions.

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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 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/EU¹, and in particular Article 48(12)(d),

Whereas:

- (1) It is important to adopt detailed regulatory technical standards to clearly identify conditions when co-location and fee structures used by trading venues may be considered fair and non-discriminatory.
- (2) Directive 2014/65/EU extends the requirements relating to co-location and fee structures to multilateral trading facilities and organised trading facilities. It is therefore important to ensure that those venues are also within the scope of this Regulation.
- (3) In order to ensure harmonised conditions, common requirements should apply to all types of co-location services and to trading venues that organise their own data centres or that use data centres owned or managed by third parties.
- (4) Trading venues should have the ability to determine their commercial policy as regards co-location and determine which types of market participants they want to grant access to those services provided that their commercial policy is based on objective, transparent and non-discriminatory criteria. Trading venues should not be required to extend their co-location capacities beyond the limits of the space, power, cooling or similar facilities available and should have discretion to decide whether they expand their co-location space or not.
- (5) Fair and non-discriminatory co-location services and fee structures require a sufficient degree of transparency to ensure that the obligations laid down in Directive 2014/65/EU are not circumvented. Trading venues should therefore use objective criteria when determining rebates, incentives and disincentives.
- (6) Fee structures that contribute to conditions leading to disorderly trading conditions through encouraging intensive trading and that may lead to a stress of market infrastructures should be prohibited. Therefore, volume discounts should be allowed, provided that, as price differentiation schemes, they are based on the total trading

¹ OJ L 173, 12.6.2014, p.349

volume, the total number of trades or the cumulated trading fees generated by one member whereby only the marginal trade executed subsequently to reaching the threshold is executed at a reduced price.

- (7) 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 related national provisions transposing Directive 2014/65/EU apply from the same date.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (9) The European Securities and Markets Authority 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

Fair and non-discriminatory co-location services

- 1. Trading venues providing co-location services shall, within the limits of the space, power, cooling and similar facilities available, ensure that such services are provided in a fair and non-discriminatory manner as laid down in paragraphs 2, 3 and 4 in relation to the following:
 - (a) data centres they own and manage;
 - (b) data centres they own which are managed by a third party selected by them;
 - (c) data centres that are owned and managed by a third party with which the trading venue has an outsourcing arrangement for the organisation of the execution infrastructure of the trading venue as well as of the proximity access to it;
 - (d) proximity hosting services owned and managed by a third party with a contractual arrangement with a trading venue.
- (2) Trading venues shall provide all users which have subscribed to the same co-location services access to their network under the same conditions, including as regards space, power, cooling, cable length, access to data, market connectivity, technology, technical support and messaging types.
- (3) Trading venues shall take all reasonable steps to monitor all connections and latency measurements to ensure the non-discriminatory treatment of all users of co-location services that have the same type of latency access.
- (4) Trading venues shall make available individual co-location services, without any requirement to purchase bundled services.

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).

Article 2
Transparency when providing co-location services

1. Trading venues shall publish the following information on their co-location services on their websites:
 - (a) a list of services provided providing information about space, power, cooling, cable length, access to data, market connectivity, technology, technical support, message types, telecommunications and related products and services;
 - (b) the fee structure for each service as set out in Article 3(2);
 - (c) the conditions for accessing the service, including IT requirements and operational arrangements;
 - (d) the different types of latency of access available;
 - (e) the procedure to allocate co-location space;
 - (f) the requirements on third party providers of co-location services, where applicable.

Article 3
Fair and non-discriminatory fees

1. Trading venues shall charge the same fee and provide the same conditions to all users of the same type of services based on objective criteria. Trading venues shall only establish different fee structures for the same type of services where those fee structures are based on non-discriminatory, measurable and objective criteria relating to:
 - (a) the total volume traded, the numbers of trades or cumulated trading fees;
 - (b) the services or packages of services provided by the trading venue;
 - (c) the scope or field of use demanded;
 - (d) the provision of liquidity in accordance with Article 48(2) of Directive 2014/65/EU or in a capacity of being a market maker as defined in Article 4(1)(7) of Directive 2014/65/EU;
2. Trading venues shall ensure that their fee structure is sufficiently granular to allow users to predict the payable fees on the basis of at least the following elements:
 - (a) chargeable services, including the activity which will triggers the fee;
 - (b) the fee for each service, stating whether the fee is fixed or variable;
 - (c) rebates, incentives or disincentives.
3. Trading venues shall make individual services available without being bundled with other services.

Article 4
Transparency of fee structures

Trading venues shall publish the objective criteria for the establishment of their fees and fee structures and other conditions provided for in Article 3, together with execution fees, ancillary fees, rebates, incentives and disincentives in one comprehensive and publicly accessible document on their website.

Article 5
Prohibited fee structures

Trading venues shall not offer their members, participants or clients a fee structure whereby, once their trades exceed a given threshold, all of their trades benefit from a lower fee for a set period, including those trades that were executed prior to reaching that threshold.

Article 6
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*.

This Regulation shall apply from the date that appears first in the second subparagraph of Article 93(1) of Directive 65/2014/EU.

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

Done at Brussels, 6.6.2016

For the Commission
The President
Jean-Claude JUNCKER