



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.6.2005
COM(2005) 253 final

2005/0111 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

**amending Directive 2004/39/EC on markets in financial instruments, as regards certain
deadlines**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

This proposal concerns extending the transposition deadline for Member States and the compliance date for regulated firms of Directive 2004/39/EC on Market in Financial Instruments (MiFID). This is because serious difficulties have been reported by industry and Member States in relation to the ability of regulated entities to comply with the current deadline for transposition of the Directive (30 April 2006).

1. *Adoption of implementing measures in practice shortens transposition period*

The transposition deadline agreed in Council and by the European Parliament was the standard 24 months after the entry into force of the directive. However, a significant part of that transposition period will be taken up by the preparation of the necessary implementing measures for 17 provisions of the directive, which cannot be effective without such measures. Under current planning, the Commission expects to have adopted the complete set of implementing measures by the beginning of 2006. The adoption of these measures cannot be accelerated both because of their complexity, the need to consult widely and building consensus as well as because the process must be carried out in accordance with the comitology procedure specified in Decision 1999/468/EC. Transposition of those provisions of the Directive which are linked to implementing measures cannot proceed until the concomitant implementing measures have been finalised. In fact, this delay in turn affects the timely transposition of other provisions of the Directive related to the provisions that require implementing measures. As a result, Member States will not have sufficient time to complete the transposition of the entire Directive in the period between the expected adoption of the implementing measures (beginning 2006) and the current transposition deadline (April 2006). Therefore in order to ensure the effective and uniform implementation of the MIFID in all Member States from the transposition deadline, it is appropriate to postpone that deadline.

2. *Practical implications for the firms*

The Commission services have been informed by a wide range of industry participants that the current MIFID implementing timetable imposes impossible deadlines for the entities within its scope. These contend that compliance with the MIFID may require significant time consuming modifications to their technological infrastructure, IT software, record-keeping and reporting systems. In addition, firms may have to adapt internal policies and guidelines concerning client relations, the segregation of assets, and the management of conflicts of interest.

Moreover, market participants claim not to be able to make definitive decisions as to what operational steps will be needed until implementing measures are finally adopted. Directive 2004/39/EC only sets general principles with respect to these requirements; the precise technical details will be provided for in the implementing legislation which

will not be available until year end.

- **General context**

Technical modification of directive 2004/39/EC.

- **Existing provisions in the area of the proposal**

Directive 2004/39/EC

- **Consistency with other policies and objectives of the Union**

Directive 2004/39/EC

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Though no specific consultation has been launched for this proposal its presentation is justified because :

- There have been numerous comments from the industry to the Commission, providing extensive evidence that an extension of the deadline for the application of the Directive is essential to allow market participants sufficient time to adapt systems and procedures to comply with the MiFID;

- Discussions with Member States in the European Securities Committee have shown that Member States, having consulted their markets and evaluated their transposition needs, are almost unanimously in favour of the proposed extension of both the transposition and application deadlines;

- Responses received to a general consultation on legislative procedures in the field of securities markets have indicated very broad support for the extension of transposition deadlines generally in this field; a number of respondents referred to the MiFID as a specific example of a directive the complexity of which justified an extended transposition deadline.

- The need to extend deadlines was also confirmed in the 3rd Report of the Inter-institutional Monitoring Group on the monitoring of the Lamfalussy process of 17th November .

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

See Directive 2004/39/EC

3) LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The purpose of the present proposal is to remedy to the difficulties that Member States and the industry will face in the transposition and application of the Directive. To this end it is proposed to :

- extend the deadline by which Member States must transpose the MiFID into national law by 6 months, i.e. until October 2006;
- grant an extra 6 month period, after transposition into national law, for the effective application of the MiFID in order to allow firms sufficient time to adapt their systems and internal procedures so as to comply with the requirements of the Directive i.e. until April 2007.

Given the close interaction between the various parts of the MiFID, these proposals apply to the whole Directive (and not just those provisions which will be supplemented by implementing measures).

1. Technical modifications

All modifications to Directive 2004/39/EC have been included in one single Article (Article 1). These are :

- 1) the substitution of the transposition deadline for Member States with the new date of 30.10.06 .
- 2) a further deadline of 6 months for Member States to defer the application of new domestic laws implementing the MiFID until 30.4.07.
- 3) A number of further consequential amendments are required to -
 - a. The date of repeal of Directive 93/22/EC (the Investment Services Directive), which is to be replaced by the MiFID, must be postponed by 6 months to coincide with the extended transposition deadline of the MiFID in order to avoid a legislative void. However, it is proposed that Member States should be required to retain their current national regulatory regime implementing Directive 93/22/EC for a further 6 months after that Directive has been repealed in order to avoid a legal void;
 - b. The date of entry into force of the transitional provisions in Article 71. These provisions should come into force at the same time as the full application of the MiFID in Member States;
 - c. The dates by which the Commission is required to produce a series of reports concerning matters relating to the MiFID and its operation. The timetable for reports was designed to allow the Commission to monitor the practical application of the MiFID - and so logically they also should be deferred by 12 months.

