RTS 24: Draft regulatory technical standards on access in respect of trading venues, central counterparties and benchmarks

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

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 access in respect of trading venues, central counterparties and benchmarks

(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) No 648/201232, and in particular Articles 35(6), 36(6) and 37(4) thereof,

Whereas:

(1) ~~To prevent competitive distortions~~ ***In line with the intention of Articles 35, 36 and 37 of Regulation (EU) No 600/2014 and set out in Recital 38 of MiFIR "to remove commercial barriers that can be used to prevent competition in the clearing of financial instruments",*** central counterparties (CCPs) as well as trading venues should only be able to deny access if they have made all reasonable efforts to manage the risk arising from that access and significant undue risk remains.

(2) Articles 35 and 36 of Regulation (EU) 600/2014 mandate granting access in relation to financial instruments. The application of the requirements in this Regulation has to take into account the differences resulting from the whole spectrum of different financial instruments. For example, managing risks in relation to derivatives may be more complex and challenging than in relation to securities. The differences between financial and commodities and other non-financial derivatives ***must*** also be taken into account ***when considering an access request***.

(3) According to Articles 35(3) and 36(3) of Regulation (EU) No 600/2014 the party denying access has to provide full reasons for that decision and this includes identifying how the relevant risks arising from granting access would in the concrete situation be unmanageable such that there would be significant undue risk remaining. An appropriate way of doing this is for the party denying access to clearly outline the changes that would arise from granting access, how it would have to manage the risk associated with the changes, and explain the impact on its structures such as necessary compliance measures. In particular, a CCP using an open offer trade acceptance model that receives a request for access from a trading venue using a novation trade acceptance model would either have to grant that access or identify how precisely the simultaneous use of an open offer and a novation trade acceptance model would give rise to significant undue risks that cannot be managed.

(4) When granting access CCPs and trading venues incur costs. These will be both one-off costs, such as assessing legal requirements, and ongoing costs. This Regulation addresses the issues regarding costs only under the empowerments in Articles 35(6)(b) and 36(6)(b), without covering the specific allocation of costs between the CCP and trading venue.

(5) The relationship between a CCP and its clearing members is regulated primarily under Articles 26(7) and 28(3) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories33, Article 10(1)(d) of Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties34, and the member eligibility criteria of the CCP. Likewise, the relationship between a trading venue and its members or participants is regulated primarily under Article 53 of 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/EU35 and the eligibility criteria of the trading venue. This Regulation does not alter those requirements.

~~(6) Although Articles 35 and 36 of Regulation (EU) No 600/2014 refer to risks incurred by CCPs and trading venues in very similar ways, in practice those risks may impact CCPs and trading venues differently, thus demanding a different approach in this Regulation~~.

(7) When a trading venue requests access to a CCP concerning instruments currently not covered under the CCP's authorisation ***and the CCP does not deny the access request***, the latter should request an extension of its authorisation to the competent authority of the Member State where it is established, which should in turn immediately transmit all information received from the applicant CCP to the college of the CCP. The relevant competent authority should duly consider the opinion of the college on the extension of authorisation according to Regulation (EU) No. 648/2012.

(8) When each relevant competent authority assesses whether access would threaten the smooth and orderly functioning of the markets or adversely affect systemic risk, it should consider whether the CCP or trading venue is functioning properly as there may be a risk of contagion and wider systemic risk if one or more of the entities involved are functioning poorly and access is permitted.

(9) According to Commission Delegated Regulation (EU) No 876/2013, of 28 May 2013, supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on colleges for central counterparties36, the competent authority of a CCP should provide the college in a timely manner with the relevant information on the commercial proposals related to the trading venue's request for access to the CCP, including new products or services offered, as well as any information on any material threats to the CCP's ability to comply with Regulation (EU) No 648/2012 related to the trading venue's request for access to the CCP.

(10) The terms under which access must be permitted should be reasonable and non-discriminatory so as not to undermine the purpose for which the access provisions were introduced. For example, charging fees in a discriminatory way so as to deter access would not be permitted. However, fees could differ on objectively justified reasons, such as where the costs to implement the access arrangements are higher ***and where the commercial agreement between the trading venue and CCP ascertains that the costs will be recovered through higher fees***. When access results in a trading venue dealing with two or more CCPs, it will be important to specify how these CCPs interact, for example, whether this is by interoperability or the preferred clearer model, and address the specific risks. The terms of an access arrangement should balance out the interests of all involved parties.

(11) Pursuant to Regulation (EU) No. 648/2012, a CCP wishing to extend its business to additional services or activities not covered by the initial authorisation should submit a request for an extension of authorisation. An extension of authorisation is needed where a CCP intends to offer clearing services on financial instruments with a different risk profile or that have material differences from the CCP's existing product set. When a contract traded on a trading venue to which a CCP has granted access is covered by the scope of the CCP's current authorisation, such a contract is to be considered as capable of being economically equivalent to ~~the~~ contracts ***in the same or related asset class*** already cleared by the CCP.

