Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2017/565

of 25 April 2016

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(Text with EEA relevance)

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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/EU[(1)], and in particular Article 2(3), the second subparagraph of Article 4(1)(2), and Articles 4(2), 16(12), 23(4), 24(13), 25(8), 27(9), 28(3), 30(5), 31(4), 32(4), 33(8), 52(4), 54(4), 58(6), 64(7), 65(7) and 79(8) thereof,

Whereas:

(1) Directive 2014/65/EU establishes the framework for a regulatory regime for financial markets in the Union, governing operating conditions relating to the performance by investment firms of investment services and, where appropriate, ancillary services and investment activities; organisational requirements for investment firms performing such services and activities, for regulated markets and data reporting services providers; reporting requirements in respect of transactions in financial instruments; position limits and position management controls in commodity derivatives; transparency requirements in respect of transactions in financial instruments.

(2) Directive 2014/65/EU empowers the Commission to adopt a number of delegated acts. It is important that all the detailed supplementing rules regarding the authorisation, ongoing operation, market transparency and integrity, which are inextricably-linked aspects inherent to the taking up and pursuit of the services and activities covered by Directive 2014/65/EU, begin to apply at the same time as Directive 2014/65/EU so that the new requirements can operate effectively. To ensure coherence and to facilitate a comprehensive view and compact access to the provisions by persons subject to those obligations as well as by investors, it is desirable to include the delegated acts related to the above-mentioned rules in this Regulation.

(3) It is necessary to further specify the criteria to determine under what circumstances contracts in relation to wholesale energy products must be physically settled for the purposes of the limitation of scope set out in Section C(6) of Annex I to Directive 2014/65/EU. In order to ensure that the scope of this exemption is limited to avoid loopholes it is necessary that such contracts require that both buyer and seller should have proportionate arrangements in place to make or receive delivery of the underlying commodity upon the expiry of the contract. In order to avoid loopholes in case of balancing agreements with the Transmission System Operator in the areas of electricity and gas, such balancing arrangements should only be considered as a proportionate arrangement if the parties to the arrangement have the obligation to physically deliver electricity or gas. Contracts should also establish clear obligations for physical delivery which cannot be offset whilst recognising that forms of operational netting as defined in Regulation (EU) No 1227/2011 of the European Parliament and of the Council[(2)] or national law should not considered as offsetting. Contracts which must be physically settled should be permitted to deliver in a variety of methods however all methods should involve a form of transfer of right of an ownership nature of the relevant underlying commodity or a relevant quantity thereof.

(4) In order to clarify when a contract in relation to wholesale energy product must be physically settled, it is necessary to further specify when certain circumstances such as force majeure or bona fide inability to settle provisions are present, and which should not alter the characterisation of those contracts as 'must be physically settled'. It is important to also clarify how oil and coal energy derivatives should be understood for the purposes of Section C(6) of Annex I to Directive 2014/65/EU. In this context, contracts related to oil shale should not be understood to be coal energy derivatives.

(5) A derivative contract should only be considered to be a financial instrument under Section C(7) of Annex I to Directive 2014/65/EU if it relates to a commodity and meets a set of criteria for determining whether a contract should be considered as having the characteristics of other derivative financial instruments and as not being for commercial purposes. This should include contracts which are standardised and traded on venues, or contracts equivalent thereof where all the terms of such contracts are equivalent to contracts traded on venues. In this case, terms of these contracts should also be understood to include provisions such as quality of the commodity or place of delivery.

(6) In order to provide clarity on the definitions of contracts relating to underlying variables set out in Section C(10) of Directive 2014/65/EU, criteria should be provided relating to their terms and underlying variables in those contracts. The inclusion of actuarial statistics in the list of underlyings should not be understood as extending the scope of those contracts to insurance and reinsurance.

(7) Directive 2014/65/EU establishes the general framework for a regulatory regime for financial markets in the Union, setting out in Section C of Annex I the list of financial instruments covered. Section C(4) of Annex I to Directive 2014/65/EU includes financial instruments relating to a currency which are therefore under the scope of this Directive.

(8) In order to ensure the uniform application of Directive 2014/65/EU, it is necessary to clarify the definitions laid down in Section C(4) of Annex I to Directive 2014/65/EU for other derivative contracts relating to currencies and to clarify that spot contracts relating to currencies are not other derivative instruments for the purposes of Section C(4) of Annex I to Directive 2014/65/EU.

(9) The settlement period for a spot contract is generally accepted in most main currencies as taking place within 2 days or less, but where this is not market practice it is necessary to make provision to allow settlement to take place in accordance with normal market practice. In such cases, physical settlement does not require the use of paper money and can include electronic settlement.

(10) Foreign exchange contracts may also be used for the purpose of effecting payment and those contracts should not be considered financial instruments provided they are not traded on a trading venue. Therefore it is appropriate to consider as spot contracts those foreign exchange contracts that are used to effect payment for financial instruments where the settlement period for those contracts is more than 2 trading days and less than 5 trading days. It is also appropriate to consider as means of payments those foreign exchange contracts that are entered into for the purpose of achieving certainty about the level of payments for goods, services and real investment. This will result in excluding from the definition of financial instruments foreign exchange contracts entered into by non-financial firms receiving payments in foreign currency for exports of identifiable goods and services and non-financial firms making payments in foreign currency to import specific goods and services.

(11) Payment netting is essential to the effective and efficient operation of currency settlement systems and therefore the classification of a foreign currency contract as a spot transaction should not require that each foreign currency spot contract is settled independently.

(12) Non deliverable forwards are contracts for the difference between an exchange rate agreed before and the actual spot rate at maturity and therefore should not be considered to be spot contracts, regardless of their settlement period.

(13) A contract for the exchange of one currency against another currency should be understood as relating to a direct and unconditional exchange of those currencies. In the case of a contract with multiple exchanges, each exchange should be considered separately. However an option or a swap on a currency should not be considered a contract for the sale or exchange of a currency and therefore could not constitute either a spot contract or means of payment regardless of the duration of the swap or option and regardless of whether it is traded on a trading venue or not.

(14) Advice about financial instruments addressed to the general public should not be considered as a personal recommendation for the purposes of the definition of ‘investment advice’ in Directive 2014/65/EU. In view of the growing number of intermediaries providing personal recommendations through the use of distribution channels, it should be clarified that a recommendation issued, even exclusively, through distribution channels, such as internet, could qualify as a personal recommendation.

Therefore, situations in which, for instance, email correspondence is used to provide personal recommendations to a specific person, rather than to address information to the public in general, may amount to investment advice.

(15) Generic advice about a type of financial instrument is not considered investment advice for the purposes of Directive 2014/65/EU. However, if an investment firm provides generic advice to a client about a type of financial instrument which it presents as suitable for, or based on a consideration of the circumstances of, that client, and that advice is not in fact suitable for the client, or is not based on a consideration of his circumstances, the firm is likely to be acting in contravention of Article 24(1) or (3) of Directive 2014/65/EU In particular, a firm which gives a client such advice would be likely to contravene the requirement of Article 24(1) to act honestly, fairly and professionally in accordance with the best interests of its clients. Similarly or alternatively, such advice would be likely to contravene the requirement of Article 24(3) that information addressed by a firm to a client should be fair, clear and not misleading.

