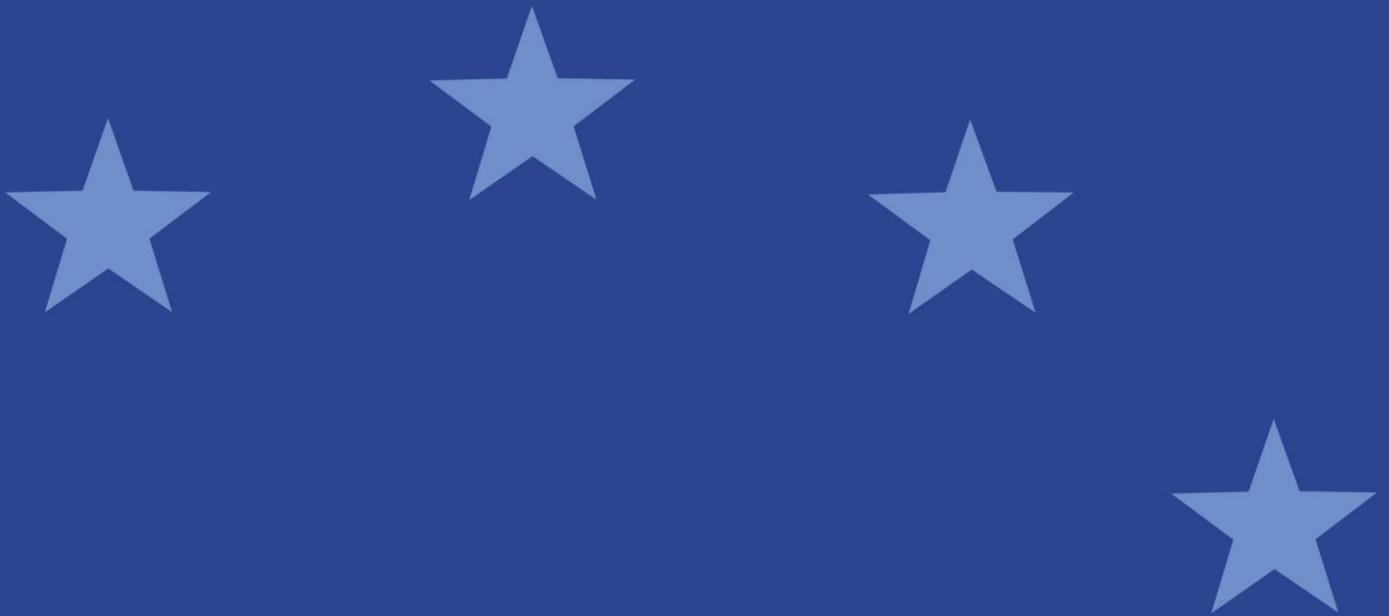




European Securities and  
Markets Authority

# Final Report

**Amendments to Commission Delegated Regulation (EU) 2017/587 (RTS 1)**



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## Acronyms used

CP	Consultation Paper
ESMA	European Securities and Markets Authority
EU	European Union
MiFID I	Directive 2004/39 of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directive 85/611/EC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC
MiFID II	Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012
MiFIR Quick Fix	Regulation (EU) No 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories
OTC	Over-the-counter
RCB	Reasonable commercial basis
RTS	Regulatory Technical Standard
RTS 1	Commission Delegated Regulation (EU) 2017/587 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 shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser
RTS 11	Commission Delegated Regulation (EU) 2017/588 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on the tick size regime for shares, depositary receipts and exchange-traded funds
SI	Systematic internaliser
SMS	Standard Market Size

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## 1 Executive Summary

Under Article 14(7) of Regulation (EU) No 600/2014 (MiFIR), ESMA received a mandate to develop draft Regulatory Technical Standards (RTS) to specify further, in the context of the quoting obligation for systematic internalisers (SIs), “the determination of whether prices reflect prevailing market conditions”. ESMA finalised its proposal in September 2015 (ESMA/2015/1464) and this proposal was endorsed and published in the Official Journal of the EU on 31 March 2017 (see Article 10 of RTS 1).

Over recent months, it has come to ESMA’s attention that the concept of “prices reflecting prevailing market conditions” may require further clarification. On 9 November 2017, ESMA therefore published a Consultation Paper (CP) (ESMA70-156-275) proposing to amend RTS 1 in order to clarify that SIs’ quotes would only adequately reflect prevailing market conditions where such quotes mirror the minimum price increment applicable to on-venue trading.