(12) ***It is important for CCPs to be consistent about how they determine contracts to be economically equivalent, so that the access provisions can be applied fairly.*** In order to ensure that a CCP does not apply discriminatory collateral and margining requirements to economically equivalent contracts ***in the same or related asset class*** traded on a trading venue that has been granted access to the CCP, any change to the margining methodology and operational requirements regarding margining and ***the particular*** netting ***processes*** applied to ***such*** economically equivalent contracts already cleared by the CCP should be subject to a review by the Risk Committee of the CCP and be considered as a significant change to the model and parameters for the purpose of the review procedure as provided for under Regulation (EU) No 648/2012. Such a review should validate that the new models and parameters are non-discriminatory and based on relevant risk considerations.

(13) Article 35 (6)(e) of Regulation (EU) No 600/2014 refers to the cross-margining of correlated contracts. It is noted that the term "portfolio margining" should be used when referring to correlated contracts cleared by the same CCP, rather than "cross-margining" which is used in contexts involving two CCPs.

(14) A notification by a relevant competent authority to the CCP college and ESMA about the approval of a CCP transitional relief in accordance with Article 35(5) of Regulation (EU) 600/2014 should be made without undue delay in order to assist other relevant competent authorities understand the impact this will have on the CCP and any trading venues that are connected by close links to that CCP. The notification should contain all relevant information necessary to enable the CCP college and ESMA to understand the decision and enhance transparency.
(15) The information specified in this Regulation will contribute to a transparent and harmonised application of the notification process.
(16) It is important to help avoid the risk of larger trading venues using calculation methods that will minimise their annual notional amount in order to avoid being captured by the access provisions. Where there are equally accepted alternative approaches to calculating notional amount, using the calculation which gives the higher value will help achieve this. The methods used for calculating notional amount for the purposes of Article 36(5) of Regulation (EU) No 600/2014 should enable genuinely smaller trading venues that have not yet acquired the technological capability to engage on a level playing field with the majority of the post-trade infrastructure market to utilise the opt-out mechanism. It is also important for the methods prescribed to be straightforward and unambiguous.
(17) It is important for trading venues to be consistent about how they calculate their notional amount for the purposes of Article 36(5) of Regulation (EU) No 600/2014 so that the access provisions can be applied fairly. Without the provisions set out in this Regulation, trading venues may apply different methods for calculating notional amount for certain types of exchange-traded derivatives, for example, in respect of commodity derivatives traded in units, such as barrels or tons.
(18) Article 37 of Regulation (EU) No 600/2014 captures a variety of different types of benchmarks and so the information a trading venue or CCP needs for trading or clearing purposes may vary depending on a number of factors, including the relevant financial instrument being traded or cleared and the type of benchmark that the financial instrument references.
(19) This Regulation, therefore, does not prescribe an exhaustive list of the types of information that should be provided by a person with proprietary rights to a benchmark to trading venues and CCPs, but allows CCPs and trading venues to request access to information, provided it is required for trading or clearing purposes. For example for option benchmarks it may be necessary to know whether the option model is volatility or premium based and for equity benchmarks it may be necessary to know relevant corporate action information.
(20) Depending on the type of benchmark concerned, a person with proprietary rights to a benchmark may need to take particular considerations into account that will require the information provided to trading venues and CCPs to be modified appropriately. For instance, for reference rate benchmarks, pricing information should include the names of the contributors themselves, but should not cover values of individual submissions by contributors as this could cause adverse signalling effects affecting the price formation process. For certain types of benchmarks information on constituents and their weightings may not be available, for example, credit benchmarks are based on submissions from contributors.
(21) To ensure Articles 35 and 36 of Regulation (EU) No 600/2014 work effectively the terms trading and clearing for the purposes of Article 37(1) of Regulation (EU) No 600/2014 should include all functions that the trading venue and CCP will be obliged to fulfil as part of its trading and clearing business. For example, a trading venue must be able to make an initial assessment of the characteristics of the benchmark, market the relevant product and support on-going market surveillance activities, and a CCP must be able to perform appropriate risk management of relevant open exchange-traded derivatives positions, including to perform netting, and to meet relevant obligations, such as to calculate risk intraday in order to assess whether it has an appropriate level of margin in accordance with requirements set out in Regulation (EU) No 648/2012.
(22) Where the person with proprietary rights to a benchmark is not in a position to pass on relevant information itself, it should, where appropriate, notify the trading venue or CCP of whom it may contact at the relevant third party or parties so that the trading venue or CCP can request access to such

information. For equity benchmarks it may be clear whom the trading venue or CCP needs to contact, but for other benchmarks it may not be as clear.

(23) In line with Recital 40 and Article 37 of Regulation (EU) No 600/2014, the purpose of this regulation is to prevent the use of the licence agreement in a way that restricts the other access provisions contained in Articles 35 and 36 of Regulation (EU) No 600/2014.

(24) The diversity of benchmarks and the different identified uses make it difficult to achieve a high degree of harmonisation on the content of licence agreements. Constraining the conditions to predetermined terms might be detrimental to all parties.

