

Securities Financing Transactions Regulation Legislative Tracker

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The Simmons & Simmons Securities Financing Transactions Regulation Legislative Tracker

This Legislative Tracker provides you with an update on the EU's Securities Financing Transactions (SFT) Regulation, setting out:

- a high level background to, and summary of the main aims of, the SFT Regulation (based on the latest Level 1 text);
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents); and
- a table setting out what is currently known about the consultation process for Level 2 measures.

Background

The 2008 global financial crisis revealed important regulatory gaps in the European financial system. In response, the EU adopted a range of measures to render the banking system more stable. These included strengthened capital requirements, rules on improved governance and supervision and resolution regimes.

However, the crisis also highlighted the need to improve transparency and monitoring in areas where non-bank credit activities took place, so called "shadow banking". The overarching aim of the EU's work (coordinated with that undertaken by the Financial Stability Board and G20) has been to eliminate the dark corners in the financial sector which have a potential impact on systemic risk and extend regulation and oversight to all systemically important financial institutions, instruments and markets.

Summary

The **Regulation on reporting and transparency of securities financing transactions** (SFT Regulation) entered into force on 12 January 2016.¹

¹ A separate element in the Commission's work on shadow banking is its proposal for a regulation on money market funds (the MMF Regulation) – please see the Simmons & Simmons MMF Legislative Tracker on elexica.com.

The SFT Regulation is intended to ensure that the structural measures which the Commission has put forward to improve the resilience of the EU banking sector are not undermined by market participants merely moving the financial risk to other, less regulated, sectors.

Who does the SFT Regulation apply to?

The SFT Regulation will apply to:

- all counterparties, financial and non-financial, including CCPs and third country entity equivalents in the SFT markets
- UCITS management and investment companies
- authorised alternative investment fund managers (AIFMs) and
- counterparties engaging in rehypothecation of financial investments provided as collateral.

What are securities financing transactions?

SFTs are defined in the SFT Regulation as:

- repurchase transactions as defined by the Capital Requirements Regulation
- securities or commodities lending or borrowing transactions and
- a buy-sell back or sell-buy back transactions
- margin lending transactions.

The reporting obligation

Counterparties to an SFT would have to report the details of the transaction to registered trade repositories (or to the European Securities and Markets Authority (ESMA) where there is no available trade repository) no later than the working day following the conclusion, modification or termination of the transaction. They must also keep a record of any SFT concluded, modified or terminated for at least five years following the termination of the transaction.

The disclosure obligation

UCITS management and investment companies will be required to report to investors on their SFTs in their half-yearly and annual reports, while AIFMs will have to do so in their annual reports.

Collateral reuse

Counterparties will be able to rehypothecate financial instruments provided as collateral only with express consent of the providing counterparty and once the financial instruments received under a collateral arrangement are transferred from the account of the providing counterparty. The receiving counterparty will also have to inform the providing counterparty of the risks and consequences of the rehypothecation of the financial instruments, and in particular the potential risks in the event of the receiving counterparty's default. Finally, the reuse must be undertaken in compliance with the terms of the collateral arrangement.

Application

The SFT Regulation starts applying from 12 January 2016, with the following exceptions:

- the reporting obligation starts applying
 - 12 months after the date of entry into force of Level 2 measures – for investment firms authorised under MiFID2, credit institutions authorised under CRD IV legislation, and third country entities equivalents
 - 18 months after the date of entry into force of Level 2 measures – for UCITS, AIFs managed by AIFMs, and third countries entities equivalents
 - 21 months after the date of entry into force of Level 2 measures – for non-financial counterparties, and third country entities equivalents
- the disclosure obligation starts applying
 - 13 January 2017 – for periodical reports
 - 12 January 2016 – for pre-contractual documents in case of funds constituted on or after the SFT Regulation enters into force
 - 13 July 2017 – for pre-contractual documents in case of funds constituted before the SFT Regulation enters into force
- Collateral reuse – 13 July 2016.

Note that:

- where a UCITS managed by a management company is the counterparty to SFTs, the reporting obligation of that UCITS applies to the management company, and
- where an AIF is the counterparty to SFTs, the reporting obligation of that AIF applies to its AIFM.