This final report describes the feedback received in the public consultation, ESMA’s reaction to feedback received as well as the final proposal for amending RTS 1.

### Next Steps

ESMA submitted the final report to the European Commission on 26 March 2018. The Commission has three months to decide whether to endorse the proposed amendments to the RTS.

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## 2 Prices reflecting prevailing market conditions

### 2.1 ESMA's proposal in the CP

#### Article 14(7) of MiFIR

7. *In order to ensure the efficient valuation of shares, depositary receipts, ETFs, certificates and other similar financial instruments and maximise the possibility of investment firms to obtain the best deal for their clients, ESMA shall develop draft regulatory technical standards to specify further the arrangements for the publication of a firm quote as referred to in paragraph 1, the determination of whether prices reflect prevailing market conditions as referred to in paragraph 3, and of the standard market size as referred to in paragraphs 2 and 4.*

1. Articles 14 and 15 of MiFIR establish the obligations for SIs to make public firm quotes in equity instruments. While for liquid instruments, SIs are required to make public quotes on a regular and continuous basis, for illiquid instruments they are only obliged to disclose quotes to their clients upon request.
2. In particular, according to Article 14(3) of MiFIR SIs' quotes have to essentially (i) be at least equivalent to 10% of the standard market size for the quoted instrument, (ii) include both a bid and an offer price and (iii) reflect the prevailing market conditions for that instrument.
3. Article 14(7) of MiFIR empowers ESMA to develop draft RTS specifying the determination of whether prices reflect prevailing market conditions. Article 10 of RTS 1 specifies the concept of "prices reflecting prevailing market conditions" by stating that: "*The prices published by a systematic internaliser shall reflect prevailing market conditions where they are close in price, at the time of publication, to quotes of equivalent sizes for the same financial instrument on the most relevant market in terms of liquidity as determined in accordance with Article 4 for that financial instrument*".
4. Over recent months, the question has emerged whether the quotes of an SI can adequately reflect prevailing market conditions when those quotes do not reflect the minimum price increments ('tick sizes') applicable on-venue to the quoted financial instrument.
5. In addition<sup>1</sup>, if only on-venue orders and quotes had to comply with the minimum tick size regime applicable to a specific instrument, this might create a competitive disadvantage for trading venues compared to SIs and, due to the increasing use of Smart Order Routers by market participants and the application of best execution obligations, result in moving large volumes currently traded on-venue to SI execution. It appears doubtful that such an outcome would go hand in hand with real benefits for end clients. While it would result in marginally better prices, it would at the same time undermine the overall quality of the liquidity available, the efficient valuation of equity instruments as well as the efficient pricing of instruments traded.

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<sup>1</sup> See the [CP](#) for a more detailed analysis of the rationale for the proposed amendment.

6. Furthermore, ESMA considered that allowing SI's quotes to reflect price levels that could not be traded on trading venue would undermine the objective of MiFIR to ensure a level playing field between different means of trading (see recital 18 of MiFIR).
7. For those reasons, ESMA proposed an amendment to RTS 1 to clarify that, for equity instruments subject to the minimum tick size regime under RTS 11, SI quotes would only be considered to reflect the prevailing market conditions where those quotes reflect the price increments applicable to EU trading venues trading the same instruments.
8. ESMA proposed in its CP to amend Article 10 of RTS 1 as follows (proposed changes in **bold**): "The prices published by a systematic internaliser shall reflect prevailing market conditions where they are close in prices to quotes of equivalent sizes for the same financial instrument on the most relevant market in terms of liquidity as determined in accordance with Article 4 for that financial instrument **and where the price levels could be traded on a trading venue at the time of publication**".