(25) Nonetheless, persons with proprietary rights to a benchmark should set conditions for trading venues and CCPs to access their benchmark. Persons with proprietary rights to a benchmark may set different conditions for different categories of trading venues and CCPs to access their benchmarks only if justified by objective criteria, such as quantity, scope or ~~field~~ ***nature*** of use demanded, and these conditions should be applied on a non-discriminatory basis and in a proportionate manner. The criteria defining the different categories of trading venues and CCPs should be made publicly available. The trading venues and CCPs before requesting access should assess to what category its activity correspond and subsequently request to see the conditions applicable to that category.

(26) Trading venues and CCPs falling under the same category should be treated equally, including where the person with proprietary rights to a benchmark and the trading venue or CCP are connected by close links.

(27) The way in which it is assessed whether a benchmark can be deemed new will vary on a case by case basis and it is for the person with proprietary rights to a benchmark to demonstrate a benchmark's newness if invoked as reason for denying immediate access. As an example, the values of two benchmarks may be highly correlated, particularly in the short run, but their compositions or methodology may be fundamentally different to one another. The long run correlation and similarities in the composition and the methodology of each of the benchmarks should be taken into account. The assessment will have to consider the ways in which the compositions of the two benchmarks are related, and where there are differences how significant they are. Furthermore, the assessment should consider whether the methodologies adopted by each of the benchmarks are related, and to what extent. It is possible for two benchmarks to calculate their benchmark value in the same way, but still be fundamentally different if the composition of each is significantly different. Each assessment of a benchmark's newness should therefore look at various factors to assess whether the benchmark meets the criteria specified in Regulation (EU) No 600/2014 or not. It will also be important to give an appropriate weighting to each of the various factors.

(28) Other factors specific to the types of benchmarks being assessed may also need to be taken into account in an assessment of a benchmark's newness, for example, for commodity benchmarks it may be necessary to assess other factors, including whether the relevant benchmarks are based on different underlying commodities and different delivery locations.

(29) Certain benchmarks release a new series on a periodic basis, such as CDS benchmarks. In these cases, the newly released benchmark is a continuation of the previous series and should therefore not be considered a new benchmark.

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

(31) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and the Council of 24 November 201037 the European Securities and Markets Authority has conducted an open public consultation on the draft regulatory standards on which this Regulation is based, has analysed the potential related costs and benefits and has requested the opinion of the Securities and Markets Stakeholder Group referred to in Article 37 of that Regulation.

HAS ADOPTED THIS REGULATION:

Title 1

Non-discriminatory access to *CCPs* and trading venues

Section 1

Denial of access by a CCP or a trading venue

Article 1

Common conditions on the denial of access by a CCP or a trading venue

(1) A CCP and***/or*** a trading venue, ***as applicable,*** shall assess whether granting access will create any of the risks specified in Articles 2 to 6 and make arrangements to manage any risk identified.

(2) ***Subject to Article 1(4),a*** CCP and a trading venue may deny access only if, after making all reasonable efforts to manage its risks in accordance with previous paragraph, there remain significant undue risks that cannot be managed.

(3) ***Subject to Article 1(4), i***f a CCP or trading venue denies access, it shall identify which risks specified in Articles 2 to 6 would result from granting access and why those risks cannot be managed.

(4) A CCP shall be entitled to deny an access request if the granting of such access would require an extension of the scope of contracts covered by the CCP's initial or subsequent authorisation under Regulation (EU) No. 648/2012

Part I

Conditions under which a CCP may deny an access request

Article 2

Denial of access based on the anticipated volume of transactions

A CCP may deny an access request ***in whole or in part*** on grounds of the anticipated volume of transactions only when the reasonably anticipated volume of transactions arising from such access would create significant undue risks by:

(a) exceeding the scalable design of the CCP to such an extent that the CCP cannot adapt its systems so as to ***be ready to*** deal with the anticipated volume ***in time for the agreed date for start of trading by the trading venue*** or

(b) exceeding the planned capacity of the CCP in a way that the CCP would not be able to acquire the required extra capacity ***in time for the agreed date for start of trading by the trading venue***.

Article 3

Denial of access based on operational risk and complexity

1. A CCP may deny an access request on grounds of operational risk and complexity arising from such access only when it cannot adopt arrangements to adequately manage those risks such that there would be significant undue risk remaining.

2. For the purposes of the previous paragraph, relevant types of risks are, ~~among others~~:

~~(a) Incompatibility of CCP and trading venue IT systems such that the CCP cannot provide for connectivity between the systems;~~

(b) the CCP does not have, nor is it able to ***procure in time for the agreed date for start of trading by the trading venue***, the necessary human resources with the necessary knowledge, skills and experience to perform its functions regarding the risk stemming from additional financial instruments where these differ from financial instruments already cleared by the CCP.