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Where are we in the process?

Table 1: Key stages in development of Level 1 text

Level 1 Text	Date
Commission <i>proposal</i>	24 January 2014
Council <i>general approach</i>	20 November 2014
European Parliament <i>draft report</i>	08 January 2015
<i>Political agreement</i>	17 June 2015
European Parliament Plenary vote – <i>First reading text</i>	29 October 2015
Adoption by the Council of the EU	16 November 2015
<i>Publication in the Official Journal of the EU</i>	23 December 2015
Effective date	12 January 2016
<i>Draft Delegated Regulation</i> supplementing the SFTR with regard to fees charged by ESMA to trade repositories	16 November 2017

Table 2: Development of Level 2 / Level 3 measures

(a) EU

Paper	Published	Closed	Outcome
Discussion Paper: <i>Draft RTS and ITS under SFT Regulation</i>	11 Mar. 2016	22 Apr. 2016	CP (see below)
Consultation Paper: <i>Draft RTS and ITS under SFTR and amendments to related EMIR RTS</i>	30 Sept. 2016	30 Nov. 2016	31 March 2017 <i>Final Report</i>
Consultation Paper: <i>ESMA's technical advice to the Commission on fees for TRs under SFTR and on certain amendments to the fees under EMIR</i>	19 Dec. 2016	31 Jan. 2017	21 April 2017 <i>Technical Advice</i> 16 Nov. 2017 <i>Delegated Act (Annex)</i>

(b) UK

Paper	Published	Closed	Outcome
Consultation Paper: <i>SFTR and consequential changes to the Handbook</i> (CP16/14)	19 May 2016	19 Jul. 2016	22 Sept 2016 <i>FCA Handbook Notice No. 37</i>
HMT <i>Financial Services and Markets Act 2000 (Transparency of Securities Financing Transactions and of Reuse) Regulations 2016</i>	13 July 2016	-	-
FCA <i>Investment Funds (Securities Financing Transactions) Instrument 2016</i> (FCA 2016/65)	22 Sept. 2016	-	-

Annex

The SFT Regulation contains a number of provisions in respect of which the Commission and/or ESMA are mandated to develop the following Level 2 measures:

Level 2 measures

- A. Amendment of the list of the exempt entities (**Article 2(4)**)
- B. Details of SFTs that need to be reported to a trade repository or ESMA (**Article 4(9)**)
- C. Format and frequency of reports for different types of SFTs (**Article 4(10)**)
- D. Registration of a trade repository (**Article 5(7) and (8)**)
- E. Further specification of supervisory fees, matters for which fees are due, the amount of fees and manner in which they are to be paid (**Article 11(2)**)
- F. Transparency and availability of data held in a trade repository (**Article 12(3)**)
- G. Further specification of the content of Section A of the SFT Regulation Annex – Information to be provided in the UCITS half-yearly and annual reports and the AIF’s annual report (**Article 13(3)**)
- H. Further specification of the content of Section B of the SFT Regulation Annex – Information to be included in the UCITS prospectus and AIF disclosure to investors (**Article 14(3)**)
- I. Legal and supervisory arrangements of third country trade repositories (**Article 19(1)**)
- J. Legal, supervisory and enforcement arrangements of a third country (**Article 21(1)**)
- K. Procedures and forms for exchange of information (**Article 25(4)**)

Looking at each of these in turn:

(i) Level 2 Measures

A. Amendment of the list of the exempt entities

(i) What does Level 1 say?

Article 2(2) of the Regulation states that:

“Articles 4 and 15 do not apply to:

- (a) members of the European System of Central Banks (ESCB), other Member States’ bodies performing similar functions, and other Union public bodies charged with, or intervening in, the management of the public debt;
- (b) the Bank for International Settlements.”

(ii) What is the Commission’s mandate?

Article 2(4) of the Regulation states that:

“The Commission shall be empowered to adopt delegated acts in accordance with Article 30 to amend the list set out in paragraph 2 of this Article.”

(iii) Timing

The Regulation sets no deadline by which the Commission must adopt such delegated acts.