(16) Acts carried out by an investment firm that are preparatory to the provision of an investment service or carrying out an investment activity should be considered as an integral part of that service or activity. This would include, for example, the provision of generic advice by an investment firm to clients or potential clients prior to or in the course of the provision of investment advice or any other investment service or activity.

(17) The provision of a general recommendation about a transaction in a financial instrument or a type of financial instrument constitutes the provision of an ancillary service within Section B(5) of Annex I to Directive 2014/65/EU, and consequently Directive 2014/65/EU and its protections apply to the provision of that recommendation.

(18) In order to ensure the objective and effective application of the definition of systematic internalisers in the Union in accordance with Article 4(1)(20) of Directive 2014/65/EU, further specifications should be provided on the applicable pre-set limits for the purposes of what constitutes frequent systematic and substantial over the counter (OTC) trading. Pre-set limits should be set at an appropriate level to ensure that OTC trading of such a size that it had a material effect on price formation is within scope while at the same time excluding OTC trading of such a small size that it would be disproportionate to require the obligation to comply with the requirements applicable to systematic internalisers.

(19) Pursuant to Directive 2014/65/EU, a systematic internaliser should not be allowed to bring together third party buying and selling interests in functionally the same way as a trading venue. A systematic internaliser should not consist of an internal matching system which executes client orders on a multilateral basis, an activity which requires authorisation as a multilateral trading facility (MTF). An internal matching system in this context is a system for matching client orders which results in the investment firm undertaking matched principal transactions on a regular and not occasional basis.

(20) For reasons of clarity and legal certainty and to ensure a uniform application, it is appropriate to provide supplementary provisions in relation to the definitions in relation to algorithmic trading, high frequency algorithmic trading techniques and direct electronic access. In automated trading, various technical arrangements are deployed.

It is essential to clarify how those arrangements are to be categorised in relation to the definitions of algorithmic trading and direct electronic access. The trading processes based on direct electronic access are not mutually exclusive to those involving algorithmic trading or its sub-segment high frequency algorithmic trading technique. The trading of a person having direct electronic access may therefore also fall under the algorithmic trading including the high frequency algorithmic trading technique definition.

(21) Algorithmic trading in accordance with Article 4(1)(39) of Directive 2014/65/EU should include arrangements where the system makes decisions, other than only determining the trading venue or venues on which the order should be submitted, at any stage of the trading processes including at the stage of initiating, generating, routing or executing orders. Therefore, it should be clarified that algorithmic trading, which encompasses trading with no or limited human intervention, should refer not only to the automatic generation of orders but also to the optimisation of order-execution processes by automated means.

(22) Algorithmic trading should encompass smart order routers (SORs) where such devices use algorithms for optimisation of order execution processes that determine parameters of the order other than the venue or venues where the order should be submitted. Algorithmic trading should not encompass automated order routers (AOR) where, although using algorithms, such devices only determine the trading venue or venues where the order should be submitted without changing any other parameter of the order.

(23) High frequency algorithmic trading technique in accordance with Article 4(1)(40) of Directive 2014/65/EU, which is a subset of algorithmic trading, should be further specified through the establishment of criteria to define high message intraday rates which constitutes orders quotes or modifications or cancellations thereof. Using absolute quantitative thresholds on the basis of messaging rates provides legal certainty by allowing firms and competent authorities to assess the individual trading activity of firms. The level and scope of these thresholds should be sufficiently broad to cover trading which constitute high frequency trading technique, including those in relation to single instruments and multiple instruments.

(24) Since the use of high frequency algorithmic trading technique is predominantly common in liquid instruments, only instruments for which there is a liquid market should be included in the calculation of high intraday message rate. Also, given that high frequency algorithmic trading technique is a subset of algorithmic trading, messages introduced for the purpose of trading that fulfil the criteria in Article 17(4) of Directive 2014/65/EU should be included in the calculation of intraday message rates. In order not to capture trading activity other than high frequency algorithmic trading techniques, having regard to the characteristics of such trading as set out in recital 61 of Directive 2014/65/EU, in particular that such trading is typically done by traders using their own capital to implement more traditional trading strategies such as market making or arbitrage through the use of sophisticated technology, only messages introduced for the purposes of dealing on own account, and not those introduced for the purposes of receiving and transmitting orders or executing orders of behalf of clients, should

be included in the calculation of high intraday message rates. However, messages introduced through other techniques than those relying on trading on own account should be included in the calculation of high intraday message rate where, viewed as a whole and taking into account all circumstances, the execution of the technique is structured in such a way as to avoid the execution taking place on own account, such as through the transmission of orders between entities within the same group. In order to take into account, when determining what constitutes high message intra-day rates, the identity of the client ultimately behind the activity, messages which were originated by clients of DEA providers should be excluded from the calculation of high intraday message rate in relation to such providers.

(25) The definition of direct electronic access should be further specified. The definition of direct electronic access should not encompass any other activity beyond the provision of direct market access and sponsored access. Therefore, arrangements where client orders are intermediated through electronic means by members or participants of a trading venue such as online brokerage and arrangements where clients have direct electronic access to a trading venue should be distinguished.

(26) In case of order intermediation, submitters of orders do not have sufficient control over the parameters of the arrangement for market access and should therefore not fall within scope of direct electronic access. Therefore, arrangements that allow clients to transmit orders to an investment firm in an electronic format, such as online brokerage, should be not be considered direct electronic access provided that clients do not have the ability to determine the fraction of a second of order entry and the life time of orders within that time frame.

(27) Arrangements where the client of a member or participant of a trading venue, including the client of a direct clients of organised trading facilities (OTFs), submit their orders through arrangements for optimisation of order execution processes that determine parameters of the order other than the venue or venues where the order should be submitted through SORs embedded into the provider's infrastructure and not on the client's infrastructure should be excluded from the scope of direct electronic access since the client of the provider does not have control over the time of submission of the order and its lifetime. The characterisation of direct electronic access when deploying smart order routers should therefore be dependent on whether the smart order router is embedded in the clients' systems and not in that of the provider.

(28) The rules for the implementation of the regime governing organisational requirements for investment firms performing investment services and, where appropriate, ancillary services and investment activities on a professional basis, for regulated markets, and data reporting services providers should be consistent with the aim of Directive 2014/65/EU. They should be designed to ensure a high level of integrity, competence and soundness among investment firms and entities that operate regulated markets, MTFs or OTFs, and to be applied in a uniform manner.

(29) It is necessary to specify concrete organisational requirements and procedures for investment firms performing such services or activities. In particular, rigorous procedures should be provided for with regard to matters such as compliance,

risk management, complaints handling, personal transactions, outsourcing and the identification, management and disclosure of conflicts of interest.