Article 4

Denial of access based on other factors creating significant undue risks

1. In addition to the circumstances identified in Articles 2 and 3 of this Regulation, a CCP may deny an access request ***in whole or in part***, only when it cannot adopt arrangements to adequately manage any of the following risks arising from granting access such that there would be significant undue risk remaining:

(a) the CCP does not have, nor is it able to ***obtain in time for the agreed date for start of trading by the trading venue***, the necessary authorisations consistent with meeting the relevant requirements set out in Title IV of Regulation (EU) No 648/2012 regarding the financial instruments in question;

(b) granting access would threaten the economic viability of the CCP or its ability to meet minimum capital requirements under Article 16 of Regulation (EU) No 648/2012; ***or***

(c) legal risks; ~~or~~

~~(d) there is an incompatibility of CCP and trading venue rules that the CCP cannot remedy in cooperation with the trading venue.~~

2. A CCP may refuse an access request based on legal risk as referred to in subparagraph (c) of the previous paragraph, where as a result of granting access the CCP:

(a) would not be able to enforce its rules relating to close out netting and default procedures; or
(b) cannot manage the risks arising from the simultaneous use of different trade acceptance models.

Part II

Conditions under which a Trading Venue may deny an access request

Article 5

Denial of access based on operational risk and complexity

1. A trading venue may deny an access request on the grounds of operational risk and complexity arising from such access only when it cannot, ***having made all reasonable efforts in co-operation with the CCP,*** adopt arrangements ***in time for the agreed date for start of trading by the trading venue*** to adequately manage those risks such that there would be significant undue risk remaining.

2. For the purposes of paragraph 1, ***the*** ~~types of~~ relevant risk ***is legal risk*** ~~are, among others, the incompatibility of CCP and trading venue IT systems such that the trading venue cannot provide for connectivity between the systems.~~

3. A trading venue may refuse an access request based on legal risk as referred to in paragraph 2 of the previous paragraph, where as a result of granting access the trading venue cannot manage the risks arising from the simultaneous use of different trade acceptance models.

Article 6

Denial of access based on other factors creating significant undue risks

In addition to the circumstances identified in the previous article a trading venue may deny an access request only when it cannot adopt arrangements to adequately manage any of the following risks arising from granting access ***in time for the agreed date for start of trading by the trading venue*** such that there would be significant undue risk remaining:

(a) threat to the economic viability of the trading venue or its ability to meet minimum capital requirements under Article 47(1)(f) of Directive 2014/65/EU; and

(b) incompatibility of trading venue and CCP rules that the trading venue cannot remedy in cooperation with the CCP.

Section 2

Denial of access by a competent authority

Article 7

Conditions under which access will threaten the smooth and orderly functioning of markets or adversely affect systemic risk

1. Granting access will threaten the smooth and orderly functioning of the markets or adversely affect systemic risk, apart from the situations identified in Regulation (EU) No 600/2014, where:

(a) one of the parties to the agreement is not meeting its legal obligations, or ***in the reasonable opinion of the competent authority***, would be unlikely to meet its legal obligations as a consequence of granting access;

(b) granting access would create significant undue risks for the CCP or the trading venue in a way that would have a wider negative impact on the market ***to the detriment of investors***; and

(c) ***and in either or both case,*** there is no remedial action that would allow the relevant party to meet its legal obligations with reasonable effort prior to the access arrangement being put in place according to Article 35(3) and 36(3) of Regulation (EU) No 600/2014.

2. In this context, "legal obligations" shall mean the regulatory requirements applicable to one of the parties under relevant legislation and rules, including capital requirements and on-going compliance with authorisations.

Title 2

Conditions under which access must be permitted

Article 8

Conditions under which access must be permitted

1. The relevant parties to an access arrangement in accordance with Articles 35 and 36 Regulation (EU) No 600/2014 shall agree on their respective rights and obligations, including the applicable law governing their relationships. The terms of the access arrangement shall:
(a) be clearly defined, transparent, valid and enforceable in all relevant jurisdictions;
(b) where applicable, specify how two or more CCPs with access to the same trading venue interact with one another;
(c) contain clear rules concerning the moment of entry of transfer orders ***as defined by [Settlement Finality Directive???]*** into relevant systems and the moment of irrevocability;
(d) not contain any provision that restricts or creates obstacles for the establishment or future extension of the access arrangement to other entities, other than on duly justified risk grounds;
(e) not impact on the compliance by the entities participating in the arrangement with the requirements to which they are subject under relevant regulations;
(f) contain rules regarding the termination of the access arrangements ***only for breach*** by any of the involved parties ***(unilateral termination at will of an access arrangement not being available to any party to the access arrangements)***, which should

(i) be clear and transparent;
(ii) cater for termination in an orderly manner that does not unduly expose other entities that are part of the access arrangement to additional risks ***and cater for the impact of such termination on trades already cleared by the CCP, including clear and transparent arrangements for the management and orderly run-off of contracts and positions made under the access arrangements and open at the point of termination***;
(iii) ensure that termination is not triggered by minor breaches of the contract and that the ***defaulting*** party is given a reasonable amount of time to remedy any breach that does not give rise to ***grounds for*** immediate termination;
(iv) allow the termination, if risks increase in a way that would have justified denial of access in the first instance ***provided the competent authority of the CCP has given a prior confirmation of this view in writing***;

