



Brussels, 24.5.2016
C(2016) 3017 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 24.5.2016

**supplementing Directive 2014/65/EU of the European Parliament and of the Council
with regard to regulatory technical standards for the admission of financial instruments
to trading on regulated markets**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 51(1) of Directive 2014/65/EU on Markets in Financial Instruments ('MiFID II') requires regulated market to have clear and transparent rules regarding the admission of financial instruments to trading. Those rules must ensure that any instruments admitted to trading are capable of being traded in a fair, orderly and efficient manner and, in case of transferable securities, are freely negotiable. Furthermore, under Article 51(3) of MiFID II the regulated markets must establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their obligations under Union law in respect of initial, ongoing or ad hoc disclosure obligations. They must establish arrangements which facilitate its members or participants in obtaining access to information which has been made public under Union law.

In this context, Article 51(6) empowers the Commission to adopt, following submission of draft regulatory technical standards by the European Securities and Markets Authority (ESMA), a delegated Regulation further specifying the criteria for (a) transferable securities to be freely negotiable and (b) for transferable securities, units and shares in collective investment undertakings and derivatives to be traded in a fair, orderly and efficient manner.

The draft regulatory technical standards were submitted to the Commission on 28 September 2015. In accordance with Article 10(1) of Regulation No (EU) 1095/2010 establishing the ESMA, the Commission shall decide within three months of receipt of the draft standards whether to endorse them. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of the Regulation (EU) 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards¹. The consultation paper was published on 19 December 2014 on ESMA website and the consultation closed on 2 March 2015. In addition, ESMA sought the views of the Securities and Markets Stakeholder Group (MSG) established in accordance with Article 37 of the ESMA Regulation. The MSG chose not to provide advice on these issues due to the technical nature of the standards.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted its impact assessment, including the analysis of costs and benefits related to the draft technical standards. This analysis is available at http://www.esma.europa.eu/system/files/2015-esma-1464_annex_ii_-_cba_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

¹ ESMA/2014/1570. The ESMA Consultation Paper (CP) on MiFID/MiFIR technical standards was published on 19 December 2014. The consultation period closed on 2 March 2015.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt a Delegated Regulation is provided for under Article 51(6) of MIFID II. Under this provision, the Commission is empowered to adopt a Delegated Regulation:

- (a) to specify the characteristics of different classes of financial instruments to be taken into account by the regulated market when assessing whether a financial instrument is issued in a manner consistent with the conditions as set out in Article 51(1) of MiFID II;
- (b) to clarify the arrangements that the regulated market is required to implement so as to be considered to have fulfilled its obligation to verify that the issuer of a transferable security complies with its obligations under Union law in respect of initial, ongoing or ad hoc disclosure obligations;
- (c) to clarify the arrangements that the regulated market has to establish in order to facilitate its members or participants in obtaining access to information which has been made public under the conditions established by Union law.

Article 1 of this Delegated Regulation lays down the criteria for transferable securities to be considered freely negotiable.

Articles 2 to 5 lay down criteria for transferable securities, units and shares in collective investment undertakings and derivatives to be traded in a fair, orderly and efficient manner.

These requirements were developed, to a large extent, on the basis of the existing rules in Articles 35 to 37 of Regulation (EC) No 1287/2006.

Article 6 confirms that emission allowances as referred to in point (11) of Section C of Annex I to MiFID II, recognised for compliance with the requirements of Directive 2003/87/EC, are eligible for admission to trading on a regulated market with no further requirements.

Article 7 requires regulated markets to adopt and publish a policy regarding the verification of the issuers' compliance with their obligations of initial, on-going and ad hoc disclosure under Union law. While it remains the responsibility of the issuers to comply with these obligations, regulated markets are required to have arrangements in place to effectively verify compliance of issuers with the relevant obligations. These obligations stem from the Prospectus, the Transparency and the Market Abuse Directive.

Finally, Article 8 requires regulated markets to establish arrangements which are easily accessible and free of charge to facilitate access of the participants or members to information that has been made public. These requirements aim to promote access of members and participants of regulated markets to information published under Union law.

COMMISSION DELEGATED REGULATION (EU) .../...

of 24.5.2016

**supplementing Directive 2014/65/EU of the European Parliament and of the Council
with regard to regulatory technical standards for the admission of financial instruments
to trading on regulated markets**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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/EU², and in particular the third subparagraph of Article 51(6) thereof,

Whereas:

- (1) Transferable securities should only be considered freely negotiable if before admission to trading no restrictions exist which prevent the transfer of those securities in a way that would disturb creating a fair, orderly and efficient market.
- (2) For the admission to trading on a regulated market of a transferable security as defined in Directive 2014/65/EU, in the case of a security within the meaning of Directive 2003/71/EC of the European Parliament and of the Council³, there needs to be sufficient information publicly available so as to enable to value that financial instrument for it to be traded in a fair, orderly and efficient manner. In addition, in the case of shares an adequate number should be available for distribution to the public, and for securitised derivatives suitable settlement and delivery arrangements should be in place.
- (3) Transferable securities which fulfil the requirements for admission to an official list in accordance with Directive 2001/34/EC of the European Parliament and of the Council⁴ should be considered freely negotiable and capable of being traded in a fair, orderly and efficient manner.
- (4) The admission to trading on a regulated market of units issued by undertakings for collective investment in transferable securities or alternative investment funds should not allow the avoidance of the relevant provisions of Directive 2009/65/EC of the European Parliament and of the Council⁵ or of Directive 2011/61/EU of the European

² OJ L 173, 12.06.2014, p. 349.

³ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

⁴ Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p.1).

⁵ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (OJ L 302, 17.11.2009, p. 32).

Parliament and of the Council⁶. Therefore, it is necessary for an operator of a regulated market to verify that the units it admits to trading stem from a collective investment scheme that complies with the relevant sectoral legislation. In the case of exchange-traded funds, it is necessary for the operator of a regulated market to ensure that adequate redemption arrangements for investors are in place at all times.

- (5) The admission to trading on a regulated market of derivative instruments referred to in points (4) to (10) of Section C of Annex I to Directive 2014/65/EU should take into account whether there is sufficient information available for the valuation of the derivative as well as the underlying, and in the case of physically settled contracts, the existence of appropriate settlement and delivery procedures.
- (6) Directive 2003/87/EC of the European Parliament and of the Council⁷ imposes certain conditions for emission allowances in order to ensure that they are freely negotiable and traded in a fair, orderly and efficient manner. Any emission allowance within the meaning of point (11) of Section C of Annex I to Directive 2014/65/EU recognised for compliance with the requirements of Directive 2003/87/EC should therefore be eligible for admission to trading on a regulated market and no further requirements should be imposed in this Regulation
- (7) Arrangements by regulated markets in relation to verifying the compliance of issuers with obligations under Union law and in relation to facilitating access to information which has been made public under Union law should cover the obligations laid down in Regulation (EU) No 596/2014 of the European Parliament and of the Council⁸, Directive 2003/71/EC and Directive 2004/109/EC of the European Parliament and of the Council⁹ as those legislative acts contain the core and most important obligations for issuers after the initial admission to trading on a regulated market.
- (8) Regulated markets should establish procedures for verifying the compliance of issuers of transferable securities with obligations under Union law which should be accessible for issuers and the public. The policy should ensure that compliance checks are efficient and issuers should be made aware of their obligations by the regulated market.
- (9) Regulated markets should facilitate access to information published under the conditions established by Union law available to members and participants via arrangements that provide for easy, fair and non-discriminatory access for all members and participants. The relevant Union law for these purposes includes Directive 2003/71/EC, Directive 2004/109/EC, Regulation (EU) No 596/2014 as well as Regulation (EU) No 600/2014. The access arrangements should ensure that members

⁶ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

⁷ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

⁸ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.06.2014, p.1).

⁹ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p.38).

and participants have access on equal terms to the relevant information that may have an influence on the valuation of a financial instrument.

- (10) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions laid down in this Regulation and the related national provisions transposing Directive 2014/65/EU apply from the same date.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁰,

HAS ADOPTED THIS REGULATION:

Article 1

Transferable securities - freely negotiable

1. Transferable securities shall be considered freely negotiable if they can be traded between the parties to a transaction, and subsequently transferred without restriction and if all securities within the same class as the security in question are fungible.
2. Transferable securities which are subject to a restriction on transfer shall not be considered as freely negotiable in accordance with paragraph 1 unless that restriction is not likely to disturb the market. Transferable securities that are not fully paid may be considered as freely negotiable if arrangements have been made to ensure that the negotiability of such securities is not restricted and that adequate information concerning the fact that the securities are not fully paid, and the implications of that fact for shareholders, is publicly available.

Article 2

Transferable securities – fair, orderly and efficient trading

1. When assessing whether a transferable security is capable of being traded in a fair, orderly and efficient manner, a regulated market shall take into account the information required to be prepared under Directive 2003/71/EC or information that is otherwise publicly available such as:
 - (a) historical financial information;
 - (b) information about the issuer;
 - (c) information providing a business overview.
2. In addition to paragraph 1, when assessing whether a share is capable of being traded in a fair, orderly and efficient manner a regulated market shall take into account the distribution of those shares to the public.

¹⁰ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

3. When assessing whether a transferable security referred to in point (c) of Article 4(1)(44) of Directive 2014/65/EU is capable of being traded in a fair, orderly and efficient manner, the regulated market shall take into account, depending on the nature of the security being admitted, whether the following criteria are satisfied:
- (a) the terms of the security are clear and unambiguous and allow for a correlation between the price of the security and the price or other value measure of the underlying;
 - (b) the price or other value measure of the underlying is reliable and publicly available;
 - (c) there is sufficient information publicly available of a kind needed to value the security;
 - (d) the arrangements for determining the settlement price of the security ensure that this price properly reflects the price or other value measures of the underlying;
 - (e) where the settlement of the security requires or provides for the possibility of the delivery of an underlying security or asset rather than cash settlement, there are adequate settlement and delivery procedures for that underlying as well as adequate arrangements to obtain relevant information about it.