(30) The organisational requirements and conditions for authorisation for investment firms should be set out in the form of a set of rules that ensures the uniform application of the relevant provisions of Directive 2014/65/EU. This is necessary in order to ensure that investment firms have equal access on equivalent terms to all markets in the Union and to eliminate obstacles, linked to authorisation procedures, to cross-border activities in the field of investment services.

(31) The rules for the implementation of the regime governing operating conditions for the performance of investment and ancillary services and investment activities should reflect the aim underlying that regime. They should be designed to ensure a high level of investor protection to be applied in a uniform manner through the introduction of clear standards and requirements governing the relationship between an investment firm and its client. On the other hand, as regards investor protection, and in particular the provision of investors with information or the seeking of information from investors, the retail or professional nature of the client or potential client concerned should be taken into account.

(32) In order to ensure the uniform application of the various relevant provisions of Directive 2014/65/EU, it is necessary to establish a harmonised set of organisational requirements and operating conditions for investment firms.

(33) Investment firms vary widely in their size, their structure and the nature of their business. A regulatory regime should be adapted to that diversity while imposing certain fundamental regulatory requirements which are appropriate for all firms. Regulated entities should comply with their high level obligations and design and adopt measures that are best suited to their particular nature and circumstances.

(34) It is appropriate to set out common criteria for assessing whether an investment service is provided by a person in an incidental manner in the course of a professional activity, in order to ensure a harmonised and strict implementation of the exemption granted by Directive 2014/65/EU. The exemption should only apply if the investment service has an intrinsic connection to the main area of the professional activity and is subordinated thereto.

(35) The organisational requirements established under Directive 2014/65/EU should be without prejudice to systems established by national law for the registration or monitoring by competent authorities or firms of individuals working within investment firms.

(36) For the purposes of requiring an investment firm to establish, implement and maintain an adequate risk management policy, the risks relating to the firm's activities, processes and systems should include the risks associated with the outsourcing of critical or important functions. Those risks should include those associated with the firm's relationship with the service provider, and the potential risks posed where the outsourced functions of multiple investment firms or other regulated entities are concentrated within a limited number of service providers.

(37) The fact that risk management and compliance functions are performed by the same person does not necessarily jeopardise the independent functioning of each function. The conditions that persons involved in the compliance function should not also be involved in the performance of the functions that they monitor, and that the method of determining the remuneration of such persons should not be likely to compromise their objectivity, may not be proportionate in the case of small investment firms. However, they would only be disproportionate for larger firms in exceptional circumstances.

(38) Clients or potential clients should be enabled to express their dissatisfaction with investment services provided by investment firms in the interests of investor protection as well as strengthening investment firms' compliance with their obligations. Clients' or potential clients' complaints should be handled effectively and in an independent manner by a complaints management function. In line with the principle of proportionality, that function could be carried out by the compliance function.

(39) Investment firms are required to collect and maintain information relating to clients and services provided to clients. Where those requirements involve the collection and processing of personal data, the respect of the right to the protection of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council[(3)] and Directive 2002/58/EC of the European Parliament and of the Council[(4)] which govern the processing of personal data carried out in application of this Directive should be ensured. Processing of personal data by the European Securities and Markets Authority (ESMA) in the application of this Regulation is subject to Regulation (EC) No 45/2001 of the European Parliament and of the Council[(5)].

(40) A definition of remuneration should be introduced in order to ensure the efficient and consistent application of the conflicts of interest and conduct of business requirements in the area of remuneration and should include all forms of financial or non-financial benefits or payments provided directly or indirectly by firms to relevant persons in the provision of investment or ancillary services to clients, such as cash, shares, options, cancellations of loans to relevant persons at dismissal, pension contributions, remuneration by third parties for instance through carried interest models, wage increases or promotions, health insurance, discounts or special allowances, generous expense accounts or seminars in exotic destinations.

(41) In order to ensure that clients' interests are not impaired, investment firms should design and implement remuneration policies to all persons who could have an impact on the service provided or corporate behaviour of the firm, including persons who are front-office staff, sales force staff or other staff indirectly involved in the provision of investment or ancillary services. Persons overseeing the sales forces, such as line managers, who may be incentivised to pressure sales staff, or financial analysts whose literature may be used by sales staff to entice clients to make investment decisions or persons involved in complaints-handling or in product design and development should also be included in the scope of relevant persons concerned by remuneration rules. Relevant persons should also include tied agents. When determining the remuneration for tied agents, firms should take the tied agents' special status and the respective national specificities into consideration. However, in such cases, firms' remuneration

policies and practices should still define appropriate criteria to be used to assess the performance of relevant persons, including qualitative criteria encouraging the relevant persons to act in the best interests of the client.

(42) Where successive personal transactions are carried out on behalf of a person in accordance with prior instructions given by that person, obligations relating to personal transactions should not apply separately to each such successive transaction if those instructions remain in force and unchanged. Similarly, those obligations should not apply to the termination or withdrawal of such instructions, provided that any financial instruments which had previously been acquired pursuant to the instructions are not disposed of at the same time as the instructions terminate or are withdrawn. However, those obligations should apply in relation to a personal transaction, or the commencement of successive personal transactions, carried out on behalf of the same person if those instructions are changed or if new instructions are issued.

(43) Competent authorities should not make the authorisation to provide investment services or activities subject to a general prohibition on the outsourcing of one or more critical or important functions. Investment firms should be allowed to outsource such functions if the outsourcing arrangements established by the firm comply with certain conditions.

(44) The outsourcing of investment services or activities or critical and important functions is capable of constituting a material change of the conditions for the authorisation of the investment firm, as referred to in Article 21(2) of Directive 2014/65/EU. If such outsourcing arrangements are to be put in place after the investment firm has obtained an authorisation according to Chapter I of Title II of Directive 2014/65/EU, those arrangements should be notified to the competent authority where required by Article 21(2) of that Directive.

(45) The circumstances which should be treated as giving rise to a conflict of interest should cover cases where there is a conflict between the interests of the firm or certain persons connected to the firm or the firm's group and the duty the firm owes to a client; or between the differing interests of two or more of its clients, to each of whom the firm owes a duty. It is not enough that the firm may gain a benefit if there is not also a possible disadvantage to a client, or that one client to whom the firm owes a duty may make a gain or avoid a loss without there being a concomitant possible loss to another such client.

(46) Conflicts of interest should be regulated only where an investment service or ancillary service is provided by an investment firm. The status of the client to whom the service is provided — as either retail, professional or eligible counterparty — should be irrelevant for that purpose.

(47) In complying with its obligation to draw up a conflict of interest policy under Directive 2014/65/EU which identifies circumstances which constitute or may give rise to a conflict of interest, the investment firm should pay special attention to the activities of investment research and advice, proprietary trading, portfolio management and corporate finance business, including underwriting or selling in an offering of securities and advising on mergers and acquisitions. In particular, such special attention is

appropriate where the firm or a person directly or indirectly linked by control to the firm performs a combination of two or more of those activities.