(g) specify the contracts being subject to the access arrangement;
(h) specify the cover of the one-off and ongoing costs triggered by the access request; and
(i) cater appropriately for claims and liabilities stemming from the access arrangements.
2. The terms shall require that the trading venue***s*** and all CCPs party to the access arrangement put in place adequate policies, procedures and systems to ensure:
(a) timely, reliable and secure communication between the relevant entities;
(b) consultation where any change to either entity's operations is likely to have a material impact on the access arrangement or the risks to which the other entity is exposed;
(c) timely notification to the relevant party before a change is implemented, where the impact of a change is unlikely to be significant;
(d) resolution of disputes;
(e) identification, monitoring and management of the potential risks arising from the access arrangement;
(f) reception by the trading venue of relevant information in order to be able to fulfil its obligations regarding the monitoring of open interest, as appropriate; and
(g) acceptance by the CCP of delivery of physically settled commodities, as appropriate.
3. The relevant parties to the access arrangement shall ensure that:
(a) risk management standards are not being ***adversely affected*** by granting access;
(b) information provided in the request for access is kept up-to-date throughout the duration of the access arrangement, which includes an information about any material changes; and
(c) non-public and commercially sensitive information including any information provided during the development phase of a financial instrument is only to be used for the specific purpose for which it was conveyed and may only be acted upon for the specific purpose agreed by the entities ***and, unless otherwise agreed between the parties, shall be kept confidential unless and until such***

information becomes public (other than by reason of the publication of such non-public or commercially sensitive information by the recipient thereof under the access arrangement).

Article 9

Non-discriminatory and transparent clearing fees charged by CCPs

1. A CCP shall only charge fees for clearing transactions executed on a trading venue to which it has granted access on the basis of objective criteria, applicable to all clearing members and, where relevant, clients. Fees shall not depend on the trading venue where the transaction takes place.
2. A CCP shall make all clearing members and, where relevant, clients subject to the same schedule of fees and rebates and not ***only*** a subset of them.
3. A CCP shall only charge fees to a trading venue in relation to access on the basis of objective criteria. The same fees and rebates shall apply for all trading venues accessing the CCP with regard to the same or similar financial instruments, unless a different basis can be objectively justified.
4. A CCP shall ensure that the fee schedules referred to in paragraphs 1, 2 and 3 are easily accessible, adequately identified per service provided and sufficiently granular in order to ensure that fees charged are ***ascertainable***.
5. For the purpose of this Article, relevant fees are fees charged to cover both one-off and ongoing costs.

Article 10

Non-discriminatory and transparent fees charged by trading venues

1. A trading venue shall only charge fees in relation to access on the basis of objective criteria. The same fees and rebates shall apply to all CCPs accessing the trading venue with regard to the same or similar financial instruments, unless a different basis can be objectively justified.
2. A trading venue shall ensure that the fee schedules referred to in paragraph 1 are easily accessible, adequately identified per service provided and sufficiently granular in order to ensure that the fees charged are predictable.
3. This Article applies to all fees related to access, including those that are charged to cover one-off and ongoing costs.

Title 3

Conditions for non discriminatory treatment of contracts

Article 11

Collateral and margining requirements of economically equivalent contracts

1. A CCP shall consider economically equivalent all contracts ***in the same or related asset class*** traded on the trading venue to which it has granted access, ***as those*** which are ***in the same or related asset class*** covered by the CCPs' initial authorisation referred to in Article 14 of Regulation (EU) No. 648/2012, or by any subsequent extension of authorisation referred to in Article 15 of Regulation (EU) No. 648/2012.
2. The CCP shall apply to economically equivalent contracts referred to in paragraph 1 the same margin and collateral methodologies, irrespective of where the contracts are executed. A CCP may introduce changes to models or parameters regarding the clearing of economically equivalent contracts referred to in paragraph 1, in order to mitigate the respective risk factors of that trading venue or the contracts traded thereon. These changes shall be considered as significant changes to models or parameters that shall be subject to a review by the Risk Committee of the CCP and be subject to the review procedure referred to in Article 49 of Regulation (EU) No 648/2012.
3. For the purposes of [this Regulation and MiFID], economic equivalence shall mean either that:
a) contracts are identical or sufficiently similar in terms or in economic outcome so as to be customarily treated in the market as interchangeable with each other (so eligible for treatment as fungible (that is, mutually interchangeable) for any or all of the netting purposes specified in Article 12(1) below); or
b) contracts, not being identical or sufficiently similar within the terms above, nevertheless have characteristics that are sufficiently aligned in terms of economic outcome and/or correlation of risk profile so as to be customarily treated in the market as highly

correlated (and so eligible for similar treatment in terms of collateral and margin arrangements, including cross-margining or portfolio margining)

Article 12

Netting of economically equivalent contracts

1. A CCP shall apply to economically equivalent contracts referred to in paragraph 1 of Article 11 the same netting processes ***(which shall include position/contract netting and/or payment netting and/or close-out netting)***, irrespective of where the contracts were executed, provided that the applied netting process is valid, binding and enforceable in compliance with Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems and the relevant applicable insolvency law.