These modifications are purely technical, and are necessary to preserve the timetable for the various stages of entry into force and the review of the directive.

2. Transposition - entry into force

For reasons of coherence the transposition deadline for this proposal has been aligned to the proposed extended transposition deadline (i.e. 30 October 2006) for Directive 2004/39/EC (Article 2). However, national legislation, implementing the previous regime established by Directive 93/22/EC may remain into force until the full application of the MiFID into national law (i.e. 30 April 2007). The proposal, once adopted by the Council and EP should enter into force on the day following that of its publication.

This is a proposal of a Directive for modifying a basic Directive providing for harmonisation of authorisation conditions in order to ensure effective freedom of establishment and free provision of services ("coordination directive"). The proposal only includes some technical adaptations strictly linked to the extension of the various deadlines included in the basic Directive; no further substantial modification is provided for in the proposal.

- **Legal basis**

Article 47(2) of the EC Treaty

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason(s):

see Directive 2004/39/EC

Community action will better achieve the objectives of the proposal for the following reason(s):

see Directive 2004/39/EC

The proposal therefore complies with the subsidiarity principle:

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s):

The proposed extensions are balanced and proportionate. They grant Member States and regulated entities the additional time needed to comply properly with the requirements of the Directive, but do not go beyond what is necessary.

- **Choice of instruments**

Proposed instruments: Directive.

Other means would not be adequate for the following reason(s).

Modifying Directive including technical adaptations to Directive 2004/39/EC: A

directive can only be modified by another directive.

4) BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5) ADDITIONAL INFORMATION

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive. No obligation to provide a correlation table is included in this Directive since this obligation had not been included in the basic Directive either. .

Proposal for a

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deadlines

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

Having regard to the proposal from the Commission¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) 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/EEC² introduces a comprehensive regulatory regime to ensure a high quality of execution of investor transactions.
- (2) Directive 2004/39/EC provides that Member States shall adopt the laws, regulations and administrative provisions to comply with that Directive by 30 April 2006 at the latest. In order to ensure uniform application in the Member States, a significant number of complex provisions of that Directive need to be supplemented by implementing measures, to be adopted by the Commission during the period for transposition by Member States. Because Member States cannot fully prepare and finalise their domestic laws until the content of the implementing measures is clear, they may have difficulty in meeting the current transposition deadline.
- (3) In order to comply with the requirements of Directive 2004/39/EC and domestic implementing legislation, investment firms and other regulated entities may have to introduce new Information Technology systems, new organisational structures, and reporting and record-keeping procedures, or to make significant modifications to existing systems and practices. This can only be done once the contents of both the

¹ OJ,, p.

² OJ L 145, 30.4.2004, p. 1.

implementing measures to be adopted by the Commission and domestic legislation transposing the Directive are settled.

- (4) It is also necessary that Directive 2004/39/EC and its implementing measures be transposed into national law or apply directly in Member States simultaneously for the Directive to produce its full effect.
- (5) It is therefore appropriate to extend the deadline for Member States to transpose Directive 2004/39/EC into national law. Similarly, the deadline for investment firms and banks to comply with the new requirements should be deferred for a period after the transposition into national law has been completed by the Member States.
- (6) Given the interaction between the different provisions of Directive 2004/39/EC, it is appropriate that any extension of those deadlines apply to all the provisions of that Directive. Any extension of the transposition and application deadlines should be proportionate to, and not exceed, the needs of the Member States and regulated entities. In order to avoid fragmentation that could hamper the functioning of the Internal Market in securities, Member States should apply the provisions of Directive 2004/39/EC from the same time.
- (7) Further consequential amendments are necessary to defer the dates for the repeal of Directive 93/22/EEC and for the transitional provisions laid down in Directive 2004/39/EC, and to extend the timetable for the Commission's reporting obligations.
- (8) Directive 2004/39/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2004/39/CE is amended as follows:

- (1) Article 65 is amended as follows:
 - (a) paragraphs 1 to 4 are replaced by the following:
 - “1. By **30 April 2007** at the latest, the Commission shall, on the basis of public consultation and in the light of discussions with competent authorities, report to the European Parliament and to the Council on the possible extension of the scope of the provisions of this Directive concerning pre and post-trade transparency obligations to transactions in classes of financial instruments other than shares.
 2. By **30 April 2008** at the latest, the Commission shall present a report to the European Parliament and to the Council on the application of Article 27.
 3. By **30 October 2007** at the latest, the Commission shall, on the basis of public consultations and in the light of discussions with competent authorities, report to the European Parliament and to the Council on:

- (a) the continued appropriateness of the exemption provided for in Article 2(1)(k) for undertakings whose main business is dealing on own account in commodity derivatives;
- (b) the content and form of proportionate requirements for the authorisation and supervision of such undertakings as investment firms within the meaning of this Directive;
- (c) the appropriateness of rules concerning the appointment of tied agents in performing investment services and/or activities, in particular with respect to the supervision on them;
- (d) the continued appropriateness of the exemption provided for in Article 2(1)(i).

