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'I' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)
Subject:	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

Delegations will find attached the Presidency proposal for a negotiating mandate with regard to the abovementioned proposal by the Commission. With respect to the Commission proposal, the new text is marked in **underlined bold** and deletions are indicated in ~~striketrough~~.

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)

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 OJ C , , p. .

² OJ C , , p. .

- (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 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.

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).

- (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. **In addition, it is also appropriate to defer the date by which the Member States need to transpose Directive 2014/65/EU to 3 July 2017.**
- (11a) Non-financial entities dealing on own account in other financial instruments than commodity derivatives, emission allowances and derivatives thereof as part of their commercial treasury risk management, to protect themselves against risks, such as exchange rate risks, should be allowed to use the exemption in point (d) of Article 2(1) as long as they do not engage in a high frequency trading technique.**
- (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) In Article 2(1), point (d)(ii) is replaced by the following:

‘(ii) are members of or participants in a regulated market or an MTF, on the one hand, or have direct electronic access to a trading venue, on the other hand, except for non-financial entities who execute transactions on a trading venue which are objectively measurable as reducing risks directly relating to their commercial activity or treasury financing activity and they do not engage in a high frequency algorithmic trading strategy.’

(-2) In Article 69(2), second subparagraph, ‘3 July 2016’ is replaced by ‘3 July 2017’.

(-3) In Article 70(1), third subparagraph, ‘3 July 2016’ is replaced by ‘3 July 2017’.

(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 July 2016’ is replaced by ‘3 July 2017’,** ‘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