2. Where the CCP considers that the legal risk or the basis risk related to a ***particular*** netting process applied to an economically equivalent contract traded on different trading venues is not sufficiently mitigated, the CCP may exclude such contracts from that ***particular*** netting process.

3. Where, in accordance with paragraph 2 above, a CCP excludes from ***a particular*** netting ***process*** economically equivalent contracts traded on different trading venues, this shall be considered as a significant change to its netting process that shall be subject to a review by the Risk Committee of the CCP and be subject to the review procedure referred to in Article 49 of Regulation (EU) No 648/2012.

4. For the purpose of this Article "basis risk" means the risk arising from less than perfectly correlated movements between two or more assets or contracts cleared by the CCP.

5. Nothing in this Article shall prevent a CCP applying one or more of the remaining netting processes (or collateral and margining requirements under Article 11 above) to an economically equivalent contract where the CCP has determined under Article 12(2) to exclude such contracts from one particular netting process.

Article 13

Cross-margining of correlated contracts (Portfolio margining)

Where a CCP calculates margins with respect to portfolio margining of financial instruments in accordance with Article 41 of Regulation (EU) No 648/2012 and Article 27 of Regulation (EU) No 153/2013, the CCP shall apply its portfolio margining approach to all relevant correlated contracts irrespective of where the contracts are executed.

Title 4

Transitional arrangements

Part 1

CCP transitional arrangements

Article 14

Notification procedure from the CCP to its competent authority

1. In accordance with Article 35 Regulation (EU) No 600/2014, where a CCP does not wish to be bound by that Article, it shall submit a notification to its competent authority in written form.

2. The CCP shall submit the notification using Form 1 in Annex I and shall include the following information:

(a) the identification of the CCP and relevant contact details;

(b) the date of the CCP's authorisation or recognition; and

(c) where a trading venue is connected by close links to the CCP, its name and the jurisdiction in which it is established.

Article 15

Notification procedure from the competent authority to ESMA and the CCP college

1. Relevant competent authorities shall notify ESMA and the CCP college of every decision to approve a transitional arrangement in accordance with Article 35 of Regulation (EU) No 600/2014 in writing without undue delay and no later than one month from the decision.

2. The competent authority shall submit the notification using Form 2 in Annex I and shall include the following information:

(a) the identification of the CCP and the relevant contact details;

(b) the date of the CCP's authorisation or recognition;
(c) the date of the approval decision;
(d) the beginning and end date of the transitional period; and
(e) where a trading venue is connected by close links to the CCP, its name and the jurisdiction in which it is established.

Part 2

Trading venues transitional opt-out arrangements

Article 16

Notification procedure from the trading venue to its competent authority regarding the initial transitional period

In accordance with Article 36 of Regulation (EU) No 600/2014, where a trading venue does not wish to be bound by that Article, it shall submit a notification to ESMA and its competent authority in written form.2. The trading venue shall submit the notification using Forms 3a and 3b in Annex I and shall include the following information:
(a) the identification of the trading venue and the relevant contact details;
(b) where applicable, information about being part of a group, including specification of any trading venues in the group and the jurisdictions in which they are established;
(c) the specification of the traded notional amount in exchange-traded derivatives per asset class for 2016, where applicable, broken down for each trading venue in the group based in the Union; and
(d) where a CCP is connected by close links to the trading venue, its name and the jurisdiction in which it is established.

Article 17

Notification procedure from the trading venue to its competent authority regarding an extension of the transitional period

1. In accordance with Article 36 Regulation (EU) No 600/2014, where a trading venue wishes to continue not to be bound by that Article, it shall submit a notification to ESMA and its competent authority in written form.
2. The trading venue shall submit the notification using Forms 4a and 4b in Annex I and shall include the following information:
(a) the identification of the trading venue and the relevant contact details;
(b) where applicable, information about being part of a group, including specification of the trading venues in the group and the jurisdictions in which they are established;
(c) the specification of the traded notional amount in exchange-traded derivatives per asset class broken down for each relevant rolling year in the preceding opt-out period and, where applicable, broken down for each other trading venue in the group based in the Union; and
(d) where a CCP is connected by close links to the trading venue, its name and the jurisdiction in which it is established.

Article 18

Further specifications for the calculation of notional amount for transitional purposes

1. In accordance with Article 36(5) of Regulation (EU) No 600/2014, a trading venue that does not wish to be bound by Article 36 for a period of thirty months from the entry into application of that Regulation shall include in its calculation of its annual notional amount all exchange-traded derivatives concluded in the calendar year preceding the entry into application that are classified as transactions under its rules.
2. For the purposes of calculating its annual notional amount in accordance with paragraph 1, a trading venue shall use for 2016 actual figures for the period for which they are available, and, for the remaining months of that year, estimate figures, by using the ratio of the corresponding period to the full year of 2015. The trading venue shall use actual figures for at least 8 consecutive months of 2016. If the notification is sent before actual data for at least the first 8 months of 2016 is available, the trading venue shall provide ESMA and the competent authority with updated figures once available.

