



EUROPEAN
COMMISSION

Brussels, **XXX**
[...](2016) **XXX** draft

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

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:

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.

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- **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

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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

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

For the Council