(48) Investment firms should aim to identify and prevent or manage the conflicts of interest arising in relation to their various business lines and their group's activities under a comprehensive conflicts of interest policy. While disclosure of specific conflicts of interest is required by Article 23(2) of Directive 2014/65/EU, it should be a measure of last resort to be used only where the organisational and administrative arrangements established by the investment firm to prevent or manage its conflicts of interest in accordance with Article 23(1) of Directive 2014/65/EU are not sufficient to ensure, with reasonable confidence, that the risks of damage to the interests of the client are prevented. Over-reliance on disclosure without adequate consideration as to how conflicts may appropriately be prevented or managed should not be permitted. The disclosure of conflicts of interest by an investment firm should not exempt it from the obligation to maintain and operate the effective organisational and administrative arrangements required under Article 16(3) of Directive 2014/65/EU.

(49) Firms should always comply with the inducements rules under Article 24 of Directive 2014/65/EU, including when providing placing services. In particular, fees received by investment firms placing the financial instruments issued to its investment clients should comply with these provisions and laddering and spinning should be considered as abusive practices.

(50) Investment research should be a sub-category of the type of information defined as a recommendation in Regulation (EU) No 596/2014 of the European Parliament and of the Council[6] (market abuse).

(51) The measures and arrangements adopted by an investment firm to manage the conflicts of interests that might arise from the production and dissemination of material that is presented as investment research should be appropriate to protect the objectivity and independence of financial analysts and of the investment research they produce. Those measures and arrangements should ensure that financial analysts enjoy an adequate degree of independence from the interests of persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom the investment research is disseminated.

(52) Persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom investment research is disseminated should include corporate finance personnel and persons involved in sales and trading on behalf of clients or the firm.

(53) Exceptional circumstances in which financial analysts and other persons connected with the investment firm who are involved in the production of investment research may, with prior written approval, undertake personal transactions in instruments to which the research relates should include those circumstances where, for personal reasons relating to financial hardship, the financial analyst or other person is required to liquidate a position.

(54) Fees, commissions, monetary or non-monetary benefits received by the firm providing investment research from any third party should only be acceptable when they are provided in accordance with requirements specified in Article 24(9) of Directive 2014/65/EU and Article 13 of Commission Delegated Directive (EU) 2017/593[7].

(55) The concept of dissemination of investment research to clients or the public should not include dissemination exclusively to persons within the group of the investment firm. Current recommendations should be considered to be those recommendations contained in investment research which have not been withdrawn and which have not lapsed. The substantial alteration of investment research produced by a third party should be governed by the same requirements as the production of research.

(56) Financial analysts should not engage in activities other than the preparation of investment research where engaging in such activities are inconsistent with the maintenance of that person's objectivity. These include participating in investment banking activities such as corporate finance business and underwriting, participating in 'pitches' for new business or 'road shows' for new issues of financial instruments; or being otherwise involved in the preparation of issuer marketing.

(57) Given the specificities of underwriting and placing services and the potential for conflicts of interest to arise in relation to such services, more detailed and tailored requirements should be specified in this Regulation. In particular, such requirements should ensure that the underwriting and placing process is managed in a way which respects the interests of different actors. Investment firms should ensure that their own interests or interests of their other clients do not improperly influence the quality of services provided to the issuer client. Such arrangements should be explained to that client, along with other relevant information about the offering process, before the firm accepts to undertake the offering.

(58) Investment firms engaged in underwriting or placing activities should have appropriate arrangements in place to ensure that the pricing process, including book-building, is not detrimental to the issuer's interests.

(59) The placing process involves the exercise of judgement by an investment firm as to the allocation of an issue, and is based on the particular facts and circumstances of the arrangements, which raises conflicts of interest concerns. The firm should have in place effective organisational requirements to ensure that allocations made as part of the placing process do not result in the firm's interest being placed ahead of the interests of the issuer client, or the interests of one investment client over those of another investment client. In particular, firms should clearly set out the process for developing allocation recommendations in an allocation policy.

(60) Requirements imposed by this Regulation, including those relating to personal transactions, to dealing with knowledge of investment research and to the production or dissemination of investment research, should apply without prejudice to requirements of Directive 2014/65/EU and Regulation (EU) No 596/2014 and their respective implementing measures.

(61) This Regulation sets out requirements regarding information addressed to clients or potential clients, including marketing communications, in order to ensure that such information be fair, clear and not misleading in accordance with Article 24(3) of Directive 2014/65/EU.

(62) Nothing in this Regulation requires competent authorities to approve the content and form of marketing communications. However, neither does it prevent them from doing so, insofar as any such pre-approval is based only on compliance with the obligation in Directive 2014/65/EU that information to clients or potential clients, including marketing communications, should be fair, clear and not misleading.

(63) Information requirements should be established which take account of the status of a client as either retail, professional or eligible counterparty. An objective of Directive 2014/65/EU is to ensure a proportionate balance between investor protection and the disclosure obligations which apply to investment firms. To this end, it is appropriate to establish less stringent specific information requirements with respect to professional clients than to retail clients.

(64) Investment firms should provide clients or potential clients with the necessary information on the nature of financial instruments and the risks associated with investing in them so that their clients are properly informed The level of detail of the information to be provided may vary according to whether the client is a retail client or a professional client and the nature and risk profile of the financial instruments that are being offered, but should always include any essential elements. Member States may specify the precise terms, or the contents, of the description of risks required under this Regulation, taking into account the information requirements set out in Regulation (EU) No 1286/2014 of the European Parliament and of the Council[(8)].

(65) The conditions with which information addressed by investment firms to clients and potential clients must comply in order to be fair, clear and not misleading should apply to communications intended for retail or professional clients in a way that is appropriate and proportionate, taking into account, for example, the means of communication, and the information that the communication is intended to convey to the clients or potential clients. In particular, it would not be appropriate to apply such conditions to marketing communications which consist only of one or more of the following: the name of the firm, a logo or other image associated with the firm, a contact point, a reference to the types of investment services provided by the firm.

(66) In order to improve the consistency of information received by investors, investment firms should ensure that the information provided to each client is consistently presented in the same language throughout all forms of information and marketing material provided to that client. However, this should not imply a requirement for firms to translate prospectuses, prepared in accordance with Directive 2003/71/EC of the European Parliament and of the Council[(9)] or Directive 2009/65/EC of the European Parliament and of the Council[(10)], provided to clients.

(67) In order to provide a fair and balanced presentation of benefits and risks, investment firms should always give a clear and prominent indication of any relevant risks,

including drawbacks and weaknesses, when referencing any potential benefits of a service or financial instrument.

(68) Information should be considered to be misleading if it has a tendency to mislead the person or persons to whom it is addressed or by whom it is likely to be received, regardless of whether the person who provides the information considers or intends it to be misleading.

(69) In cases where an investment firm is required to provide information to a client before the provision of a service, each transaction in respect of the same type of financial instrument should not be considered as the provision of a new or different service.

(70) Detailed information on whether investment advice is provided on an independent basis, on the broad or restricted analysis of different types of instruments and on the selection process used should help clients assess the scope of the advice provided. Sufficient details on the number of financial instruments analysed by the firms should be provided to clients. The number and variety of financial instruments to be considered, other than the ones provided by the investment firm or entities close to the firm, should be proportionate to the scope of the advice to be given, client preferences and needs. However, irrespective of the scope of services offered, all assessments should be based on an adequate number of financial instruments available on the market to allow an appropriate consideration of what the market offers as alternatives.

