



Brussels, 28.8.2017
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COMMISSION DELEGATED REGULATION (EU) .../...

of 28.8.2017

amending Delegated Regulation (EU) 2017/565 as regards the specification of the definition of systematic internalisers for the purposes of Directive 2014/65/EU

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Directive 2014/65/EU ('MiFID II') 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/EU¹ is due to become applicable on 3 January 2018 and, together with Regulation (EU) No 600/2014² (MiFIR), replace Directive 2004/39/EC³. MiFID II and MiFIR provide an updated harmonised legal framework governing the requirements applicable to investment firms, regulated markets, data reporting services providers and third country firms providing investment services or activities in the Union.

MiFID II and MiFIR aim to enhance the efficiency, resilience and integrity of financial markets, notably by:

1. Achieving greater transparency: introduction of a pre- and post-trade transparency regime for non-equities and strengthening and broadening of the existing equities trade transparency regime;
2. Bringing more trading onto regulated venues: creation of a new category of platforms to trade derivatives and bonds - the Organised Trading Facilities - and of a trading obligation for shares on regulated venues as well as a clear separation between bilateral and multilateral execution venues.

In light of alleged nascent industry initiatives building on the ambiguity around the notion of "trading on own account when executing client orders" which define the activity of systematic internalisers, it is necessary to further specify the definition of systematic internaliser to address those market developments and circumscribe the risk of circumvention of MiFID 2.

This Commission Delegated Regulation is based on the empowerment set out in Article 4(2) of Directive 2014/65/EU, which grants powers to the Commission to adopt delegated acts to specify some technical elements of the definitions laid down in Article 4(1) of Directive 2014/65/EU, to adjust them to market developments, technological developments and experience of behaviour that is prohibited under Regulation (EU) No 596/2014⁴ and to ensure the uniform application of Directive 2014/65/EU. As the definition of "systematic internaliser" is laid down in Article 4(1)(20) of Directive 2014/65/EU and specified in Commission Delegated Regulation (EU) No 2017/565 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive⁵, this Commission Delegated Regulation amends Commission Delegated Regulation (EU) No 2017/565.

¹ OJ L 173, 12.6.2014, p. 349.

² Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

³ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

⁴ Regulation (EU) No 596/2014 of the European Parliament and of the Council 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, 12.6.2014, p. 1).

⁵ OJ L 87, 31.3.2017, p. 1.

This Commission Delegated Regulation was not preceded by an impact assessment, since it neither has nor is intended to have the consequence of changing the regulatory requirements for investment firms. Instead it merely clarifies the precise scope of the definition of "systematic internaliser" to ensure uniform application of this term and avoid circumvention.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Commission services had numerous meetings with a range of stakeholders to discuss the present measure throughout 2016 and the first half of 2017. The Commission has also had extensive exchanges with Members of the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee) and held consultation of the Expert Group of the European Securities Committee (EGESC), during which this Delegated Act was consulted upon among Member States' experts and involving observers from the European Parliament, the Council, the European Central Bank and the European Securities and Markets Authority (ESMA). The draft delegated act was published for a 4-week feedback consultation that closed on 18 July 2017. During the public consultation, concerns were raised pertaining to prudential risk management achieved by means of intra-group transactions. Those concerns have been addressed by introducing a new recital and an amendment to Article 16a clarifying the scope of matching arrangements that are considered dealing on own account.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The Delegated Act contains one operational provision which provides further technical specification of one element of the definition of systematic internaliser as defined in Article 4(1)(20) of Directive 2014/65/EU. This Commission Delegated Regulation will amend Commission Delegated Regulation (EU) No 2017/565.

To ensure the smooth implementation of Commission Delegated Regulation (EU) No 2017/565, it is necessary that this amending Commission Delegated Regulation enters into force as a matter of urgency.

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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 2015 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU⁶, and in particular Article 4(2) thereof,

Whereas:

- (1) In order to further ensure the objective and effective application of the definition of systematic internalisers in the Union as laid down in Article 4(1)(20) of Directive 2014/65/EU, further specifications should be provided on recent technological developments in securities markets concerning matching arrangements in which investment firms may participate.
- (2) Technological developments in the securities markets have led to the emergence of electronic communication networks that allow for the linking of several investment firms that intend to operate under the systematic internaliser designation with other liquidity providers engaging in high frequency algorithmic trading techniques. Those developments risk undermining a clear separation between bilateral own account trading when executing client orders and multilateral trading foreseen by Delegated Regulation (EU) 2017/565. Those technological and market developments therefore make it necessary to specify that a systematic internaliser is not allowed to engage, on a regular basis, in the internal or external matching of trades via matched principal trading or other types of *de facto* riskless back-to-back transactions in a given financial instrument outside a trading venue.
- (3) Insofar as centralised risk management within a group usually involves the transfer of risk accumulated by an investment firm as a result of transactions with third parties to an entity within the same group which has no ability to provide quotes, other information on trading interests or to reject or amend such transactions, those transfers should be still considered as dealing on own account where carried out for the sole purposes of centralising the risk management of the group.
- (4) For reasons of clarity and legal certainty, the wording on the date of application of Delegated Regulation (EU) 2017/565 should be brought in line with the wording on the date of application of Directive 2014/65/EU.
- (5) To ensure the smooth functioning of the financial markets, it is necessary that this Regulation enters into force as a matter of urgency.

⁶ OJ L 173, 12.6.2014, p. 349.

- (6) The measures provided for in this Regulation are in accordance with the opinion of the Expert Group of the European Securities Committee,

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) 2017/565 is amended as follows:

- (1) the following Article 16a is inserted:

“Article 16a

Participation in matching arrangements

An investment firm shall not be considered to be dealing on own account for the purposes of Article 4(1)(20) of Directive 2014/65/EU where that investment firm participates in matching arrangements entered into with entities outside its own group with the objective or consequence of carrying out *de facto* riskless back-to-back transactions in a financial instrument outside a trading venue.”

- (2) in Article 91, the second paragraph is replaced by the following:

“It shall apply from 3 January 2018.”

Article 2

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

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

Done at Brussels, 28.8.2017

For the Commission
The President
Jean-Claude JUNCKER