

MiFID II Directive and the Markets in Financial Instruments Regulation (“MiFIR”)

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Financial Services and Regulation

Introduction

The European Securities and Markets Authority (“ESMA”) has now published the long-awaited Final Report (ESMA/2015/1464) on its draft Implementing Technical Standards (“ITS”) and draft Regulatory Technical Standards (“RTS”) under the MiFID II Directive and the Markets in Financial Instruments Regulation (“MiFIR”). Published on September 28, 2015, the Final Report follows ESMA’s consultation on the draft technical standards in December 2014 and February 2015. The Final Report details ESMA’s final proposals in relation to 28 draft Technical Standards and attaches those draft Technical Standards in an Annex. The Final Report also discusses the feedback received by ESMA and ESMA’s rationale in making the final proposals and includes a cost-benefit analysis.

The Final Report and draft RTS and ITS contain ESMA’s proposals on the following areas.

Transparency

In relation to transparency, the draft RTS cover the following:

- transparency requirements in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments (RTS 1);
- transparency requirements in respect of bonds, structured finance products, emission allowances and derivatives (RTS 2);
- the volume cap mechanism and the provision of information for the purposes of transparency and other calculations (RTS 3);
- the criteria for determining whether derivatives should be subject to the trading obligation (RTS 4); and
- the criteria for determining whether derivatives have a direct, substantial and foreseeable affect within the European Union (RTS 5).

Microstructural issues

The Final Report contains draft RTS on the following microstructural issues:

- organisational requirements to be imposed on investment firms which engage in algorithmic trading, provide direct electronic access and act as general clearing members (RTS 6);
- organisational requirements relating to regulated markets, multilateral trading facilities (“MTFs”) and organised trading facilities (“OTFs”) enabling or allowing algorithmic trading through their systems (RTS 7);
- market-making agreements and market-making schemes (RTS 8);
- the ratio of unexecuted orders to transactions (RTS 9);
- the imposition of requirements to ensure co-location and fee structures are fair and non-discriminatory (RTS10);
- the tick size regime for share, depository receipts and exchange-traded funds (RTS 11); and
- determination of a material market in terms of liquidity relating to trade halt notifications (RTS 12).

Data publication and access

The Final Report contains draft RTS covering the following areas:

- authorisation, organisational requirements and the publication of transactions for data reporting service providers (RTS 13);
- data disaggregation (RTS 14);
- access considerations with regard to central counterparties (“CCPs”) and trading venues (RTS 15); and
- access in respect of benchmarks (RTS 16).

Requirements applying to trading venues

The requirements in the Final Report and RTS applying to trading venues include:

- draft RTS on the admission of financial instruments to trading on regulated markets (RTS 17);
- draft RTS on the suspension and removal of financial instruments and trading (RTS 18);
- ITS regarding the description of the functioning of MTFs and OTFs (RTS 19).

Commodity derivatives

The draft RTS in relation to commodity derivatives cover:

- the criteria for establishing the circumstances in which an activity may be considered to be ancillary to a firm's main business (RTS 20); and
- the methodology for the calculation of, and the application of, position limits for commodity derivatives traded on trading venues and economically equivalent OTC contracts (RTS 21).

Market data reporting

The draft RTS in relation to market data reporting include the following:

- the reporting obligations under Article 26 of MiFIR (RTS 22);
- the supply of financial instruments reference data under Article 27 of MiFIR (RTS 23);
- the maintenance of relevant data relating to orders in financial instruments (RTS 24); and
- clock synchronisation (RTS 25).

Post-trading issues

The Final Report contains draft RTS on the obligation to clear derivatives traded on regulated markets and the timing of acceptance for clearing (RTS 26).

Best execution

The draft RTS cover the determination of the specific content, the format and the periodicity of data relating to the quality of execution to be published, taking into account the type of execution venue and the type of financial instrument concerned; and the content and the format of information to be published by investment firms. This is in response to the Mandate in Article 27(10)(a) and (b) of MiFID II. The draft RTS are set out in RTS 27 and RTS 28.

Additional documentation

Annex I of the Final Report contains the draft RTS. Annex II contains a cost-benefit analysis.

ESMA has also published the following briefings:

- a briefing on trading venue topics (ESMA/2015/1468);
- a briefing on investment firms topics (ESMA/2015/1469); and

- a briefing on non-financial topics (ESMA/2015/1470).

Next steps

ESMA has submitted the Final Report to the European Commission, together with the draft ITS and RTS. The European Commission now has three months to consider the Final Report and the draft ITS and RTS and to decide on whether or not to endorse ESMA's technical standards.

We shall be publishing further briefings on MiFID II and MiFIR, looking at specific areas of the Final Report and the draft ITS and RTS in due course.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services and Regulation practice group:

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