

Potential MiFID II / MiFIR delay and its consequences

Legislation background

The «Markets in Financial Instruments Directive 2014/65/EU» (MiFID II) and the related «Regulation No. 600/2014» (MiFIR) were published in the Official Journal and entered into force 20 days after their publication (Art. 96 MiFID II) on July 2, 2014.¹

Besides the Regulatory & Implementing Technical Standards (RTS & ITS) which were developed by European Securities and Markets Authority (ESMA) during 2015², ESMA answered to the formal request³ of the European Commission in a Technical Advice⁴ on December 19, 2014.

EU Member States have the obligation to adopt and publish their *national laws, regulations and administrative provisions* necessary to comply with MiFID until July 3, 2016 (Art. 93 (1) (1) MiFID II). These will in general⁵ apply from January 3, 2017 (Art. 93 (1) (2) MiFID II).

Reasons for a potential MiFID II / MiFIR delay

On November 27, 2015 European Parliament's negotiating team for MiFID II / MiFIR informed the European Commission about a potential delay of the entry into force of MiFID II.⁶

The main reasons for the potential delay of MiFID II / MiFIR are firstly the complex IT

systems⁷ which need to be build and secondly the delayed⁸ second set of draft Technical Standards within a Final Report⁹ submitted by ESMA to the Commission only on September 28, 2015 instead of July 2015 (e.g. Art. 27 MiFID II¹⁰, best execution).¹¹

Impact on your MiFID II / MiFIR project, continue or hold?

The legislations introduce a revised trading landscape (e.g. extended pre- and post-trade transparency requirements) and strengthen consumer protection (e.g. client information (ex-ante) and client reporting (ex-post) obligations) that should lead to more transparency for the individual client and financial stability in general. According to ESMA, «*financial stability is a key component of orderly functioning of markets.*»¹² It follows that MiFID II / MiFIR include a cross dynamic approach regarding their regulatory requirements.

For investment firms, the challenge of these regulatory requirements is not only the implementation but even more their strategic and operational reorganization. Those organizational restructurings are a challenge but at the same time should be seen as a chance for each investment firm to analyse their organization (e.g. legal & compliance function, training employees) and realign their business model (e.g. independent / non-independent advice, product shelf, relationship managers' responsibilities).

This means that besides the challenge to update and supplement the IT system landscape, investment firms need to tackle

many more obstacles. They need to train their employees¹³, introduce new Product Governance arrangements (e.g. product approval process), implement new client information and reporting processes and consider their positioning in the market, just to mention some of the potential obstacles.

As a consequence the supposed gain of one year should be used wisely in order to make sure all MiFID II / MiFIR requirements will be implemented on time. Investment firms should continue their implementation work within all relevant topics as well as take action on the opportunity to reorganize their business model for the future. Time is running and even a postponed deadline of January 2018 remains a challenging time frame, especially for investment firms which have not yet properly launched their MiFID II / MiFIR projects.

Parts of client information will not be postponed as falling under PRIIPs

The «Regulation No. 1286/2014 on Key Information Documents for packaged retail and insurance-based investment products» (PRIIPs) came into force in EU Member States on December 29, 2014¹⁴ and will apply from December 31, 2016¹⁵. The regulation introduces a standardized pre-contractual «Key Investor Document» (KID) for manufacturers as well as distributors of PRIIPs and applies inter alia to investment products such as investment funds, structured products and insurance-based products with an investment element.¹⁶

ESMA stated in its Final Report on December 19, 2014¹⁷ that it is important to have as much consistency as possible between MiFID II and the PRIIPs regulation. The cli-

ent information obligations (ex-ante) in regards to financial instruments (information on financial instruments as well as their cost & charges) are similar under both legislations. The difference is the addressee as PRIIPs is targeting retail clients while the client information requirements of MiFID II are focusing on all client categories (retail clients, professional clients and eligible counterparties) with certain deviations.¹⁸

If the MiFID II / MiFIR delay becomes definite, there would be different timings for the two legislations. As a consequence, the product documentation requirements under PRIIPs would still need to be implemented. PRIIPs as a regulation and not a directive “*shall be binding in its entirety and directly applicable in all Member States.*”¹⁹ This means that the regulation does not need to be transposed into national laws.

The whole data preparation for investment products which will be sold to retail investors needs to be ensured as there will be a KID required. Data preparation and management is time consuming and likely a big challenge within the implementation work (either under PRIIPs or under MiFID II / MiFIR). It is important to evaluate data availability and sources for the investment products manufactured, in order to be able to draw up a KID. This can also mean, that specific data need to be sourced from 3rd parties, which needs to be accounted for when setting up internal timelines. Finally, the investment firm has to decide whether it wants to produce the KID by its own or buy it from a third party provider.