3. Where a trading venue wishes to continue to not be bound by Article 36 of Regulation (EU) No 600/2014 for a further thirty month period, it shall include in its calculation of its annual notional amount all trades in exchange-traded derivatives concluded in each of the first two rolling 12 month periods of the previous thirty month period that are classified as transactions under its rules.
4. Where for certain types of instruments there are equally accepted alternative approaches to calculating notional amount, but there are notable differences in the values to which these calculation methods give rise, the calculation which gives the higher value shall be used. In particular, for a future or an option, including for commodity derivatives which are designated in units, the notional amount shall be the full value of the derivative's underlying assets at the relevant price at the time at which the transaction is concluded.

Article 19

Approval and verification method by ESMA

1. For the purposes of verification, the trading venue shall submit to ESMA on request all facts and figures on which the calculation is based.
2. ESMA shall also consider relevant post-trade data and annual statistics for verification of the submitted notional amount figures.
3. ESMA shall decide on the approval of the opt-out within three months after the reception of the notification according to either Article 16 or 17, including the information specified by Article 18. The three month assessment period shall be interrupted for the period between the request of any additional information by ESMA and the receipt of the requested information.

Title 5

Non-discriminatory access to and licensing of benchmarks

Article 20

[Article 37(4)(a) of Regulation 600/2014]

Principles guiding the information to be made available to CCPs and trading venues

1. In accordance with Article 37(1) of Regulation (EU) No 600/2014, trading venues and CCPs shall only obtain information that is necessary for trading and clearing purposes. The information required shall depend on a number of factors, including the relevant financial instrument being traded or cleared and the type of benchmark that the financial instrument references.
2. A trading venue or CCP may request from the person with proprietary rights to a benchmark the information mentioned in Article 21 and shall also explain to that person the reasons why such information is required for trading or clearing purposes.
3. A person with proprietary rights to a benchmark shall supply relevant information requested by a trading venue or CCP promptly, either on a one-off basis, including amendments to previously supplied information, or on a continuous or periodic basis, depending on the type of information concerned.
4. A person with proprietary rights to a benchmark shall provide information to a trading venue on the same basis as it provides to other trading venues, unless a different basis can be objectively justified.
5. A person with proprietary rights to a benchmark shall provide information to a CCP on the same basis as it provides it to other CCPs, unless a different basis can be objectively justified.
6. A person with proprietary rights to a benchmark shall provide all relevant information to all trading venues, all CCPs and any other licensees on the same timescales.
7. Where a person with proprietary rights to a benchmark does not have access to relevant information mentioned in Article 21 or cannot pass such information on to a trading venue or CCP due to non-discriminatory restrictions included in the contract with the third party or parties who own that information or other legal obligations, the trading venue or CCP shall request such information directly from the third party or parties who own it. Where appropriate, the person with proprietary rights to a benchmark shall notify the trading venue or CCP of whom it may contact at the third party or parties to be able to access the relevant information.
8. If a person with proprietary rights to a benchmark can show that certain information is available publicly or through other commercial means to a trading venue or CCP, provided such information is

reliable and timely, it does not need to supply that information through licensing to that trading venue or CCP.

Article 21

The information through licensing to be made available to CCPs and trading venues

1. Subject to the provisions in Article 20, relevant information in respect of price and data feeds shall at least include:

(a) a feed of the relevant benchmark's values;

(b) prompt notification of any inaccuracy in the calculation of a benchmark's value and of the updated or corrected benchmark value;

(c) historical benchmark values where the person with proprietary rights to the benchmark maintains such information.

2. In respect of composition and methodology, the information provided shall allow the trading venue or CCP to understand how each benchmark value is developed ***and*** the actual methodology used to make benchmark's values ~~and the rationale for adopting a particular methodology~~. Subject to the provisions in Article 20 and unless such information is not needed for trading or clearing purposes, relevant information in respect of composition and methodology shall at least include:

(a) definitions of key terms;

(b) all criteria and procedures used to develop the benchmark, including input selection, the mix of inputs used to derive the benchmark, the procedures and practices that control the exercise of discretion, priority given to certain data types, minimum data needed to determine a benchmark, any models or extrapolation methods, and the methodology used to determine the benchmark's value;

(c) the procedures used to calculate the benchmark in periods of market stress or disruption, or when inputs are temporarily unavailable, such as when inputs are suspended or closed;

(d) the hours during which the benchmark is calculated.

(e) the procedures which govern the benchmarks rebalancing methodology and the resulting weightings of the constituents of the benchmark;

(f) the procedures for dealing with error reports, including when a revision of a benchmark would be applicable;

(g) information regarding the frequency for any internal reviews and approvals of the composition and methodology. Where applicable, information regarding the procedures and frequency for external review of the composition and methodology;

(h) the circumstances and procedures under which the person with proprietary rights to that benchmark will consult with the trading venue or CCP that uses the benchmark, as appropriate;

(i) the identification of potential limitations of the benchmark, including its operation in illiquid or fragmented markets and the possible concentration of inputs;

(j) procedures for making changes to the composition and methodology and details of any change thereof.