4. By **30 October 2007** at the latest, the Commission shall present a report to the European Parliament and to the Council on the state of the removal of the obstacles which may prevent the consolidation at European level of the information that trading venues are required to publish.”

(b) Paragraph 6 is replaced by the following:

“6. By **30 April 2006** at the latest, the Commission shall, in the light of discussions with competent authorities, report to the European Parliament and to the Council on the continued appropriateness of the requirements for professional indemnity insurance imposed on intermediaries under Community law.”

(2) Article 69 is replaced by the following:

*“Article 69
Repeal of Directive 93/22/EEC*

- 1. Directive 93/22/EEC is repealed with effect from **30 October 2006**. References to Directive 93/22/EEC shall be construed as references to this Directive. References to terms defined in, or Articles of, Directive 93/22/EEC shall be construed as references to the equivalent term defined in, or Article of, this Directive.
- 2. Member States shall provide that national laws, regulations and administrative provisions adopted in order to comply with Directive 93/22/EC shall remain in force until the measures adopted under Article 70 are applied, and in any event, no later than 30 April 2007.”

(3) In Article 70, Paragraph 1 is replaced by the following:

“Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by **30 October 2006** at the latest. They shall forthwith inform the Commission thereof. **They shall apply these provisions from 1 May 2007.**”

(4) In Article 71, paragraphs 1 to 4 are replaced by the following:

- “1. Investment firms already authorised in their home Member State to provide investment services before **30 April 2007** shall be deemed to be so authorised for the purposes of this Directive, if the laws of that Member State provide that to take up such activities they must comply with conditions comparable to those provided for in Articles 9 to 14.
2. A regulated market or a market operator already authorised in its home Member State before **30 April 2007** shall be deemed to be so authorised for the purposes of this Directive, if the laws of that Member State provide that the regulated market or market operator, as the case may be, must comply with conditions comparable to those provided for in Title III.
3. Tied agents already entered in a public register before **30 April 2007** shall be deemed to be so registered for the purposes of this Directive, if the laws of those Member States provide that tied agents must comply with conditions comparable to those provided for in Article 23.
4. Information communicated before **30 April 2007** for the purposes of Articles 17, 18 or 30 of Directive 93/22/EEC shall be deemed to have been communicated for the purposes of Articles 31 and 32 of this Directive.”

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 October 2006 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX

<u>FINANCIAL STATEMENT</u>		[...]		
		DATE: [...]		
1. BUDGET HEADING: - None – NO FINANCIAL IMPLICATION		APPROPRIATIONS: None		
2. TITLE: PROPOSAL FOR A DIRECTIVE AMENDING DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS				
3. LEGAL BASIS: Article 47 (2)				
4. AIMS: Extend the transposition deadline for Directive 2004/39/EC and defer the application deadline; adjust consequently further deadlines included in this Directive				
5. FINANCIAL IMPLICATIONS – not applicable	12 MONTH PERIOD (EUR million)	CURRENT FINANCIAL YEAR [n] (EUR million)	FOLLOWING FINANCIAL YEAR [n+1] (EUR million)	
5.0 EXPENDITURE - not applicable - CHARGED TO THE EC BUDGET (REFUNDS/INTERVENTIONS) - NATIONAL AUTHORITIES - OTHER				
5.1 REVENUE - not applicable - OWN RESOURCES OF THE EC (LEVIES/CUSTOMS DUTIES) - NATIONAL				
	[n+2]	[n+3]	[n+4]	[n+5]
5.0.1 ESTIMATED EXPENDITURE				
5.1.1 ESTIMATED REVENUE				
5.2 METHOD OF CALCULATION:				
6.0 CAN THE PROJECT BE FINANCED FROM APPROPRIATIONS ENTERED IN THE RELEVANT CHAPTER OF THE CURRENT BUDGET? not applicable YES NO				
6.1 CAN THE PROJECT BE FINANCED BY TRANSFER BETWEEN CHAPTERS OF THE CURRENT BUDGET? YES NO				
6.2 WILL A SUPPLEMENTARY BUDGET BE NECESSARY? YES NO				
6.3 WILL APPROPRIATIONS NEED TO BE ENTERED IN FUTURE BUDGETS? YES NO				
OBSERVATIONS:				