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2016/0033 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Directive 2014/65/EU on markets in financial instruments as regards certain
dates

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Reasons for the proposal

Directive 2014/65/EU ('MiFID') together with Regulation (EU) No 600/2014 ('MiFIR') was adopted in the wake of the financial crisis. MiFID and MiFIR, collectively referred to as MiFID II, covers securities markets, investment intermediaries and trading venues. The new framework reinforces and replaces the current MiFID framework.

MiFID II extends the number of financial instruments covered by trading rules and ensures that trading takes place on regulated platforms. It introduces rules on high frequency trading. It improves the transparency and oversight of financial markets – including derivatives markets - and addresses the issue of price volatility in commodity derivatives. The new framework improves conditions for competition in the trading and clearing of financial instruments. Building on the rules already in place, the revised MiFID rules also strengthen the protection of investors by introducing robust organisational and conduct of business requirements. The MiFID II package consists of a Directive and a Regulation. Member States need to transpose the Directive by 3 July 2016. Both MiFID and MiFIR are scheduled to apply as of 3 January 2017.

The purpose of the draft proposal is to extend the entry into application of both instruments that are comprised in the MiFID II package as a result of the technical implementation challenges met by the European Securities and Markets Authority ('ESMA'), national competent authorities ('NCAs') and stakeholders. These challenges are of such magnitude that essential data infrastructures will not be in place in time for 3 January 2017.

During the legislative process, the very high level of complexity of the MiFID II package and the need for a significant number of implementing measures were recognised. To this end, a period of 30 months was foreseen between the adoption and the entry into application, instead of the usual 18-24 months.

Despite this unusually long period, ESMA has made clear to the Commission that the technical implementing challenges are of such magnitude that essential data infrastructures will not be in place in time for 3 January 2017. If the date of entry into application remains unchanged, this would mean, in practice, that neither competent authorities, nor market participants, would be in a position to apply the new rules on 3 January 2017. This would lead to legal uncertainty and potential market disruption.

In light of these exceptional circumstances and the particular technical implementation challenges faced by ESMA and the competent authorities in this specific case, the Commission deems it necessary to extend the entry into application of both instruments that are comprised in MiFID II. Such extension shall be strictly limited to what is necessary to allow the technical implementation work to be finalised.

1.2 The 'data' challenge

ESMA have informed the Commission that neither they nor NCAs will be in a position to apply MiFID II as of 3 January 2017. This is a result of significant challenges in collecting the data that is necessary for the operation of the MiFID II rules. In order to ensure legal certainty and avoid potential market disruption, urgent action is therefore needed to adjust the date of entry into application for MiFID II. The reasons for the urgency are linked to the need to establish new and extensive electronic data collection networks between trading venues, national regulators and ESMA.

The new framework requires trading venues and systematic internalisers to provide competent authorities with financial instrument reference data that describes in a uniform manner the characteristics of every financial instrument subject to the scope of MiFID II. Additional data are also used for other purposes, in particular for the calculation of various liquidity and transparency thresholds used for on-venue trading of all financial instruments covered by MiFID as well as for positions reporting of commodity derivatives.

In order to collect data in an efficient and harmonised manner, a new data collection infrastructure must be developed. This obliges ESMA, in conjunction with competent national authorities, to establish a Financial Instruments Reference Data System ('FIRDS'). FIRDS will need to cover the entire range of financial instruments that are included in the increased scope of MiFID II. In accomplishing this task, FIRDS will necessitate linking of data feeds between ESMA, NCAs and around 300 trading venues across the European Union. The vast majority of the new IT-systems underpinning FIRDS will need to be built from the ground, based on new parameters.

The Commission recognises that as a result of the size and complexity of the data needed to be collected and processed for MiFID II to become operational, in particular for transaction reporting, transparency calculations and reporting of positions in commodity derivatives, neither stakeholders, such as trading platforms, nor NCAs nor ESMA are in a position to ensure that the necessary data collection infrastructures would be in place and become operational by 3 January 2017. Therefore, on 2 October 2015 ESMA informed the Commission that a delay in the technical implementation of MiFID II was unavoidable.

1.3. The scope of the proposal

The absence of data has ramifications across multiple areas of MIFID II. As regards market regulation, it is clear that without the foundation of reference data (instrument ID) and the additional data infrastructures for transparency calculations and position reporting in place, it will not be possible to apply the majority of the market rules. In particular:

- Transaction reporting: without reference data, there will be challenges to determine what instruments are within the scope. In addition, the necessary infrastructure for market participants to report to their competent authorities will not be available.
- Transparency framework: the trade transparency rules for all financial instruments (equity as well as non-equity) cannot be established and applied. In addition, the calculations and thresholds for the liquidity assessment, waivers, deferred publication and, in the equity area, the double volume cap (which limits dark trading) cannot be established.
- Commodity derivatives: in the absence of position reporting for commodity derivatives it will be very difficult to enforce position limits on such commodity derivative contracts. With no position reporting, there is a limited ability to effectively detect breaches of position limits.
- Microstructural regulation: many of the requirements in relation to algorithmic trading/high frequency trading are by their nature dependent on data. In particular, the key provisions on *tick-size regime* and the obligations in relation to *market making obligations and schemes* are also tailored on there being a liquid market as determined under the transparency framework.