Article 3

Transferable securities – official listing

A transferable security that is officially listed in accordance with Directive 2001/34/EC, and the listing of which is not suspended, shall be deemed to be freely negotiable and capable of being traded in a fair, orderly and efficient manner.

Article 4

Units and shares in collective investment undertakings

- 1. A regulated market shall, when admitting units or shares of a collective investment undertaking to trading, ensure that those units or shares are permitted to be marketed in the Member State of the regulated market.
- 2. When assessing whether units or shares in an open-ended collective investment undertaking are capable of being traded in a fair, orderly and efficient manner, a regulated market shall take into account the following:
 - (a) the distribution of those units or shares to the public;
 - (b) whether there are appropriate market-making arrangements, or whether the management company of the scheme provides appropriate alternative arrangements for investors to redeem the units or shares;
 - (c) in the case of exchange-traded funds, whether in addition to market making arrangements appropriate alternative arrangements for investors to redeem units or shares are provided, at least in cases where the value of the units or shares significantly varies from the net asset value;
 - (d) whether the value of the units or shares is made sufficiently transparent to investors by means of the periodic publication of the net asset value.

3. When assessing whether units or shares in a closed-end collective investment undertaking are capable of being traded in a fair, orderly and efficient manner, a regulated market shall take into account the following:
 - (a) the distribution of those units or shares to the public;
 - (b) whether the value of the units or shares is made sufficiently transparent to investors, either by publication of information on the fund's investment strategy or by the periodic publication of the net asset value.

Article 5
Derivatives

1. When assessing whether a financial instrument referred to in points (4) to (10) of Section C of Annex I to Directive 2014/65/EU are capable of being traded in a fair, orderly and efficient manner, a regulated market shall verify that the following conditions are satisfied:
 - (a) the terms of the contract establishing the financial instrument are clear and unambiguous, and enable a correlation between the price of the financial instrument and the price or other value measure of the underlying;
 - (b) the price or other value measure of the underlying is reliable and publicly available;
 - (c) sufficient information of a kind needed to value the derivative is publicly available;
 - (d) the arrangements for determining the settlement price of the contract is such that the price properly reflects the price or other value measures of the underlying;
 - (e) where the settlement of the derivative requires or provides for the possibility of the delivery of an underlying security or asset rather than cash settlement, there are adequate arrangements to enable market participants to obtain relevant information about that underlying as well as adequate settlement and delivery procedures for the underlying.
2. Point (b) of paragraph 1 of this Article shall not apply to financial instruments referred to in points (5), (6), (7) and (10) of Section C of Annex I to Directive 2014/65/EU, where the following conditions are fulfilled:
 - (a) the contract establishing that instrument is likely to provide a means of disclosing to the market, or enabling the market to assess, the price or other value measure of the underlying, where the price or value measure is not otherwise publicly available;
 - (b) the regulated market ensures that appropriate supervisory arrangements are in place to monitor trading and settlement in such financial instruments;
 - (c) the regulated market ensures that settlement and delivery, whether physical delivery or by cash settlement, can be effected in accordance with the contract terms and conditions of those financial instruments.

Article 6
Emission allowances

Any emission allowance referred to in point (11) of Section C of Annex I to Directive 2014/65/EU recognised for compliance with the requirements of Directive 2003/87/EC of the European Parliament and of the Council, is eligible for admission to trading on a regulated market with no further requirements.

Article 7
Verification of issuer obligations

1. Regulated markets shall adopt and publish on their website procedures for verifying compliance by an issuer of a transferable security with its obligations under Union law
2. Regulated markets shall ensure that compliance with the obligations referred to in paragraph 1 is checked effectively in accordance with the nature of the obligation under review taking into account the supervisory tasks performed by relevant competent authorities.
3. Regulated markets shall ensure that the procedures referred to in paragraph 1 describe:
 - (a) the processes the regulated markets employ to achieve the outcome specified in paragraph 1;
 - (b) how an issuer may best demonstrate compliance with the obligations referred to in paragraph 1 to the regulated market.
4. Regulated markets shall ensure that an issuer is made aware of the obligations referred to in paragraph 1 upon admission to trading of that issuer's transferable security and at the issuer's request.

Article 8
Facilitation of access to information

Regulated markets shall have arrangements which are easily accessible, free of charge and published on their website to facilitate access of their members or participants to information which has been made public in accordance with Union law.

Article 9

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from the date that appears in the second subparagraph of Article 93(1) of Directive 2014/65/EU.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24.5.2016

For the Commission
The President
Jean-Claude JUNCKER