Potential MiFID II / MiFIR delay would enable an alignment to FinSA / FinIA

Beside the European reform efforts concerning the financial markets, there are two

federal acts in Switzerland – the Swiss Federal Financial Services Act (FinSA) and the Financial Institutions Act (FinIA), both currently in draft status. The FinSA governs the requirements for providing financial services and offering financial instruments whereas FinIA regulates a differentiated authorisation («chain system») and supervision regime of financial institutions.²⁰

Their main goal is to strengthen investor protection and the competitiveness of the financial centre and to minimize competitive distortions between service providers.²¹ Therefore, the two draft federal acts have among others strong analogies to MiFID II.²²

On November 4, 2015 the Federal Council has adopted the dispatch²³ on the FinSA and on the FinIA. As the Federal Council has sent the dispatch to the Parliament, it is not possible yet to determine the date when the laws will enter into force. The National Council and Council of State will evaluate the dispatch of the Federal Council and it is expected that both federal acts will enter into force in 2017 / 2018.²⁴

A definitive MiFID II delay would be positive as the MiFID II and FinSA / FinIA timelines would become aligned. Many investment firms with legal entities in Switzerland and the EU / EEA have already today one overall “MiFID II / MiFIR and FinSA / FinIA project”. As both the European and the Swiss legislative efforts are very similar, it is reasonable to combine their implementation in one overarching project.

Besides the temporal alignment, a definitive MiFID II / MiFIR postponement would not have a direct impact on the FinSA / FinIA as in any case both legislations will need to be implemented.

Conclusion

If the potential delay becomes definite and the European Commission would agree to the postponement of MiFID II / MiFIR to January 3, 2018 this would give investment firms a timely relief on their implementation and reorganization work. Nevertheless, it is strongly recommended that investment firms proceed with their MiFIR II / MiFIR projects with the same intensity.²⁵

As the potential delay affects only MiFID II / MiFIR and not the overlapping PRIIPs regulation it is important that the challenging work on data preparation for investment products is pursued with the same dedication as before. Regardless of a potential postponement of MiFID II / MiFIR, PRIIPs will be applicable within the EU Member States as of December 31, 2016. This timeline is set.

A definitive MiFID II / MiFIR delay would align the timeline of the European legislation with the FinSA / FinIA timeline. Therefore, the approach to have one encompassing project which has already been adopted by many investment firms makes even more sense.

Footnotes

- ¹ <https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir>
- ² <https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir>
- ³ http://ec.europa.eu/finance/securities/docs/isd/mifid/140423-esma-request_en.pdf
- ⁴ https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1569_final_report_-_esmas_technical_advice_to_the_commission_on_mifid_ii_and_mifir.pdf
- ⁵ Exception with regard to Art. 65 (2) MiFID II which shall apply from September 3, 2018.
- ⁶ <http://www.europarl.europa.eu/news/en/news-room/20151127IPR05110/Statement-on-MIFID-II-potential-delay-of-the-entry-into-force>
- ⁷ <http://www.europarl.europa.eu/news/en/news-room/20151127IPR05110/Statement-on-MIFID-II-potential-delay-of-the-entry-into-force>
- ⁸ <http://www.cms-lawnow.com/regzone/articles/2015/november/esma-raises-the-prospect-of-a-delay-in-mifid-ii-implementation>
- ⁹ https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_-_final_report_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf “With this report ESMA publishes its final proposals for a total of 28 draft technical standards”.
- ¹⁰ “ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.”
- ¹¹ ESMA/2015/1464: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_-_final_report_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf
- ¹² Final Report, ESMA’s Technical Advice to the Commission on MiFID II and MiFIR, p. 370.
- ¹³ ESMA published Final Report on MiFID II Guidelines on assessment and knowledge of competence on 17.12.15: <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-report-mifid-ii-guidelines-assessment-and-knowledge>
- ¹⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R1286&from=DE>
- ¹⁵ Art. 34 para. 2 PRIIPs.
- ¹⁶ http://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2015/fa_bj_1508_basisinformationsblatt_priips_verordnung_en.html
- ¹⁷ Final Report, ESMA’s Technical Advice to the Commission on MiFID II and MiFIR, p. 114.
- ¹⁸ Final Report, ESMA’s Technical Advice to the Commission on MiFID II and MiFIR, p. 109 ff., p. 121 ff.
- ¹⁹ Art. 34 para. 3 PRIIPs.
- ²⁰ <https://www.news.admin.ch/message/index.html?lang=en&msg-id=59331>
- ²¹ <https://www.news.admin.ch/message/index.html?lang=en&msg-id=59331>
- ²² <https://www.sif.admin.ch/sif/de/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-53561.html>
- ²³ <http://www.news.admin.ch/NSBSubscriber/message/attachments/41573.pdf>
- ²⁴ http://pestalozzilaw.com/uploads/Swiss%20Financial%20Markets%20Regulation/Level1_articles/FIDLEG01.pdf; <http://www.swissbanking.org/home/dossiers-link/fidleg.htm>
- ²⁵ With this understanding also: <http://www.cms-lawnow.com/regzone/articles/2015/november/esma-raises-the-prospect-of-a-delay-in-mifid-ii-implementation>

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info@weisshorn-consulting.ch | www.weisshorn-consulting.ch

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