The investor protection rules, the conduct of business rules and certain associated organisational requirements under MIFID II will not be directly affected by the lack of data. The important exception is the rules on *best execution*, where the scope of the disclosure is

designed by reference to there being a liquid market and other transparency concepts. For other investor protection rules, aside from issues relating to the definition of financial instruments or the scope of the legislation, data inter-linkages generally do not exist, as these rules directly concern distribution and not trading. It is, therefore, recognised that an alternative approach would be to extend the date of entry into application only for the parts of the legislation directly relating to data collection.

However, after a careful analysis of that option, it appears that an extension for the whole package, including investor protection rules, as opposed to a staggered approach is preferable:

- It avoids the risk of causing confusion and unnecessary costs that stakeholders would incur through a staggered implementation. Building various infrastructures simultaneously – as opposed to doing so in stages - would make the process more cost effective. For example, it avoids situations, where investment firms, involved in execution of orders, would have to set up organisational requirements/conduct rules in stages, which would be complicated, expensive and costly;
- It avoids having to delineate between the areas that can be immediately implemented and those that cannot be, and, therefore, avoids the risk of causing unintended consequences which may not have been foreseen or sufficiently considered; and
- It avoids the need for transitional rules, which by themselves would create new issues and divert resources of ESMA, NCAs and stakeholders from building the permanent framework.

On the basis of the above considerations, extending the entry into application for the entire MiFID II rulebook is therefore necessary and justified.

1.4. Length of the extension

An extension of one year should provide sufficient and reasonable time for ESMA, NCAs and operators to put in place the infrastructure for data collection, reporting and the transparency threshold calculations. There are five steps in the implementation process: (1) business requirements (which in this case are the necessary regulatory technical standards/implementing technical standards), (2) specifications, (3) development (4) testing and (5) deployment. ESMA estimates that it should complete these steps in relation to the reference data, transparency calculations and position reporting systems by January 2018. This assumes that there is sufficient legal clarity on the final requirements under the relevant regulatory technical standards by mid-2016. On this basis, the draft proposal therefore extends the entry into application of the whole framework until 3 January 2018 by one year.

The extension of entry into application of the measures of the Member States transposing Directive 2014/65/EU should not impact adoption of delegated acts and technical standards to be developed under Directive 2014/65/EU. The Commission should adopt these measures in accordance with the procedure envisaged in order to allow the industry to set up and adjust internal systems to ensure compliance with new requirements on the date of entry into application of Directive 2014/65/EU.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The proposal is based on Article 53(1) of the TFEU. It is complementary to the proposed regulation extending the entry into application of MiFIR.

- **Subsidiarity**

According to the principle of subsidiarity, EU action may only be taken if the envisaged aims cannot be achieved by Member States alone. EU intervention is needed to improve the proper functioning of the internal market and avoid the distortion of competition in the field of securities markets. In this regard, the legislation, that is being amended, is adopted in full compliance with the principle of subsidiarity and any amendment thereto must be made through a Commission proposal.

- **Proportionality**

This EU action is necessary to achieve the objective of the proper implementation of data collection infrastructure, as established by MIFID II. The extension as proposed in terms of the scope and length is necessary to allow for an efficient and orderly planning and implementation by all involved parties. This proposal will therefore ensure that the original purpose of MIFID II of achieving a fully functioning internal market for securities services with a high level of market transparency and investor protection can be attained.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

This proposal is not accompanied by a separate Impact Assessment, as an impact assessment for MIFID II has already been undertaken. This proposal does not alter MiFID II on substance and does not impose new obligations on investment firms and trading venues or any other operator covered by MiFID II. It only aims at providing - for exceptional reasons in particular linked to the high complexity of the package and the data collection tools needed – an extension of the date of entry into application of MiFID II by 1 year to provide legal certainty and develop the necessary data collection infrastructures to ensure effective application and enforcement of the new rules by ESMA and NCAs.

4. BUDGETARY IMPLICATIONS

The proposal does not have a budgetary impact for the Commission.

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DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2014/65/EU on markets in financial instruments as regards certain dates

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national parliaments,
Having regard to the opinion of the European Central Bank¹,
Having regard to the opinion of the European Economic and Social Committee²,
Acting in accordance with the ordinary legislative procedure,
Whereas:

- (1) Regulation (EU) No 600/2014 of the European Parliament and of the Council³ and Directive 2014/65/EU of the European Parliament and of the Council⁴ are major pieces of financial legislation adopted in the wake of the financial crisis as regards securities markets, investment intermediaries and trading venues. The new framework reinforces and replaces Directive 2004/39/EC of the European Parliament and of the Council⁵.
- (2) Regulation (EU) No 600/2014 and Directive 2014/65/EU establish requirements in relation to authorisation and operation of investment firms, regulated markets and data reporting services providers. It harmonises position-limits regime for commodity derivatives to improve transparency, support orderly pricing and prevent market abuse. It also introduces rules on high frequency trading and improves oversight of financial markets by harmonising administrative sanctions. Building on the rules already in place, the new framework also strengthens the protection of investors by introducing

¹ OJ C , , p. .

