

European Commission Confirms One Year Delay for Entire MiFID II Package

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Financial Services and Regulation

A delay in the implementation date for the Markets in Financial Instruments Directive 2004/39/EC (“MiFID II”) has been generally anticipated for some time. On February 10, 2016, the European Commission finally announced that it is proposing a one year delay to the full MiFID II legislative package (that is, the MiFID II Directive (2014/65/EU)) and the markets in Financial Instruments Regulation (Regulation 600/2014) (“MiFIR”).

The European Commission has made formal proposals to delay application until January 3, 2018. These formal proposals have been issued in the form of an amending [Directive](#) and [Regulation](#), which have yet to be adopted by the European Council and the European Parliament. However, it is expected that the proposals are likely to be fast-tracked.

The proposals will affect aspects of the Market Abuse Regulation (Regulation 596/2014) (“MAR”) and the Regulation on improving securities settlement and regulating central securities depositories (Regulation 909/2014) (“CSDR”).

In the accompanying [press release](#), Jonathan Hill, the Commissioner for Financial Services, Financial Stability and Capital Markets Union said:

“Given the complexity of the technical challenges highlighted by ESMA, it makes sense to extend the deadline for MiFID II. We will therefore give people another year to prepare properly and make the necessary changes to their systems. Meanwhile, we are pressing ahead with the level II legislation to implement MiFID II and expect to announce those measures shortly.”

The European Commission is proposing the extension to the application date because of the complexity of the technical data infrastructure that needs to be established in order that MiFID II may operate effectively. Due to the significant challenges in collecting the required data, ESMA informed the European Commission in October 2015 that neither National Competent Authorities, nor market participants will have the necessary systems ready by January 3, 2017. As a result, ESMA concluded that the delay is unavoidable. Due to these exceptional circumstances and in order to avoid legal uncertainty and potential market disruption, the European Commission considers that an extension of the MiFID II application date is necessary. However, the press release also makes clear that the delay will not impact the timetable for the adoption of the Level II implementing measures under the MiFID II Directive and MiFIR. These have already been delayed considerably; however, it is anticipated that the final drafts will be published in the next few weeks.

Despite a good deal of lobbying by Member States (including the UK), the European Commission has not proposed a delay to the date for adoption and transposition of MiFID II implementing legislation. This means that the cut-off date for transposition into national law remains July 3, 2016. Accordingly, timelines are going to be extremely tight for national regulators and legislators, especially given the existing delay in the publication of the Delegated Acts and Regulated Technical Standards.

Scope of the European Commission's Proposal

As mentioned above, the formal proposals are being made in the form of an amending Directive and Regulation. In these, the European Commission explains that the lack of the essential data needed to be collected and processed in order for MiFID II to become operational will have an impact on a number of areas. Without reference data (that is, 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 this will have an effect on the following areas:

- transaction reporting;
- the transparency framework;
- commodity derivatives; and
- microstructural regulation - the requirements in relation to algorithmic trading and high frequency trading that depend upon data.

The investor protection rules, conduct of business rules and certain associated organisational requirements within MiFID II will not be directly affected by the lack of data. However, best execution is an important exception to this, as the scope of the disclosure is designed by reference to there being a liquid market and other concepts related to transparency. Although the European Commission recognises that an alternative approach might be to extend the date of entry into application only for the parts of MiFID II directly relating to data collection, it has finally concluded, having analysed the issues, that an extension for the entire MiFID II legislative package is preferable in the circumstances.

An extension of the MiFID II application date will have an impact on the applicability of other legislation, in particular, the Market Abuse Regulation ("MAR") and the CSDR.

Impact on MAR

MAR and MiFID II rely upon each other for certain definitions and concepts. MAR applies from July 3, 2016 and includes a provision that ensures that before the original MiFID II application date (that is January 3, 2017), the concepts and rules under the existing MiFID directive (2004/39 EC) will apply. In order to ensure legal certainty for the period between the original MiFID II application date (January 3, 2017) and the new MiFID II application date (January 3, 2018), the European Commission's proposed Regulation will amend MAR in order to clarify that:

- The concepts and rules as set out in the original MiFID Directive should be used until the new MiFID II application date.
- Provisions referring to concepts that will be introduced by MiFID II, including organised trading facilities ("OTFs"), small and medium-sized enterprises ("SME") growth markets, emission allowances or auctioned products based upon them, will not apply until the new MiFID II application date.

Impact on CSDR

The European Commission's proposed Regulation amends the CSDR to clarify the position in relation to the period between the original MiFID II application date and the revised MiFID II application date, as follows.

- The rules on settlement discipline relating to multi-lateral trading facilities ("MTFs") applying for registration as SME growth markets will apply in accordance with the MiFID II Directive. Specifically, these rules will allow MTFs meeting the criteria for an SME growth market under MiFID II to apply a longer extension period for the settlement of transactions, whilst their registration as an SME growth market under MiFID II is still ongoing.
- In order to achieve legal certainty and coherent legislative framework for trading and settlement, to the extent the CSDR relies on MiFID II definitions and concepts, the rules and concepts set out in MiFID should be used until the new MiFID II application date.

Firms Must Be Compliant by the New Date

The European Commission's decision to delay the application date does, however, come with an expectation that firms will be compliant by the new date. The European Commission considers that a one-year extension should provide sufficient and reasonable time for all parties to put in place the infrastructure for data collection, reporting, and transparency threshold calculations.

In the press release, the European Commission comments that the period of 30 months (as opposed to the usual period of 18-24 months) between the adoption and the entry of application of MiFID II had already been foreseen to take account of the very high level of complexity involved. Therefore, the extension of the application date is limited strictly to what is necessary in order to allow the technical implementation work to be finalised.

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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