(71) The scope of the advice given by investment firms on an independent basis could range from broad and general to specialist and specific. In order to ensure that the scope of the advice allows for a fair and appropriate comparison between different financial instruments, investment advisers specialising in certain categories of financial instruments and focusing on criteria that are not based on the technical structure of the instrument per se, such as ‘green’ or ‘ethical’ investments, should comply with certain conditions if they present themselves as independent advisers.

(72) Enabling the same adviser to provide both independent and non-independent advice could create confusion for the client. In order to ensure clients' understanding of the nature and basis of investment advice provided, certain organisational requirements should also be established.

(73) The provision by an investment firm to a client of a copy of a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC should not be treated as the provision by the firm of information to a client for the purposes of the operating conditions under Directive 2014/65/EU which relate to the quality and contents of such information, if the firm is not responsible under that Directive for the information given in the prospectus.

(74) Directive 2014/65/EU strengthens investment firms' obligations to disclose information on all costs and charges and extends these obligations to relationships with professional clients and eligible counterparties. In order to ensure that all categories of clients benefit from such increased transparency on costs and charges, investment firms should be allowed, in certain situations, when providing investment services to professional clients or eligible counterparties, to agree with these clients to limit the detailed

requirements set out in this Regulation. This however should never lead to disapplying the obligations imposed on investment firms pursuant to Article 24(4) of Directive 2014/65/EU. In this respect, investment firms should inform professional clients about all costs and charges as set out in this Regulation, when the services of investment advice or portfolio management are provided or when, irrespective of the investment service provided, the financial instruments concerned embed a derivative. Investment firms should also inform eligible counterparties about all costs and charges as set out in this Regulation when, irrespective of the investment service provided, the financial instrument concerned embeds a derivative and intends to be distributed to their clients. However, in other cases, when providing investment services to professional clients or eligible counterparties, investment firms may agree, for instance, at the request of the client concerned, not to provide the illustration showing the cumulative effect of costs on return or an indication of the currency involved and the applicable conversion rates and costs where any part of the total costs and charges is expressed in foreign currency.

(75) Taking into account the overarching obligation to act in accordance with the best interest of clients and the importance of informing clients, on an *ex-ante* basis, of all costs and charges to be incurred, the reference to financial instruments recommended or marketed should include in particular investment firms providing investment advice or portfolio management services, firms providing general recommendation concerning financial instruments or promoting certain financial instruments in the provision of investment and ancillary services to clients. This would for instance be the case for investment firms that have entered into distribution or placement agreements with a product manufacturer or issuer.

(76) In accordance with the overarching obligation to act in accordance with the best interest of clients and taking into account the obligations resulting from specific Union legislation regulating certain financial instruments (in particular, units in collective investment undertakings and packaged retail and insurance-based investment products (PRIIPs) investment firms should disclose and aggregate all costs and charges, including the costs of the financial instrument, in all cases where investment firms are obliged to provide the client with information about the costs of a financial instrument in accordance with Union legislation.

(77) Where investment firms have not marketed or recommended a financial instrument or are not required under Union law to provide clients with information about costs of a financial instrument, they may not be in the position to take into account all the costs associated with that financial instrument. Even in these residual instances, investment firms should inform clients, on an ex-ante basis, about all costs and charges associated to the investment service and the price of acquiring the relevant financial instrument. Furthermore, investment firms should comply with any other obligations to provide appropriate information about the risks of the relevant financial instrument in accordance with Article 24(4)(b) of Directive 2014/65/EU or to provide clients, on an ex-post basis, with adequate reports on the services provided in accordance with Article 25(6) of Directive 2014/65/EU, including cost elements.

(78) In order to ensure clients' awareness of all costs and charges to be incurred as well as evaluation of such information and comparison with different financial instruments and investment services, investment firms should provide clients with clear and comprehensible information on all costs and charges in good time before the provision of services. *Ex-ante* information about the costs related to the financial instrument or ancillary service can be provided based on an assumed investment amount. However, the costs and charges disclosed should represent the costs the client would actually incur based on that assumed investment amount. For example, if an investment firm offers a range of ongoing services with different charges associated with each service, the firm should disclose the costs associated with the service the client subscribed to. For ex-post disclosures, information related to costs and charges should reflect the client's actual investment amount at the time the disclosure is produced.

(79) In order to ensure investors receive information about all costs and charges pursuant to Article 24(4) of Directive 2014/65/EU, the underlying market risk should be understood as relating only to movements in the value of capital invested caused directly by movements in the value of underlying assets. Transactions costs and ongoing charges on financial instruments should therefore also be included in the required aggregation of costs and charges and should be estimated using reasonable assumptions, accompanied by an explanation that such estimations are based on assumptions and may deviate from costs and charges that will actually be incurred. Following the same objective of full disclosure, practices where there is 'netting' of costs should not be excluded from the obligation to provide information on costs and charges. The costs and charges disclosure is underpinned by the principle that every difference between the price of a position for the firm and the respective price for the client should be disclosed, including mark-ups and mark-downs.

(80) While investment firms should aggregate all costs and charges in accordance with Article 24(4) of Directive 2014/65/EU and provide clients with the overall costs expressed both as a monetary amount and as a percentage, investment firms should, in addition, be allowed to provide clients or prospective clients with separate figures comprising aggregated initial costs and charges, aggregated on-going costs and charges and aggregated exit costs.

(81) Investment firms distributing financial instruments, in relation to which information on costs and charges is insufficient, should additionally inform their clients about those costs as well as all the other costs and associated charges relating to the provision of investment services in relation to those financial instruments in order to safeguard clients' rights to full disclosure of costs and charges. This would be the case for investment firms distributing units in collective investment undertakings for which transaction costs have not been provided by for example units in UCITS management company. In such cases, the investment firms should liaise with UCITS management companies to obtain the relevant information.

(82) In order to improve transparency for clients on the associated costs of their investments and the performance of their investments against the relevant costs and charges over time, periodic *ex-post* disclosure should also be provided where the investment firms

have or have had an ongoing relationship with the client during the year. *Ex-post* disclosure on all the relevant costs and charges should be provided on a personalised basis. The *ex-post* periodic disclosure may be made by building on existing reporting obligations, such as obligations for firms providing execution of orders other than portfolio management, portfolio management or holding client financial instruments or funds.

(83) The information which an investment firm is required to give to clients concerning costs and associated charges includes information about the arrangements for payment or performance of the agreement for the provision of investment services and any other agreement relating to a financial instrument that is being offered. For this purpose, arrangements for payment will generally be relevant where a financial instrument contract is terminated by cash settlement. Arrangements for performance will generally be relevant where, upon termination, a financial instrument requires the delivery of shares, bonds, a warrant, bullion or another instrument or commodity.

