Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016 amending Directive 2014/65/EU on markets in financial instruments (Text with EEA relevance)

DIRECTIVE (EU) 2016/1034 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 23 June 2016

amending Directive 2014/65/EU on markets in financial instruments

(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 Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Regulation (EU) No 600/2014 of the European Parliament and of the Council[(4)] and Directive 2014/65/EU of the European Parliament and of the Council[(5)] (together, 'the new legal framework') are major financial legislative acts adopted in the wake of the financial crisis as regards securities markets, investment intermediaries and trading venues. The new legal framework reinforces and replaces Directive 2004/39/EC of the European Parliament and of the Council[(6)].

(2) The new legal framework governs the requirements applicable to investment firms, regulated markets, data reporting services providers and third country firms providing investment services or activities in the Union. It harmonises the position limits regime for commodity derivatives to improve transparency, to support orderly pricing and to prevent market abuse. It also introduces rules on high-frequency algorithmic trading and improves the oversight of financial markets by harmonising administrative sanctions. Building on the rules already in place, the new legal 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 legal framework 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 that is subject to

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Directive 2014/65/EU. Those data are also used for other purposes, for instance for the calculation of transparency and liquidity thresholds, as well as for the reporting of positions in commodity derivatives.

(4) In order to collect data in an efficient and harmonised manner, a new data collection infrastructure, the Financial Instruments Reference Data System ('FIRDS'), is being developed by the European Securities and Markets Authority ('ESMA') in conjunction with national competent authorities ('NCAs'). FIRDS will cover a wide range of financial instruments brought into the scope of Regulation (EU) No 600/2014 and it will link data feeds between ESMA, NCAs and trading venues across the Union. The vast majority of the new IT-systems underpinning FIRDS will need to be built from scratch, based on new parameters.

(5) Member States are to apply the measures transposing Directive 2014/65/EU from 3 January 2017. However, due to the size and complexity of the data to be collected and processed for the new legal framework to become operational, in particular for transaction reporting, transparency calculations and the 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 necessary data collection infrastructures would have implications across the entire scope of the new legal framework. Without data, it would not be feasible to establish a precise delineation of financial instruments that fall within the scope of the new legal framework. Furthermore, it would 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) In the absence of the necessary data collection infrastructures, trading venues and investment firms would not be able to report executed transactions to competent authorities. In the absence of the reporting of positions in commodity derivatives, it would be difficult to enforce position limits on such commodity derivatives. With no position reporting, there would be 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 the necessary data collection infrastructures would also make it difficult for investment firms to apply best execution rules. Trading venues and systematic internalisers would not be able to publish data relating to the quality of execution of transactions on those venues. Investment firms would 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 new legal framework in its entirety, including all delegated and implementing acts adopted thereunder.

(10) The implementation process for the data collection infrastructures involves five steps: business requirements, specifications, development, testing and deployment. ESMA

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estimates that those steps will be completed by January 2018, provided that there is legal certainty on the final requirements under the relevant regulatory technical standards 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. It is also appropriate to defer the date by which the Member States need to transpose Directive 2014/65/EU to 3 July 2017.

(12) The exemption set out in point (d) of Article 2(1) of Directive 2014/65/EU should be extended to include non-financial entities who are members of or participants in a regulated market or a multilateral trading facility (MTF), or have direct electronic access to a trading venue when executing transactions on a trading venue which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of those non-financial entities or their groups.

(13) 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 the commercial activity or treasury financing activity of those non-financial entities or their groups;;

(2) in point (a) of Article 25(4), the second subparagraph is replaced by the following:

For the purpose of this point, a third-country market shall be considered to be equivalent to a regulated market if the requirements and the procedure laid down under the third and the fourth subparagraphs are fulfilled.

At the request of the competent authority of a Member State, the Commission shall adopt equivalence decisions in accordance with the examination procedure referred to in Article 89a(2), stating whether the legal and supervisory framework of a third country ensures that a regulated market authorised in that third country complies with legally binding requirements which are, for the purpose of the application of this point, equivalent to the requirements resulting from Regulation (EU) No 596/2014, from Title III of this Directive, from Title II of Regulation (EU) No 600/2014 and from Directive 2004/109/EC, and which are subject to effective supervision and enforcement in that third country. The competent authority shall indicate why it considers that the legal and supervisory framework of the third country concerned is to be considered equivalent and shall provide relevant information to that end.