B. Details of SFTs that need to be reported to a trade repository or ESMA

(i) What does Level 1 say?

Article 4(1) of the Regulation states that:

“Counterparties to SFTs shall report the details of any SFT they have concluded, as well as any modification or termination thereof, to a trade repository registered in accordance with Article 5 or recognised in accordance with Article 19. Those details shall be reported no later than the working day following the conclusion, modification or termination of the transaction.

The reporting obligation laid down in the first subparagraph shall apply to SFTs which:

- (a) were concluded before the relevant date of application referred to in point (a) of Article 33(2) and remain outstanding on that date, if:
 - (i) the remaining maturity of those SFTs on that date exceeds 180 days; or
 - (ii) those SFTs have an open maturity and remain outstanding 180 days after that date;
- (b) are concluded on or after the relevant date of application referred to in point (a) of Article 33(2).

The SFTs referred to in point (a) of the second subparagraph shall be reported within 190 days of the relevant date of application referred to in point (a) of Article 33(2).”

Article 4(5) of the Regulation states that:

“Where a trade repository is not available to record the details of SFTs, counterparties shall ensure that those details are reported to the European Supervisory Authority (European Securities and Markets Authority) (‘ESMA’).

In those cases, ESMA shall ensure that all of the relevant entities referred to in Article 12(2) have access to all of the details of SFTs they need to fulfil their respective responsibilities and mandates.”

(ii) What is the Commission’s mandate?

Article 4(9) of the Regulation states that:

Power is delegated to the Commission to adopt the regulatory technical standards that ESMA shall, in close cooperation with, and taking into account the needs of, the ESCB, draft and that should specify the details of the reports referred to in paragraphs 1 and 5 of this Article for the different types of SFTs that shall include at least:

- (a) the parties to the SFT and, where different, the beneficiary of the rights and obligations arising therefrom;
- (b) the principal amount; the currency; the assets used as collateral and their type, quality, and value; the method used to provide collateral; whether collateral is available for reuse; in cases where the collateral is distinguishable from other assets, whether it has been reused; any substitution of the collateral; the repurchase rate, lending fee or margin lending rate; any haircut; the value date; the maturity date; the first callable date; and the market segment;
- (c) depending on the SFT, details of the following:
 - (i) cash collateral reinvestment;
 - (ii) securities or commodities being lent or borrowed.

In developing those draft technical standards, ESMA shall take into account the technical specificities of pools of assets and shall provide for the possibility of reporting position level collateral data where appropriate.

(iii) Timing

Article 4(9) subpara (3) of the Regulation states that:

“ESMA shall submit those draft regulatory technical standards to the Commission by 13 January 2017.”

The *draft technical standards* were submitted to the European Commission on **31 March 2017**. The European Commission has three months to decide whether or not to endorse them.

C. Format and frequency of reports for different types of SFTs

(i) What does Level 1 say?

Article 4(1) of the Regulation states that:

“Counterparties to SFTs shall report the details of any SFT they have concluded, as well as any modification or termination thereof, to a trade repository registered in accordance with Article 5 or recognised in accordance with Article 19. Those details shall be reported no later than the working day following the conclusion, modification or termination of the transaction.

The reporting obligation laid down in the first subparagraph shall apply to SFTs which:

- (a) were concluded before the relevant date of application referred to in point (a) of Article 33(2) and remain outstanding on that date, if:
 - (i) the remaining maturity of those SFTs on that date exceeds 180 days; or
 - (ii) those SFTs have an open maturity and remain outstanding 180 days after that date;
- (b) are concluded on or after the relevant date of application referred to in point (a) of Article 33(2).

The SFTs referred to in point (a) of the second subparagraph shall be reported within 190 days of the relevant date of application referred to in point (a) of Article 33(2).”

Article 4(5) of the Regulation states that:

“Where a trade repository is not available to record the details of SFTs, counterparties shall ensure that those details are reported to the European Supervisory Authority (European Securities and Markets Authority) (‘ESMA’).

In those cases, ESMA shall ensure that all of the relevant entities referred to in Article 12(2) have access to all of the details of SFTs they need to fulfil their respective responsibilities and mandates.”

(ii) What is the Commission’s mandate?