(84) It is necessary to introduce different requirements for the application of the suitability assessment set out in Article 25(2) of Directive 2014/65/EU and the appropriateness assessment set out in Article 25(3) of that Directive. These tests are different in scope with regards to the investment services to which they relate, and have different functions and characteristics.

(85) Investment firms should include in the suitability report and draw clients' attention to information on whether the recommended services or instruments are likely to require the retail client to seek a periodic review of their arrangements. This includes situations where a client is likely to need to seek advice to bring a portfolio of investments back in line with the original recommended allocation where there is a probability that the portfolio could deviate from the target asset allocation.

(86) In order to take market developments into account and ensure the same level of investor protection, it should be clarified that investment firms should remain responsible for undertaking suitability assessments where investment advice or portfolio management services are provided in whole or in part through an automated or semi-automated system.

(87) In accordance with the suitability assessment requirement under Article 25(2) of Directive 2014/65/EU, it should also be clarified that investment firms should undertake a suitability assessment not only in relation to recommendations to buy a financial instrument are made but for all decisions whether to trade including whether or not to buy, hold or sell an investment.

(88) For the purposes of Article 25(2) of Directive 2014/65/EU, a transaction may be unsuitable for the client or potential client due to the risks of the associated financial instruments, the type of transaction, the characteristics of the order or the frequency of the trading. A series of transactions, each of which are suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the client. In the case of portfolio management, a transaction might also be unsuitable if it would result in an unsuitable portfolio.

(89) A recommendation or request made, or advice given, by a portfolio manager to a client to the effect that the client should give or alter a mandate to the portfolio manager that defines the limits of the portfolio manager's discretion should be considered a recommendation as referred to in of Article 25(2) of Directive 2014/65/EU.

(90) In order to provide legal certainty and enable clients to better understand the nature of the services provided, investment firms that provide investment or ancillary services to clients should enter into a written basic agreement with the client, setting out the essential rights and obligations of the firm and the client.

(91) This Regulation should not require competent authorities to approve the content of the basic agreement between an investment firm and its clients. Nor should it prevent them from doing so, insofar as any such approval is based only on the firm's compliance with its obligations under Directive 2014/65/EU to act honestly, fairly and professionally in accordance with the best interests of its clients, and to establish a record that sets out the rights and obligations of investment firms and their clients, and the other terms on which firms will provide services to their clients.

(92) The records an investment firm is required to keep should be adapted to the type of business and the range of investment services and activities performed, provided that the record-keeping obligations set out in Directive 2014/65/EU, Regulation (EU) No 600/2014 of the European Parliament and of the Council[(11)], Regulation (EU) No 596/2014, Directive 2014/57/EU of the European Parliament and of the Council[(12)] and this Regulation are fulfilled and that competent authorities are able to fulfil their supervisory tasks and perform enforcement actions in view of ensuring both investor protection and market integrity.

(93) In light of the importance of reports and periodic communications for all clients, and the extension of Article 25(6) of Directive 2014/65/EU to the relationship to eligible counterparties, the reporting requirements set in this Regulation should apply to all categories of clients. Taking into account the nature of the interactions with eligible counterparties, investment firms should be allowed to enter into agreements determining the specific content and timing of reporting different from the ones applicable for retail and professional clients.

(94) In cases where an investment firm providing portfolio management services is required to provide clients or potential clients with information on the types of financial instruments that may be included in the client portfolio and the types of transactions that may be carried out in such instruments, such information should state separately whether the investment firm will be mandated to invest in financial instruments not admitted to trading on a regulated market, in derivatives, or in illiquid or highly volatile instruments; or to undertake short sales, purchases with borrowed funds, securities financing transactions, or any transactions involving margin payments, deposit of collateral or foreign exchange risk.

(95) Clients should be informed of the performance of their portfolio and depreciations of their initial investments. In the case of portfolio management, this trigger should be set

at the depreciation of 10 %, and thereafter at multiples of 10 %, of the overall value of the overall portfolio and should not apply to individual holdings.

(96) For the purposes of the reporting obligations in respect of portfolio management, a contingent liability transaction should involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument.

(97) For the purposes of the provisions on reporting to clients, a reference to the type of the order should be understood as referring to its status as a limit order, market order, or other specific type of order.

(98) For the purposes of the provisions on reporting to clients, a reference to the nature of the order should be understood as referring to orders to subscribe for securities, or to exercise an option, or similar client order.

(99) When establishing its execution policy in accordance with Article 27(4) of Directive 2014/65/EU, an investment firm should determine the relative importance of the factors mentioned in Article 27(1) of that Directive, or at least establish the process by which it determines the relative importance of these factors, so that it can deliver the best possible result to its clients. In order to give effect to that policy, an investment firm should select the execution venues that enable it to obtain on a consistent basis the best possible result for the execution of client orders. In order to comply with the legal obligation of best execution, investment firms, when applying the criteria for best execution for professional clients, will typically not use the same execution venues for securities financing transactions (SFTs) and other transactions. This is because the SFTs are used as a source of funding subject to a commitment that the borrower will return equivalent securities on a future date and the terms of SFTs are typically defined bilaterally between the counterparties ahead of the execution. Therefore, the choice of execution venues for SFTs is more limited than in the case of other transactions, given that it depends on the particular terms defined in advance between the counterparties and on whether there is a specific demand on those execution venues for the financial instruments involved. As a result, the order execution policy established by investment firms should take into account the particular characteristics of SFTs and it should list separately execution venues used for SFTs. An investment firm should apply its execution policy to each client order that it executes with a view to obtaining the best possible result for the client in accordance with that policy.

(100) In order to ensure that investment firms who transmit or place clients' orders with other entities for execution act in the best interest of their clients in accordance with Article 24(1) of Directive 2014/65/EU and with Article 24(4) of Directive 2014/65/EU to provide appropriate information to clients on the firm and its services, investment firms should provide clients with appropriate information on the top five entities for each class of financial instruments to which they transmit or place clients' orders and provide clients with information on the execution quality, in accordance with Article 27(6) of Directive 2014/65/EU and respective implementing measures. Investment firms transmitting or placing orders with other entities for execution may select a single entity for execution only where they are able to show that this allows them to obtain the best possible result for their clients on a consistent basis and where they can reasonably

expect that the selected entity will enable them to obtain results for clients that are at least as good as the results that they reasonably could expect from using alternative entities for execution. This reasonable expectation should be supported by relevant data published in accordance with Article 27 of Directive 2014/65/EU or by internal analysis conducted by these investment firms.

(101) For the purposes of ensuring that an investment firm obtains the best possible result for the client when executing a retail client order in the absence of specific client instructions, the firm should take into consideration all factors that will allow it to deliver the best possible result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution. Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client.

(102) When an investment firm executes an order following specific instructions from the client, it should be treated as having satisfied its best execution obligations only in respect of the part or aspect of the order to which the client instructions relate. The fact that the client has given specific instructions which cover one part or aspect of the order should not be treated as releasing the investment firm from its best execution obligations in respect of any other parts or aspects of the client order that are not covered by such instructions. An investment firm should not induce a client to instruct it to execute an order in a particular way, by expressly indicating or implicitly suggesting the content of the instruction to the client, when the firm ought reasonably to know that an instruction to that effect is likely to prevent it from obtaining the best possible result for that client. However, this should not prevent a firm inviting a client to choose between two or more specified trading venues, provided that those venues are consistent with the execution policy of the firm.