## 2.2 Feedback received to the CP

9. The vast majority of respondents, representing a broad range of stakeholders covering trading venues, savings banks, the buy-side as well as high-frequency traders and market makers, supported ESMA's proposal for amending Article 10 of RTS 1.
10. In particular, respondents highlighted that the proposal would contribute to a level playing field between SIs and trading venues and avoid further market fragmentation by artificially directing order flow for execution to SIs offering non-significant price improvements. Only one respondent did not support the proposal to amend Article 10 based on legal and procedural arguments.
11. Some divergence in the responses supporting the ESMA proposal can be noted. One group of respondents, mainly trading venues, advocated in favour of additional changes, including changes of the Level 1 text to ensure that SI quotes always reflect the price levels that could be traded on a trading venue, i.e. also in case the quote is above the standard market size (SMS) or for illiquid instruments. Furthermore, those respondents also advocated changes to the methodology for determining the SMS, arguing that the current SMS is too low for many equity instruments and should be increased to a higher level.
12. Another group of respondents, mainly representing the buy-side and the banking sector, took a different view. While those respondents were supportive of the proposed change of Article 10 of RTS 1, they stressed that it should only apply to quotes below SMS. Moreover, these respondents highlighted concerns that in some areas trading venues might, following the proposed amendment of RTS 1, de facto benefit from a lighter regime than SIs. Those respondents stressed that trading venues were not always bound by the minimum tick size regime, such as for trading facilities operating under a reference price waiver and matching orders at mid-point (including orders below the SMS).
13. Some respondents expressed concerns that various trading venues increased fees for their market data over the last months, including for SIs, which was perceived as distorting the level playing field. Those respondents feared that by requiring SI quotes to mirror prices displayed by trading venues, the proposed RTS 1 amendment might result in further increases of fees for market data.
14. In addition, a number of respondents raised concerns on the tick size regime as such. Issues raised included concerns that liquidity might move to third country trading venues – especially in a post-Brexit market – that are not subject to the same tick size regime; that the calculation method for determining the tick size may be improved to more accurately

reflect a share's true liquidity or more generic concerns about the unintended consequences of the additional costs imposed by the tick size regime on end investors.

## 2.3 ESMA's reaction and final proposal

15. Given the strong support by stakeholders, ESMA did not amend its proposal following the consultation. ESMA understands that the views of respondents are mixed as to whether also quotes from SIs above SMS should reflect the price levels on trading venues. It should be noted that such a change would go beyond the proposed amendment of RTS 1 and not be covered by the empowerment in Article 14(7) of MiFIR, but would require amending the Level 1 text.
16. With regard to the legal and procedural concerns raised by one stakeholder, ESMA considers that the proposed amendment of RTS 1 further specifies whether prices reflect prevailing market conditions and is therefore covered by the specific empowerment set out in Article 14(7) of MiFIR. Furthermore, ESMA considers that it is within its competence to propose amendments to technical standards subject to being covered by a legal empowerment and the consultation of stakeholders.
17. ESMA also does not fully subscribe to the arguments brought forward by some stakeholders that, in consequence of the proposed amendment of RTS 1, trading venues would be subject to a lighter regime than SIs.
18. It is important to stress that ESMA already published several Q&As regarding the scope of the tick size regime (see for instance Q&As 6 and 10 in section 4 of the Q&A document market structures topics - reference ESMA70-872942901-38, [here](#)). Q&A 10 clarifies in particular that "the reference to "orders" in Article 2 of RTS 11 should not be interpreted as restricting the application of the tick size regime to only certain types of trading systems but, on the contrary, should be understood in the broadest sense". Furthermore, while Q&A 6 recognises that certain orders may benefit from a pre-trade waiver without being subject to the tick size regime, it should be noted that this applies only in very limited circumstances and, that in most cases, the use of those waivers is limited by the double volume cap.
19. ESMA has observed and been made aware of various increases in the fees for market data by trading venues (and approved publication arrangements (APAs)) ahead of the application of MiFID II. ESMA shares the concerns expressed by some respondents over the recent increases in fees for market data. Article 13 of MiFIR requires trading venues to make data available to the public on a reasonable commercial basis (RCB) and the concept of RCB has been further specified in Articles 6-11 of Commission Delegated Regulation (EU) 2017/567. ESMA intends to have a closer look at recent developments on market data, and may address some of the issues identified through Q&As.
20. Concerning the comments received on the tick size regime per se, ESMA agrees that it is crucial that the minimum applicable tick size is adequately calibrated and does not unduly constrain prices and trading in general. While it is too early to draw definitive conclusions, the first weeks of application of the MiFID II tick size regime have not fundamentally put into question the way the regime is calibrated. ESMA therefore does not envisage at this stage an in-depth revision of the regime and methodology of RTS 11. Nevertheless, ESMA agrees that the specific case of instruments for which the main pool of liquidity is located outside the EU (third-country instruments) may require further investigation.
21. Lastly, ESMA takes note of the suggestion to amend the methodology used to calculate the average value of transactions with a view to increase the applicable SMS thresholds.