² OJ C , , p. .

³ 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 (OJ L 173, 12.6.2014, p. 349).

⁴ 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).

⁵ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

robust organisational and conduct requirements. Member States are to transpose the Directive 2014/65/EU by 3 July 2016.

- (3) The new framework introduced by Regulation (EU) No 600/2014 and Directive 2014/65/EU requires trading venues and systematic internalisers to provide competent authorities with financial instrument reference data that describe in a uniform manner the characteristics of every financial instrument subject to that Directive. Those data are also used for other purposes, for instance for the calculation of transparency and liquidity thresholds as well as for positions reporting of commodity derivatives.
- (4) In order to collect data in an efficient and harmonised manner, a new data collection infrastructure is being developed. To this end, the European Securities and Markets Authority ('ESMA'), in conjunction with competent national authorities, are obliged to establish a Financial Instruments Reference Data System ('FIRDS'). It will cover a wide range of financial instruments brought into the scope of Regulation (EU) No 600/2014 and it will link of data feeds between ESMA, national competent authorities ('NCAs') and trading venues across the European Union. The vast majority of the new IT-systems underpinning FIRDS will to be built from the ground, based on new parameters.
- (5) Pursuant to Article 93 of Directive 2014/65/EU, the Member States are to apply the measures transposing that Directive from 3 January 2017. However, due to the size and complexity of the data to be collected and processed for the new framework to become operational, in particular for transaction reporting, transparency calculations and reporting of positions in commodity derivatives, stakeholders, such as trading platforms, ESMA and NCAs are not in a position to ensure that the necessary data collection infrastructures will be in place and become operational by that date.
- (6) The absence of the data collection infrastructures has implications across the entire scope of Regulation (EU) No 600/2014 and Directive 2014/65/EU. Without data it will not be feasible to establish a precise delineation of financial instruments that fall within the scope of the new framework. Furthermore, it will not be possible to tailor the pre-trade and post-trade transparency rules, in order to determine which instruments are liquid and when waivers or deferred publication should be granted.
- (7) Absent the data, trading venues and investment firms will not be able to report executed transactions to competent authorities. In the absence of position reporting for commodity derivatives it will be difficult to enforce position limits on such contracts. With no position reporting, there is a limited ability to effectively detect breaches of the position limits. Many of the requirements in relation to algorithmic trading are also dependent on data.
- (8) The absence of data collection infrastructure will also make it difficult for investment firms to apply best execution rules. Trading venues and systematic internalisers will not be able to publish data relating to the quality of execution of transactions on those venues. Investment firms will not be provided with important execution data to help them determine the best way to execute client orders.
- (9) In order to ensure legal certainty and avoid potential market disruption, it is necessary and justified to take urgent action to extend the entry into application of the whole framework, including all delegated and implementing acts.
- (10) The implementation process for data infrastructure involves five steps: business requirements, specifications, development, testing and deployment. ESMA estimates that those steps should be completed by January 2018 provided that there is legal

certainty on the final requirements under the relevant regulatory technical standards no later than by June 2016.

- (11) In light of the exceptional circumstances and in order to enable ESMA, NCAs and stakeholders to complete the operational implementation, it is appropriate to defer the date by which the Member States need to apply the measures transposing Directive 2014/65/EU and the date by which the repeal of Directive 2004/39/EC is to take effect by 12 months until 3 January 2018. Reports and reviews should be deferred accordingly.
- (12) Directive 2014/65/EU should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2014/65/EU is amended as follows:

- (1) Article 90 is amended as follows:
- (a) in the first paragraph, ‘3 March 2019’ is replaced by ‘3 March 2020’;
 - (b) the second paragraph is amended as follows:
 - (i) ‘3 September 2018’ is replaced by ‘3 September 2019’;
 - (ii) ‘3 September 2020’ by ‘3 September 2021’;
 - (c) in the fourth paragraph, ‘1 January 2018’ is replaced by ‘1 January 2019’;
- (2) In the second subparagraph of Article 93(1), ‘3 January 2017’ is replaced by ‘3 January 2018’ and ‘3 September 2018’ by ‘3 September 2019’;
- (3) In Article 94, ‘3 January 2017’ is replaced by ‘3 January 2018’;
- (4) In Article 95(1), ‘3 July 2020’ is replaced by ‘3 January 2021’ and ‘3 January 2017’ is replaced by ‘3 January 2018’.

Article 2

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the European Parliament
The President

For the Council
The President