(103) Dealing on own account with clients by an investment firm should be considered as the execution of client orders, and therefore subject to the requirements under Directive 2014/65/EU and this Regulation and, in particular, those obligations in relation to best execution. However, if an investment firm provides a quote to a client and that quote would meet the investment firm's obligations under Article 27(1) of Directive 2014/65/EU if the firm executed that quote at the time the quote was provided, then the firm should meet those same obligations if it executes its quote after the client accepts it, provided that, taking into account the changing market conditions and the time elapsed between the offer and acceptance of the quote, the quote is not manifestly out of date.

(104) The obligation to deliver the best possible result when executing client orders applies in relation to all types of financial instruments. However, given the differences in market structures or the structure of financial instruments, it may be difficult to identify and apply a uniform standard of and procedure for best execution that would be valid and effective for all classes of instrument. Best execution obligations should therefore be applied in a manner that takes into account the different circumstances associated with the execution of orders related to particular types of financial instruments. For example,

transactions involving a customised OTC financial instrument that involve a unique contractual relationship tailored to the circumstances of the client and the investment firm may not be comparable for best execution purposes with transactions involving shares traded on centralised execution venues. As best execution obligations apply to all financial instruments, irrespective of whether they are traded on trading venues or OTC, investment firms should gather relevant market data in order to check whether the OTC price offered for a client is fair and delivers on best execution obligation.

(105) The provisions of this Regulation as to execution policy should be without prejudice to the general obligation of an investment firm under Article 27(7) of Directive 2014/65/EU to monitor the effectiveness of its order execution arrangements and policy and assess the venues in its execution policy on a regular basis.

(106) This Regulation should not require a duplication of effort as to best execution between an investment firm which provides the service of reception and transmission of order or portfolio management and any investment firm to which that investment firm transmits its orders for execution.

(107) The best execution obligation under Directive 2014/65/EU requires investment firms to take all sufficient steps to obtain the best possible result for their clients. The quality of execution, which includes aspects such as the speed and likelihood of execution such as fill rate) and the availability and incidence of price improvement, is an important factor in the delivery of best execution. Availability, comparability and consolidation of data related to execution quality provided by the various execution venues is crucial in enabling investment firms and investors to identify those execution venues that deliver the highest quality of execution for their clients. In order to obtain best execution result for a client, investment firms should compare and analyse relevant data including that made public in accordance with Article 27(3) of Directive 2014/65/EU and respective implementing measures.

(108) Investment firms executing orders should be able to include a single execution venue in their policy only where they are able to show that this allows them to obtain best execution for their clients on a consistent basis. Investment firms should select a single execution venue only where they can reasonably expect that the selected execution venue will enable them to obtain results for clients that are at least as good as the results that they reasonably could expect from using alternative execution venues. This reasonable expectation must be supported by relevant data published in accordance with Article 27 of Directive 2014/65/EU or by other internal analyses conducts by the firms.

(109) The reallocation of transactions should be considered as detrimental to a client if, as an effect of that reallocation, unfair precedence is given to the investment firm or to any particular client.

(110) Without prejudice to Regulation (EU) No 596/2014, for the purposes of the provisions of this Regulation concerning client order handling, client orders should not be treated as otherwise comparable if they are received by different media and it would not be practicable for them to be treated sequentially. Any use by an investment firm of information relating to a pending client order in order to deal on own account in the financial instruments to which the client order relates, or in related financial

instruments, should be considered a misuse of that information. However, the mere fact that market makers or bodies authorised to act as counterparties confine themselves to pursuing their legitimate business of buying and selling financial instruments, or that persons authorised to execute orders on behalf of third parties confine themselves to carrying out an order dutifully, should not in itself be deemed to constitute a misuse of information.

(111) When assessing whether a market fulfils the requirement laid down in point (a) of Article 33(3) of Directive 2014/65/EU that at least 50 % of the issuers admitted to trading on that market are small and medium-size enterprises (SMEs), a flexible approach should be taken by competent authorities with regard to markets with no previous operating history, newly created SMEs whose financial instruments have been admitted to trading for less than three years and issuers exclusively of non-equity financial instruments.

(112) Given the diversity in operating models of existing MTFs with a focus on SMEs in the Union, and to ensure the success of the new category of SME growth market, it is appropriate to grant SME growth markets an appropriate degree of flexibility in evaluating the appropriateness of issuers for admission on their venue. In any case, an SME growth market should not have rules that impose greater burdens on issuers than those applicable to issuers on regulated markets.

(113) With regard to the content of the admission document which an issuer is required to produce upon initial admission to trading of its securities on an SME growth market, where the requirement to publish a prospectus pursuant to Directive 2003/71/EC does not apply, it is appropriate that competent authorities retain discretion to assess whether the rules set out by the operator of the SME growth market achieve the proper information of investors. While full responsibility for the information featured in the admission document should lie with the issuer, it should be for the operator of an SME growth market to define how the admission document should be appropriately reviewed. This should not necessarily involve a formal approval by the competent authority or the operator.

(114) The publication by issuers of annual and half-yearly financial reports represents an appropriate minimum standard of transparency which is coherent with the prevailing best practice in existing markets focusing on SMEs. As to the content of financial reports, the operator of an SME growth market should be free to prescribe the use of International Financial Reporting Standards or financial reporting standards permitted by local laws and regulations, or both, by issuers whose financial instruments are traded on its venue. Deadlines for publishing financial reports should be less onerous than those prescribed by Directive 2004/109/EC of the European Parliament and of the Council[(13)] as less stringent timeframes appear better suited to the needs and circumstances of SMEs.

(115) Since the rules on dissemination of information about issuers on regulated markets under Directive 2004/109/EC would be too burdensome for issuers on SME growth markets, it is appropriate that the website of the operator of the SME growth market becomes the point of convergence for investors seeking information on the issuers

traded on that venue. A publication on the website of the operator of the SME growth market can also be effected by providing a direct link to the website of the issuer in case the information is published there, if the link goes directly to the relevant part of the website of the issuer where the regulatory information can be easily found by investors.

(116) It is necessary to further specify when a suspension or a removal from trading of a financial instrument is likely to cause significant damages to the investor's interest or to the orderly functioning of the market. Convergence in that field is necessary to ensure that market participants in a Member State where trading in financial instruments has been suspended or financial instruments have been removed are not disadvantaged in comparison to market participants in another Member State, where trading is still ongoing.

(117) To ensure the necessary level of convergence, it is appropriate to specify a list of circumstances constituting significant damage to investors' interests and the orderly functioning of the market which could be the basis of a decision by a national competent authority, a market operator operating a regulated market or an investment firm or a market operator operating an MTF or an OTF not to demand the suspension or removal of a financial instrument from trading, or not to follow a notification thereto. It is appropriate for such a list to be non-exhaustive as it will thus provide national competent authorities with a framework for the exercise of their judgement and will leave them a necessary degree of flexibility in the assessment of individual cases.