However, ESMA considers that the Level 1 text sets strict boundaries concerning the calculation methodology for SMS.

### **3 Other amendments to RTS 1**

#### **3.1 ESMA's proposal in the CP**

22. In the CP, ESMA also proposed to make a number of minor amendments to RTS 1 in order to correct a number of inconsistencies that were introduced in the course of the adoption process and following the amendment of MiFIR (Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 (Quick Fix).
23. These changes included removing the references to securities financing transactions in RTS 1 (Articles 2(h) and 6(h) of RTS 1), to clarify the definition of a portfolio trade in the context of the trading obligation for shares (Article 2(b) of RTS 1), to correct a cross-reference (Article 3(2) of RTS 1) as well as to clarify the methodology for determining the standard market size (Article 11(4) and (5) of RTS 1) and for the transparency calculations (Article 17(2) of MiFIR).

#### **3.2 Feedback received to the CP**

24. Most respondents providing feedback to this question agreed with the proposed other amendments to RTS 1 aiming at ensuring the application of a consistent and unambiguous legal text. However, some respondents limited their support to the amendments proposed for Articles 2(h) and 6(h) as well as the amendment of the cross-reference in Article 3(2) only. In the view of these respondents the additional changes proposed go beyond correcting errors in implementation and they therefore recommended considering such changes at a later stage, subject to a public consultation.
25. A few respondents asked for further amendments to RTS 1, such as changes to the determination of the SMS by amending Article 11(3) of RTS 1, and in particular requiring to include post-trade LIS-transactions when determining the SMS. Another respondent suggested introducing new provisions in RTS 1 to impose more robust post-trade transparency requirements on SIs.

#### **3.3 ESMA's reaction and final proposal**

26. ESMA maintained the proposal for the additional amendments of RTS 1 in view of the strong support by stakeholders. ESMA does not concur with the view of some stakeholders that some of the amendments proposed go beyond addressing inconsistencies. ESMA considers that these changes were inadvertently introduced during the adoption process and did not have the purpose to amend the substance of the RTS. It is therefore important to address these issues as early as possible to avoid any inconsistent application as a consequence.
27. Concerning the proposals for amendments of RTS 1 going beyond the changes proposed in the CP, as explained above, ESMA does not consider appropriate at this stage to make changes to the RTS going beyond the issues created during the adoption process. Such changes would require a more in-depth analysis, including another public consultation.



## 4 Annexes

### 4.1 Annex I

#### Cost-benefit analysis

As explained in the CP, ESMA considers that the costs and benefits attached to the proposal for amending Article 10 of RTS 1 are included in the section on “prices reflecting prevailing market conditions” in the CP and the final report.

Respondents were invited to provide any comments they may have on the costs and benefits attached to the proposal directly in their answer to questions 1 and 2. ESMA did not receive much feedback in this respect.

One respondent stressed that the costs that banks incur in connection with the implementation, validation and ongoing development of the logic governing best execution and smart order routing would be lower if the tick size regime were applied in a uniform manner. In particular, a difference of treatment between SIs and trading venues would increase the complexity of validation and development and ultimately the investment firm’s costs. Therefore, the amendment of RTS 1 might result in lower costs for investment firms for meeting their best execution requirements. These lower costs are expected to be passed on to end-clients, thereby resulting in lower costs for end-clients

One respondent noted that requiring SIs’ quotes to reflect price increments applicable to EU trading venues might imply additional trading costs for investors in particular those trading ETFs, ESMA notes that this comment relates to the calibration of the tick size regime per se and is therefore not related to the proposal at hand. In addition, it should be stressed that the development of RTS 11 has been subject to a specific cost and benefit analysis.

Lastly, several respondents raised concerns about the fact that the ESMA proposal might encourage trading venues to (further) increase the fees charged to SIs for market data, thereby resulting in additional costs. As explained in the final report, ESMA is monitoring developments in this area but believes that this issue should be tackled independently from the amendment at hand and from a broader perspective.