Article 4(10) of the Regulation states that:

Power is conferred on the Commission to adopt the implementing technical standards that ESMA shall, in close cooperation with, and taking into account the needs of, the ESCB, draft and that should specify the format and frequency of the reports referred to in paragraphs 1 and 5 of this Article for the different types of SFTs.

The format shall include, in particular:

- (a) global legal entity identifiers (LEIs), or pre-LEIs until the global legal entity identifier system is fully implemented;
- (b) international securities identification numbers (ISINs); and
- (c) unique trade identifiers.

In developing those draft technical standards, ESMA shall take into account international developments and standards agreed at Union or global level.

(iii) Timing

Article 4(10) subpara (4) of the Regulation states that:

“ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.”

The *draft technical standards* were submitted to the European Commission on **31 March 2017**. The European Commission has three months to decide whether or not to endorse them.

D. Registration of a trade repository

(i) What does Level 1 say?

Article 5(1) of the Regulation states that:

“A trade repository shall register with ESMA for the purposes of Article 4 under the conditions and the procedure set out in this Article.”

Article 5(2) of the Regulation states that:

“To be eligible to be registered under this Article, a trade repository shall be a legal person established in the Union, apply procedures to verify the completeness and correctness of the details reported to it under Article 4(1), and meet the requirements laid down in Articles 78, 79 and 80 of Regulation (EU) No 648/2012. For the purposes of this Article, references in Articles 78 and 80 of Regulation (EU) No 648/2012 to Article 9 thereof shall be construed as references to Article 4 of this Regulation.”

Article 5(5) of the Regulation states that:

“A trade repository shall submit to ESMA either of the following:

- (a) an application for registration;
- (b) an application for an extension of registration for the purposes of Article 4 of this Regulation in the case of a trade repository already registered under Title VI, Chapter 1 of Regulation (EU) No 648/2012.”

(ii) What is the Commission’s mandate?

Article 5(7) of the Regulation states that:

Power is delegated to the Commission to adopt the regulatory technical standards that ESMA shall draft and that shall specify the details of all of the following:

- (a) the procedures referred to in paragraph 2 of this Article and which are to be applied by trade repositories in order to verify the completeness and correctness of the details reported to them under Article 4(1);
- (b) the application for registration referred to in point (a) of paragraph 5;
- (c) a simplified application for an extension of registration referred to in point (b) of paragraph 5 in order to avoid duplicate requirements.

Article 5(8) of the Regulation states that:

Power is conferred on the Commission to adopt the implementing technical standards that ESMA shall draft and that should specify the format of both of the following:

- (a) the application for registration referred to in point (a) of paragraph 5;
- (b) the application for an extension of registration referred to in point (b) of paragraph 5.

With regard to point (b), ESMA shall develop a simplified format to avoid duplicate procedures.

(iii) Timing

Article 5(7) subpara (2) and Article 5(8) subpara (2) of the Regulation state that:

ESMA shall submit those draft regulatory/implementing technical standards to the Commission by 13 January 2017.

The *draft technical standards* were submitted to the European Commission on **31 March 2017**. The European Commission has three months to decide whether or not to endorse them.

E. Further specification of supervisory fees, matters for which fees are due, the amount of fees and manner in which they are to be paid

(i) What does Level 1 say?

Article 11(1) of the Regulation states that:

“ESMA shall charge the trade repositories fees in accordance with this Regulation and in accordance with the delegated acts adopted pursuant to paragraph 2 of this Article. Those fees shall be proportionate to the turnover of the trade repository concerned and fully cover ESMA’s necessary expenditure relating to the registration, recognition and supervision of trade repositories as well as the reimbursement of any costs that the competent authorities may incur as a result of any delegation of tasks pursuant to Article 9(1) of this Regulation. In so far as Article 9(1) of this Regulation refers to Article 74 of Regulation (EU) No 648/2012, references to Article 72(3) of that Regulation shall be construed as references to paragraph 2 of this Article.

Where a trade repository has already been registered under Title VI, Chapter 1, of Regulation (EU) No 648/2012, the fees referred to in the first subparagraph of this paragraph shall only be adjusted to reflect additional necessary expenditure and costs relating to the registration, recognition and supervision of trade repositories pursuant to this Regulation.”