(118) Articles 31(2) and 54(2) of Directive 2014/65/EU respectively require investment firms and market operators operating an MTF or an OTF, and market operators of regulated markets to immediately inform their national competent authorities under certain circumstances. This requirement is intended to ensure that national competent authorities can fulfil their regulatory tasks and are informed in a timely manner about relevant incidents which may have a negative impact on the functioning and integrity of the markets. The information received from operators of trading venues should enable national competent authorities to identify and assess the risks for the markets and their participants as well as to react efficiently and to take action if necessary.

(119) It is appropriate to set up a non-exhaustive list of high-level circumstances where significant infringements of the rules of a trading venue, disorderly trading conditions or system disruptions in relation to a financial instrument may be assumed, thus triggering the obligation for the operators of trading venues to immediately inform their competent authorities as set out in Articles 31(2) and 54(2) of Directive 2014/65/EU. For that purpose, reference to the ‘rules of a trading venue’ should be understood in a broad sense and should comprise all rules, rulings, orders as well as general terms and conditions of contractual agreements between the trading venue and its participants which contain the conditions for trading and admission to the trading venue.

(120) With regard to conduct that may indicate abusive behaviour within the scope of Regulation (EU) No 596/2014, it is also appropriate to set up a non-exhaustive list of signals of insider dealing and market manipulation which should be taken into account by the operator of a trading venue when examining transactions or orders to trade in order to determine whether the obligation to inform the relevant national competent

authority applies, as set out in Articles 31(2) and 54(2) of Directive 2014/65/EU. For that purpose, reference to 'order to trade' should encompass all types of orders, including initial orders, modifications, updates and cancellations of orders, irrespective of whether or not they have been executed and irrespective of the means used to access the trading venue.

(121) The list of signals of insider dealing and market manipulation should be neither exhaustive nor determinative of market abuse or attempts of market abuse, as each of the signals may not necessarily constitute market abuse or attempts of market abuse *per se*. Transactions or orders to trade meeting one or more signals may be conducted for legitimate reasons or in compliance with the rules of the trading venue.

(122) In order to provide transparency to market stakeholders whilst preventing market abuse and preserving confidentiality of the identities of position holders, the publication of aggregate weekly position reports on positions referred to in Article 58(1)(a) of Directive 2014/65/EU should only apply to contracts that are traded by a certain number of persons, above certain sizes as specified in this Regulation.

(123) In order to ensure that market data is provided on a reasonable commercial basis in a uniform manner in the Union, this Regulation specifies the conditions that APAs and CTPs must fulfil. These conditions are based on the objective to ensure that the obligation to provide market data on a reasonable commercial basis is sufficiently clear to allow for an effective and uniform application whilst taking into account different operating models and costs structures of data providers.

(124) To ensure that fees for market data are set at a reasonable level, the fulfilment of the obligation to provide market data on a reasonable commercial basis requires that prices be based on a reasonable relationship to the cost of producing and disseminating that data. Therefore, without prejudice to the application of competition rules, data providers should determine their fees on the basis of their costs whilst being allowed to obtain a reasonable margin, based on factors such as the operating profit margin, the return on costs, the return on operating assets and the return on capital. Where data providers incur joint costs for data provision and the provision of other services, costs of data provision may include an appropriate share of costs arising from any other relevant service provided. Since specifying the exact cost is very complex, cost allocation and cost apportionment methodologies should be specified instead, leaving the specification of those costs to the discretion of market data providers.

(125) Market data should be provided on a non-discriminatory basis, which requires that the same price and other terms and conditions should be offered to all customers who are in the same category according to published objective criteria.

(126) To allow data users to obtain market data without having to buy other services, market data should be offered unbundled from other services. To avoid that data users are charged more than once for the same market data when buying data from different market data distributors, market data should be offered on a per user basis unless doing so would be disproportionate to the cost of such way of offering that data in respect of the scale and the scope of the market data provided by the APA and the CTP.

(127) In order to allow for data users and competent authorities to effectively assess whether market data is provided on a reasonable commercial basis, it is necessary that all the essential conditions for its provision are disclosed to the public. Data providers should therefore disclose information about their fees and the content of the market data As well as the cost accounting methodologies used to determine their costs without having to disclose their actual costs.

(128) It is appropriate to set the criteria for determining when the operations of a regulated market, an MTF or an OTF are of substantial importance in a host Member State so as to avoid creating an obligation on a trading venue to deal with or be made subject to the supervision of more than one competent authority where this would not be necessary according to Directive 2014/65/EU. For MTFs and OTFs, it is appropriate that only MTFs and OTFs with a significant market share be considered as being of substantial importance, so that not any relocation or acquisition of an economically insignificant MTF or OTF automatically triggers the establishment of the cooperation arrangements set out in Article 79(2) of Directive 2014/65/EU.

(129) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (Charter). Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles in particular the right to protection of personal data, the freedom to conduct business, the right to consumer protection, the right to effective remedy and to a fair trial. Any processing of personal data under this Regulation should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with the Directive 95/46/EC and Regulation (EC) No 45/2001.

(130) ESMA, established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(14)] has been consulted for technical advice.

(131) In order to allow competent authorities and investment firms to adapt to the new requirements contained in this Regulation so that they can be applied in an efficient and effective manner, the starting date of application of this Regulation should be aligned with the entry into application date of Directive 2014/65/EU,

HAS ADOPTED THIS REGULATION:

Textual Amendments

F1 Regulation revoked (5.4.2024 for the revocation of Arts. 84-89) by Financial Services and Markets Act 2023 (c. 29), s. 86(3), **Sch. 1 Pt. 3** (with s. 1(4)); S.I. 2023/1382, reg. 4(d)(i)

Modifications etc. (not altering text)

C1 Regulation: power to modify conferred (11.7.2023) by Financial Services and Markets Act 2023 (c. 29), ss. 3, 86(3), **Sch. 1 Pt. 3**; S.I. 2023/779, reg. 2(d)

C2 Regulation: power to modify conferred (29.8.2023) by Financial Services and Markets Act 2023 (c. 29), **ss. 13**, 17, 86(3); S.I. 2023/779, reg. 4(h)(l)

C3 Regulation: power to amend or revoke conferred (29.8.2023) by Financial Services and Markets Act 2023 (c. 29), **ss. 15**, 17, 86(3); S.I. 2023/779, **reg. 4(j)(l)**

(**1**) OJ L 173, 12.6.2014, p. 349.

(**2**) Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

(**3**) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

(**4**) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31.7.2002, p. 37).

(**5**) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

(**6**) Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

(**7**) Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (see page 500 of this Official Journal).

(**8**) Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1).

(**9**) Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

(**10**) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

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

(**12**) Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ L 173, 12.6.2014, p. 179).

(**13**) Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

(**14**) 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).

Changes to legislation:
There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2017/565, Introductory Text.