3. Subject to the provisions in Article 20 and unless such information is not needed for trading or clearing purposes, relevant information in respect of pricing shall include the values, types and sources of inputs used to develop the benchmark's values.

Article 22

Other conditions under which access must be granted

1. A person with proprietary rights to a benchmark shall set the conditions in paragraph 5 for licensing agreements pursuant to Article 37 of Regulation (EU) No 600/2014 and shall make those conditions freely available to any trading venue or CCP upon request.

2. Where a person with proprietary rights to a benchmark sets different conditions, including fees, and the conditions for paying them, for different categories of licensees, those differences shall be objectively justified according to parameters such as the quantity, scope or field of use and that person shall make freely available to a trading venue or CCP upon request the conditions for the category to which that trading venue or CCP belongs.

3. A person with proprietary rights to a benchmark shall make the criteria defining the different categories of licensees publicly available.

4. The conditions shall be granted on fair, reasonable and non-discriminatory terms. A person with proprietary rights to a benchmark shall set the same rights and obligations for the licensees within the same category, including where the person with proprietary rights to a benchmark and a trading venue or CCP are connected by close links. The person with proprietary rights to a benchmark shall ensure that the conditions for licensing agreements and the specific content of the agreement do not contain any provision that restricts or creates obstacles for the establishment or future extension of the access arrangement to other entities or mandate the use of a designated CCP, where derivatives constructed on the benchmark would have to be mandatorily cleared, or in any other way hinder the rights under Articles 35 and 36 of Regulation (EU) 600/2014.

5. In particular, the conditions shall:

(a) set the scope of use and content of information for each use under the licence, clearly identifying in each case confidential information;

(b) set the conditions for redistribution, if allowed, of information by trading venues and CCPs;

(c) set the technical requirements to ***receive*** the service;

(d) set the fees and the conditions for paying them;

(e) set the conditions under which the agreement expires taking into consideration the lifespan of financial instruments that reference the benchmark;

(f) set the contingency circumstances and the relevant measures to regulate the continuation, transitional periods and interruption of the service during this contingency period, which:

(i) cater for termination in an orderly manner;

(ii) ensure that termination is not triggered by minor breaches of the contract and that the relevant party is given a reasonable amount of time to remedy any breach that does not give rise to immediate termination; and

(g) set the governing law and allocation of liabilities.

6. The person with proprietary rights to a benchmark shall make available to all licensees within the same category any additions or modifications to the conditions in paragraph 5 agreed with a licensee within that category.

7. The licensing agreement shall require that the person with proprietary rights to a benchmark and the trading venue or CCP put in place adequate policies, procedures and systems, including in relation to relevant conditions referred to in paragraph 5, to ensure:

(a) a prompt implementation of the service ~~since its request~~ according to a prearranged schedule;

(b) ~~all information provided by both parties be kept up-to-date throughout the duration of the access arrangement, and~~ that each party informs the other about any material changes, including information that could have a reputational impact;

(c) a***n agreed*** ~~fluent~~ communication channel between all parties ~~that is timely, reliable and secure~~ during the lifetime of the licence agreement;

(d) consultation where any change to either entity's operations is likely to have a material impact on the licence agreement ~~or on the risks to which the other entity is exposed~~;

(e) the provision of information and the relevant instructions to transmit and use it through the technical means agreed;

(f) disclosure of any modifications to the technical ***requirements required by*** the trading venue or CCP ***to receive the service*** as soon as possible before they are implemented;

~~(g) notification to the relevant party within a reasonable notice period before any change to either entity's operations is implemented, where the impact of a change is unlikely to be significant;~~

(h) the provision of up-to-date information to persons with proprietary rights to a benchmark regarding the dissemination, if redistribution is allowed, of information to clearing members of CCPs and participants of trading venues; and

(i) resolution of disputes and termination of the agreement occurs in an orderly manner according to the identified circumstances.

Article 23

Standards guiding how a benchmark may be proven to be new

1. A person with proprietary rights to a benchmark shall establish whether a benchmark is new in accordance with the criteria specified in Article 37(2)(a) and (b) of Regulation (EU) No 600/2014 taking into account the factors specified in paragraph 2.

2. A benchmark is less likely to be new if any of the following factors apply:

(a) Contracts based on the newer benchmark are capable of being netted or substantially offset with contracts based on the relevant existing benchmark by a CCP.

(b) The regions and industry sectors covered by the relevant benchmarks are the same, or relatively similar ***and the methodologies of each relevant benchmark are the same, or relatively similar***.

(c) The values of the relevant benchmarks are highly correlated.

(d) The composition of the relevant benchmarks, having regard to the number of constituents, the actual constituents, their values and their weightings, are the same, or relatively similar ***and the methodologies of each relevant benchmark are the same, or relatively similar***.

~~(e) The methodologies of each relevant benchmark are the same, or relatively similar.~~

3. Each assessment shall also take into account any other factors specific to the types of benchmarks being assessed, as appropriate.

4. Any adaptation to an existing benchmark, whether material or not, shall not constitute a new benchmark.

5. Each newly released series of a benchmark shall not constitute a new benchmark