(ii) What is the Commission’s mandate?

Article 11(2) of the Regulation states that:

“The Commission shall be empowered to adopt a delegated act in accordance with Article 30 to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.”

(iii) Timing

The Regulation sets no deadline by which the European Commission must adopt such delegated act.

ESMA submitted its *Technical Advice* to the European Commission on **21 April 2017**.

F. Transparency and availability of data held in a trade repository

(i) What does Level 1 say?

Article 12(1) of the Regulation states that:

“A trade repository shall regularly, and in an easily accessible way, publish aggregate positions by type of SFTs reported to it.”

Article 12(2) of the Regulation states that:

“A trade repository shall collect and maintain the details of SFTs and shall ensure that the following entities have direct and immediate access to these details to enable them to fulfil their respective responsibilities and mandates:

- (a) ESMA;
- (b) the European Supervisory Authority (European Banking Authority) (‘EBA’);
- (c) the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (‘EIOPA’);
- (d) the ESRB;
- (e) the competent authority supervising the trading venues of the reported transactions;
- (f) the relevant members of the ESCB, including the European Central Bank (ECB) in carrying out its tasks within a single supervisory mechanism under Regulation (EU) No 1024/2013;
- (g) the relevant authorities of a third country in respect of which an implementing act pursuant to Article 19(1) has been adopted;
- (h) supervisory authorities designated under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council (1);
- (i) the relevant Union securities and market authorities whose respective supervisory responsibilities and mandates cover transactions, markets, participants and assets which fall within the scope of this Regulation;
- (j) the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council (2);
- (k) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council (3);
- (l) the Single Resolution Board established by Regulation (EU) No 806/2014 of the European Parliament and of the Council (4);
- (m) the authorities referred to in Article 16(1).”

(ii) What is the Commission’s mandate?

Article 12(3) of the Regulation states that:

Power is delegated to the Commission to adopt the regulatory technical standards that ESMA shall, in close cooperation with the ESCB and taking into account the needs of the entities referred to in paragraph 2, draft and that shall specify:

- (a) the frequency and the details of the aggregate positions referred to in paragraph 1 and the details of SFTs referred to in paragraph 2;
- (b) the operational standards required, to allow the timely, structured and comprehensive:
 - (i) collection of data by trade repositories;
 - (ii) aggregation and comparison of data across repositories;
- (c) the details of the information to which the entities referred to in paragraph 2 are to have access, taking into account their mandate and their specific needs;
- (d) the terms and conditions under which the entities referred to in paragraph 2 are to have direct and immediate access to data held in trade repositories.

Those draft regulatory technical standards shall ensure that the information published under paragraph 1 does not enable the identification of a party to any SFT.

(iii) Timing

Article 12(3) subpara (3) of the Regulation states that:

“ESMA shall submit those draft regulatory technical standards to the Commission by 13 January 2017.”

The *draft technical standards* were submitted to the European Commission on **31 March 2017**. The European Commission has three months to decide whether or not to endorse them.

G. Further specification of the content of Section A of the SFT Regulation Annex – Information to be provided in the UCITS half-yearly and annual reports and the AIF’s annual report

(i) What does Level 1 say?

Article 13(1) of the Regulation states that:

“UCITS management companies, UCITS investment companies, and AIFMs shall inform investors on the use they make of SFTs and total return swaps in the following manner:

- (a) for UCITS management companies or UCITS investment companies in the half-yearly and annual reports referred to in Article 68 of Directive 2009/65/EC;
- (b) for AIFMs in the annual report referred to in Article 22 of Directive 2011/61/EU.”

Article 13(2) of the Regulation states that:

“The information on SFTs and total return swaps shall include the data provided for in Section A of the Annex.”

(ii) What is the Commission’s mandate?

Article 13(3) of the Regulation states that:

Power is delegated to the Commission to adopt the regulatory technical standards that ESMA may, taking into account the requirements laid down in Directives 2009/65/EC and 2011/61/EU as well as evolving market practices, develop and that shall further specify the content of Section A of the Annex.

