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'I' ITEM NOTE

From: General Secretariat of the Council

To: Permanent Representatives Committee (Part 2)

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Subject: Digital Finance Package:

Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 and

Proposal for a Regulation of the European Parliament and of the Council on on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 and

Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 (partial)

- Mandate for negotiations with the European Parliament

I. INTRODUCTION

1. On 24 September 2020 the Commission presented its "Digital Finance Package". The Digital Finance Package consists of a digital finance strategy¹, a renewed strategy for modern and safe retail payments² as well as four legislative proposals: a proposal for a regulation on markets in crypto-assets (MiCA)³; a proposal for a regulation on digital operational resilience

¹ ST 11048 2020

² ST 11050 2020

³ ST 11053 2020 ADD1 ADD2 ADD3

(DORA)⁴; a proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT pilot regime)⁵; and a complementing proposal for a Directive amending several directives⁶ (Amending Directive).

2. The Package aims at ensuring a competitive, innovative and digitally-resilient financial market while at the same time preserving consumer protection and financial stability. An innovative, yet robust financial sector is vital to support the EU's ambition for a recovery that embraces digitisation and help to turn Europe into a global digital player.
3. The MiCA proposal seeks to support innovation and fair competition by creating a framework for the issuance, and provision of services related to crypto-assets. In addition, it aims to ensure a high level of consumer and investor protection and market integrity in the crypto-asset markets, as well as address financial stability and monetary policy risks that could arise from a wide use of crypto-assets and DLT-based solutions in financial markets.
4. The DORA proposal aims to strengthen the digital operational resilience of financial sector entities in light of the ongoing digitisation of financial services. In particular, DORA provides for a stringent and robust regulation of information and communication technology (ICT) related risks. The framework will deepen the digital risk management of financial entities and enhance and streamline their conduct of ICT risk management, establish a thorough testing of ICT systems, increase supervisors' awareness of cyber risks and ICT-related incidents faced by financial entities, as well as introduce powers for European supervisory authorities to oversee risks stemming from financial entities' dependency on ICT third-party service providers. The proposal will also create a consistent incident reporting mechanism in line with measures laid out in the EU Common Cybersecurity Framework, while it aims at ensuring proportionality.

⁴ ST 11051 2020 ADD1 ADD2

⁵ ST 11055 2020 ADD1 ADD2

⁶ ST 10052 2020 ADD1 ADD2

5. The Amending Directive supplements the other proposals of the Digital Finance Package, by including various amendments to several Directives. It also amends the Directive 2014/65/EU⁷ on markets in financial instruments (MiFID2), in order to clarify the definition of financial instruments (first paragraph of Article 6) and to temporarily exempt distributed ledger technology market infrastructures from certain provisions in Directive 2014/65/EU in order enable them to develop solutions for the trading of crypto-assets that would qualify as financial instruments (fourth paragraph of Article 6).
6. These provisions are related to the DLT pilot regime proposal which is currently under negotiations with the European Parliament in trialogues and is out of the scope of this note. The provisions concerned have thus been put between square brackets. The other provisions of the Amending Directive have not been changed since the last informal non-objection procedure, where no Member State raised any objections or concerns.
7. These proposals are based on Article 114 of the Treaty on the Functioning of the European Union and are subject to the ordinary legislative procedure. The Amending Directive is also based on Article 53(1) TFEU.
8. Regarding the MiCA proposal, the European Economic and Social Committee adopted its opinion⁸ on this proposal on 2 March 2021 and the European Central Bank delivered its opinion⁹ on 19 February 2021. The European Data Protection Supervisor also adopted an opinion¹⁰ on 24 June 2021.
9. Regarding the DORA proposal, the European Economic and Social Committee adopted its opinion¹¹ on 2 March 2021 and the European Central Bank delivered its opinion¹² on 4 June 2021. The European Data Protection Supervisor adopted an opinion¹³ on 10 May 2021. Regarding the Amending Directive, the opinions were provided within the framework of the opinions on DORA.

⁷ 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/EU (OJ L 173, 12.6.2014, p. 349).

⁸ ST 6627 2021

⁹ ST 6371 2021

¹⁰ ST 10224 2021

¹¹ ST 6634 2021

¹² ST 9530 2021

¹³ ST 8717 2021

10. Due to the impossibility of holding physical meetings of Member States' experts in the context of travel restrictions, the above mentioned proposals were discussed at technical level through informal videoconference meetings of the Working Party on Financial Services. Based on these discussions, the Presidency has put forward compromise proposals and has submitted them to an informal non-objection procedure. On 16 November 2021, it was confirmed that all delegations could accept the compromise proposals, which are presented in:
- a) ST 14067/21+ADD1: Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, and its annexes;
 - b) ST 14068/21: Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014;
 - c) ST 14069/21: Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341.
11. Finally, provisions concerning the handling of significant cyber threats (classification and reporting requirements in relation to significant cyber threats) are square bracketed in the compromise proposal on DORA due to the fact that these issues are also covered by the Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 (NIS II). During the negotiations on DORA, Member States expressed the view that full consistency between DORA and NIS 2 should be ensured, as this would best ensure the *lex specialis* approach under DORA. Since there is no final agreement on the treatment of significant cyber threats under NIS 2 yet, the respective provisions in DORA should remain square-bracketed until there is clarity under NIS 2. Once the outcome of the negotiations under NIS 2 becomes clear, this outcome would also be reflected and implemented in DORA by aligning the respective provisions with those in NIS 2.

II. CONCLUSION

12. In view of the above, it is suggested that the Committee of Permanent Representatives:
- agree the negotiating mandate with regard to the proposed MiCA, DORA and the corresponding parts of the Amending Directive, as set out in documents ST 14067/21+ADD1, ST 14068/21 and ST 14069/21;
 - invite the Presidency to start negotiations with the European Parliament, on the basis of this mandate, with a view to reaching agreement at first reading.
13. Unless objected by Committee of Permanent Representatives, this document and its Addenda will be made public by the General Secretariat of the Council after approval.
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