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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: Position of the Council at first reading with a view to the adoption of a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL on European crowdfunding service providers for business, and
amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937
- Draft Statement of the Council's reasons

I. INTRODUCTION

On 8 March 2018, the Commission adopted a package of measures to deepen the Capital Markets Union, together with the Communication "Completing Capital Markets Union by 2019 - time to accelerate delivery". This package included the following two Ordinary Legislative Procedure proposals:

- Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ESCP) for Business; and
- Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments.

The European Parliament adopted its first-reading positions at its plenary session on 27 March 2019.

On the side of the Council, the Working Party on Financial Services examined the two proposals in a number of meetings under various Presidencies. The Permanent Representatives Committee issued a mandate to negotiate an agreement with the Parliament on these proposals on 26 June 2019.

An agreement on compromise texts for the Regulation and the Directive was reached with the European Parliament on 18 December 2019, subject to technical revision and legal-linguistic review.

On 7 May 2020 and following the completion of the technical revision, the European Parliament's Committee on Economic and Monetary Affairs approved the compromise texts. On 12 May 2020, the Chair of that Committee then signed a letter to the Council Presidency stating that, should the Council adopt the technically revised compromise texts (including any necessary legal-linguistic changes) as its first-reading positions, she would recommend to the Parliament's plenary session that the Parliament should in its second reading approve the Council's positions without further amendment. The effect of this would be that the two proposed acts would then be deemed to have been adopted in the wording which corresponds to the positions of the Council.

On 20 May 2020, the Permanent Representatives Committee reached a political agreement on the technically revised compromise texts.

Taking into account the above agreement and after legal-linguistic revision, the Council adopted its position at first reading on 20 July 2020, in accordance with the ordinary legislative procedure laid down in Article 294 of the Treaty on the Functioning of the European Union (TFEU).

II. OBJECTIVE

Crowdfunding is a financial technology solution that provides small and medium-sized enterprises, particularly start-ups and scale-ups, with alternative access to finance in order to promote innovative entrepreneurship in the Union, thereby strengthening the Capital Markets Union. That in turn contributes to a more diversified financial system that is less dependent on bank financing, consequently limiting systemic and concentration risks. Other benefits of promoting innovative entrepreneurship through crowdfunding are the unlocking of frozen capital for investment in new and innovative projects, the acceleration of efficient allocation of resources and a diversification of assets.

The objective of the Regulation and the Directive is to address the fragmentation of the legal framework applicable to crowdfunding services in order to ensure the proper functioning of the internal market in such services while enhancing investor protection as well as market efficiency and contributing to establishing the Capital Markets Union.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

(a) Nature and scope of the Regulation

The Council's first-reading position creates a single harmonised regime that will apply to all crowdfunding service providers falling within the scope of the Regulation.

The Regulation does not apply to project owners that are consumers, or to crowdfunding offers with a consideration of more than EUR 5 000 000 over a period of 12 months. In addition, for a period of twenty-four months and where in a Member State the threshold of total consideration for the publication of a prospectus in accordance with Regulation (EU) 2017/1129 is below EUR 5 000 000, the present Regulation shall apply in that Member State only to crowdfunding offers with a total consideration up to the amount of that threshold.

The Regulation provides for a transitional period until twenty-four months after its entry into force, during which crowdfunding service providers may (unless and until they are in the meantime granted an authorisation under this Regulation) continue in accordance with the applicable national law to carry out crowdfunding services which are included within the scope of the Regulation.

(b) Organisational and operational requirements

The Regulation includes a number of measures to protect investors, including provisions on governance, risk assessment, due diligence requirements, the extent of discretion that crowdfunding service providers may exercise when offering individual portfolio management of loans, complaints handling, conflicts of interest, outsourcing, client asset safekeeping services and payment services, and prudential safeguards.

(c) Authorisation

The Member States' national competent authorities will be responsible for granting authorisation as a crowdfunding service provider under the Regulation. The competent authorities that grant authorisation will also supervise the crowdfunding service provider, and shall have the power to withdraw the authorisation in certain specified conditions.

ESMA (the European Securities and Markets Authority) is to keep a register of authorised crowdfunding service providers, and may also request information with a view to ensuring that authorisations are granted in a consistent manner.

(d) Investor protection

Crowdfunding service providers shall provide information to clients that is fair, clear and not misleading. The Regulation contains measures on default rate disclosure, an entry knowledge test and simulation of the ability to bear loss, a pre-contractual reflection period, a key investment information sheet, bulletin boards and access to records.

(e) Marketing communications

Marketing communications should be clearly identifiable as such. The information that they contain is to be fair, clear and not misleading. Competent authorities are to publish and keep up-to-date on their websites the national laws, regulations and administrative provisions that are applicable to marketing communications.

(f) Competent authorities and ESMA

The Regulation sets out the minimum investigatory and supervisory powers that competent authorities should have. It requires them to cooperate with each other and with ESMA. It contains measures on professional secrecy and data protection.

(g) Administrative penalties and other administrative measures

The Regulation sets out minimum administrative penalties and measures in relation to infringement of the Regulation. It also contains provisions on right of appeal, publication of decisions, and reporting to ESMA of imposed penalties.

(h) Review

The Regulation requires the Commission to present a report to the European Parliament and the Council within 36 months of the Regulation's entry into force. The Commission will have consulted ESMA and EBA (the European Banking Authority) when preparing its report. The report shall assess 26 aspects of the Regulation.

(i) Whistleblowing

The Regulation amends Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law by adding the present Regulation to the annex in that Directive that sets out the list of Union acts that constitute the material scope of that Directive.

IV. CONCLUSION

The Council's first-reading positions for the Regulation and Directive reflect the compromise reached in negotiations between the Council and the European Parliament.

The Council believes that its first-reading positions constitute a balanced package which will, once adopted, fulfil the objective of promoting the proper functioning of the internal market in crowdfunding services, enhancing investor protection as well as market efficiency, and contributing to establishing the Capital Markets Union.