(iii) Timing

The Regulation sets no deadline by which the Commission must adopt such regulatory technical standards.

H. Further specification of the content of Section B of the SFT Regulation Annex – Information to be included in the UCITS prospectus and AIF disclosure to investors

(i) What does Level 1 say?

Article 14(1) of the Regulation states that:

“The UCITS prospectus referred to in Article 69 of Directive 2009/65/EC, and the disclosure by AIFMs to investors referred to in Article 23(1) and (3) of Directive 2011/61/EU shall specify the SFT and total return swaps which UCITS management companies or UCITS investment companies, and AIFMs respectively, are authorised to use and include a clear statement that those transactions and instruments are used.”

Article 14(2) of the Regulation states that:

“The prospectus and the disclosure to investors referred to in paragraph 1 shall include the data provided for in Section B of the Annex.”

(ii) What is the Commission’s mandate?

Article 14(3) of the Regulation states that:

Power is delegated to the Commission to adopt the regulatory technical standards that ESMA may, taking into account the requirements laid down in Directives 2009/65/EC and 2011/61/EU, develop and that shall further specify the content of Section B of the Annex.

In preparing the draft regulatory technical standards referred to in the first subparagraph, ESMA shall take into account the need to allow for a sufficient time before their application.

(iii) Timing

The Regulation sets no deadline by which the Commission must adopt such regulatory technical standards.

I. Legal and supervisory arrangements of third country trade repositories

(i) What is the Commission’s mandate?

Article 19(1) of the Regulation states that:

“The Commission may adopt implementing acts determining that the legal and supervisory arrangements of a third country ensure that:

- (a) trade repositories authorised in that third country comply with legally binding requirements which are equivalent to those laid down in this Regulation;
- (b) effective supervision of trade repositories and effective enforcement of their obligations takes place in that third country on an ongoing basis;
- (c) guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and those guarantees are at least equivalent to those laid down in this Regulation; and
- (d) trade repositories authorised in that third country are subject to a legally binding and enforceable obligation to give direct and immediate access to the data to the entities referred to in Article 12(2).

The implementing act referred to in the first subparagraph shall also specify the relevant third-country authorities that are entitled to access the data on SFTs held in trade repositories established in the Union.

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the examination procedure referred to in Article 31(2).”

(ii) Timing

The Regulation sets no deadline by which the Commission must adopt such implementing acts.

J. Legal, supervisory and enforcement arrangements of a third country

(i) What is the Commission’s mandate?

Article 21(1) of the Regulation states that:

“The Commission may adopt implementing acts determining that the legal, supervisory and enforcement arrangements of a third country:

- (a) are equivalent to the requirements laid down in Article 4;
- (b) ensure protection of professional secrecy equivalent to that laid down in this Regulation;

- (c) are being effectively applied and enforced in an equitable and non-distortive manner in order to ensure effective supervision and enforcement in that third country; and
- (d) ensure that the entities referred to in Article 12(2) have either direct access to the details on SFT data pursuant to Article 19(1) or indirect access to the details on SFTs pursuant to Article 20.”

(ii) Timing

The Regulation sets no deadline by which the Commission must adopt such implementing acts.

K. Procedures and forms for exchange of information

(i) What does Level 1 say?

Article 25(1) of the Regulation states that:

“Competent authorities shall provide ESMA annually with aggregated and granular information regarding all administrative sanctions and other administrative measures imposed by them in accordance with Article 22. ESMA shall publish aggregated information in an annual report.”

Article 25(2) of the Regulation states that:

“Where Member States have chosen to lay down criminal sanctions for infringements of the provisions referred to in Article 22, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish, in an annual report, data on criminal sanctions imposed.”

(ii) What is the Commission’s mandate?

Article 25(4) of the Regulation states that:

Power is conferred to the Commission to adopt the implementing technical standards that ESMA shall draft and that shall determine procedures and forms for exchange of information as referred to in paragraphs 1 and 2.

(iii) Timing

Article 25(4) of the Regulation states that:

“ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.”

The *draft technical standards* were submitted to the European Commission on **31 March 2017**. The European Commission has three months to decide whether or not to endorse them.

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