## 4.2 Annex II

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

of [ ]

**amending Commission Delegated Regulation (EU) 2017/587 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 shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser**

**(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 648/2012, and in particular Article 4(6), Article 14(7), Article 22(4) and Article 23(3) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2017/587<sup>2</sup> sets out transparency requirements for trading venues and systematic internalisers in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments. In particular, Commission Delegated Regulation (EU) 2017/587 determines whether prices quoted by systematic internalisers in accordance with the obligation to make public firm quotes as set out in Regulation (EU) 600/2014 reflect prevailing market conditions.
- (2) In order to ensure a level playing field between trading venues and systematic internalisers, it is important to further clarify whether prices published by systematic internalisers reflect prevailing market conditions. This Regulation therefore amends Commission Delegated Regulation (EU) 2017/587 by specifying that prices published by a systematic internaliser

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<sup>2</sup> Commission Delegated Regulation (EU) 2017/587 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 shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser (OJ L 87, 31.3.2017, p.387).

reflect prevailing market conditions only where they have a price level that could be traded on a trading venue.

- (3) This amendment ensures that prices published by systematic internalisers reflect the minimum price increments applicable to orders and quotes advertised on trading venues. This appears to be even more relevant for shares that are subject to the trading obligation under Regulation (EU) 600/2014 in order to create a level playing field between regulated markets, MTFs and systematic internalisers.
- (4) For reasons of consistency and to ensure the convergent application as well as to provide market participants with adequate legal certainty, it is necessary to amend certain provisions of Commission Delegated Regulation (EU) 2017/587.
- (5) Since Regulation (EU) 2016/1033 of the European Parliament and of the Council<sup>3</sup> removes securities financing transactions from the scope of the transparency provisions for trading venues and systematic internalisers, it is necessary to remove references to securities financing transactions also from this Regulation.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>4</sup>,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

#### **Amendments to Delegated Regulation (EU)2017/587**

(1) Article 2 is amended as follows:

(a) point (b) is replaced by the following:

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<sup>3</sup> Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) No 596/2014 on market abuse and Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories (OJ L 175, 30.6.2016, p. 1).

<sup>4</sup> 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).

‘(b) the transaction is part of a portfolio trade which includes five or more different shares.’;

(b) point (h) is replaced by the following:

‘(h) the transaction is carried out under the rules or procedures of a trading venue, a CCP or a central securities depository to effect a buy-in of unsettled transactions in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council <sup>(5)</sup>

(c) point (i) is deleted;

(2) Article 3, paragraph 2 is replaced by the following:

‘The transparency requirements referred to in paragraph 1 shall also apply to any 'actionable indication of interest' as defined in Article 2(1)(33) and pursuant to Article 3 of Regulation (EU) No 600/2014.’;

(3) Article 6 is amended as follows

(a) point (h) is replaced by the following:

‘(h) the transaction is carried out under the rules or procedures of a trading venue, a CCP or a central securities depository to effect buy-in of unsettled transactions in accordance with Regulation (EU) No 909/2014;’

(b) point (i) is replaced by the following:

‘(i) any other transaction equivalent to one of those described in points (a) to (h) in that it is contingent on technical characteristics which are unrelated to the current market valuation of the financial instrument traded.

(c) point (j) is deleted.

(4) Article 10 is replaced by the following:

‘The prices published by a systematic internaliser shall reflect prevailing market conditions where they are close in prices to quotes of equivalent sizes for the same financial instrument on the most relevant market in terms of liquidity as determined in accordance with Article 4 for that financial instrument and where the price levels could be traded on a trading venue at the time of publication.’

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<sup>5</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1)

(5) Article 11, paragraphs 4 and 5 are replaced by the following:

‘4. Before a share, depositary receipt, ETF, certificate or other similar financial instrument is traded for the first time on a trading venue in the Union, the competent authority shall estimate the average value of transactions for that financial instrument taking into account any previous trading history of that financial instrument and of other financial instruments that are considered to have similar characteristics, and ensure publication of that estimate;

5. The estimated average value of transactions laid down in paragraph 4 shall be used to determine the standard market size for a share, depositary receipt, ETF, certificate or other similar financial instrument during a six-week period following the date that the share, depositary receipt, ETF, certificate or other similar financial instrument was first admitted to trading or first traded on a trading venue.’;

(6) Article 17, paragraph 2 is replaced by the following:

The information published in accordance with paragraph 1 shall apply from 1 April following its publication.’

#### *Article 2*

#### **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 be binding in its entirety and directly applicable in all Member States.

Done at Brussels, []

*For the Commission*  
*The President*