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NOTE

From: Presidency
To: Delegations

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2014/65/EU on markets in financial instruments and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Presidency compromise proposal

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Directive 2014/65/EU on markets in financial instruments and
Directive 2009/138/EC on the taking-up and pursuit of the business of
Insurance and Reinsurance (Solvency II)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,¹

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure,

¹ OJ C , , p. .

² OJ C , , p. .

Whereas:

(1) Directive 2014/65/EU creates a regulatory framework for data reporting services providers Consolidated tape providers (CTP) are required to offer consolidated trading data covering all trades in both equity and non- equity instruments throughout the Union, in accordance with Directive 2014/65/EU.

(2) The quality of trading data and of the processing and provision of those data, including cross-border data provision, is of paramount importance for achieving the main objective of Regulation (EU) No 600/2014 of the European Parliament and of the Council, which is to strengthen the transparency of financial markets.

Accurate post-trade data provide users with an overview of trading activity across Union financial markets . Given the cross-border dimension of consolidated tape providers, it is therefore appropriate to transfer the authorisation of, and the supervision of CTP from competent authorities to ESMA.

(3) To achieve a consistent transfer of such powers it is appropriate to delete respective provisions pertaining to the operational requirements for CTP and competences of competent authorities with respect to consolidated tape providers set out in Directive 2014/65/EU, and to introduce the respective provisions in Regulation (EU) No 600/2014 of the European Parliament and of the Council³.

³ 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).

(5) In view of increased cross-border activities it is necessary to enhance the convergent application of Union law in cases of cross-border activity, especially at an early stage. For this purpose, information exchange and cooperation between supervisory authorities and EIOPA should be strengthened. In particular, notification requirements in case of significant cross-border activity or a crisis situation as well as conditions for setting up cooperation platforms should be laid down. Cooperation platforms are an effective tool to achieve stronger and timely cooperation between supervisory authorities and therefore to enhance consumer protection. However, authorisation, supervision and enforcement decisions are and remain within the competence of the supervisory authority of the home Member State.

(11) Directive 2009/138/EC⁴ should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

⁴ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p.1).

Article 1

Amendments to Directive 2014/65/EU

Directive 2014/65/EU is amended as follows:

(1) Article 1 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. This Directive shall apply to investment firms, market operators, approved publication arrangements, approved reporting mechanisms and third-country firms providing investment services or performing investment activities through the establishment of a branch in the Union.';

(b) in paragraph 2, point (d) is replaced by the following:

'authorisation and operation of approved publication arrangements, approved reporting mechanisms; and';

(2) in Article 4, paragraph 1 is amended as follows:

(a) points (36) and (37) are replaced by the following:

'(36) 'management body' means the body or bodies of an investment firm, market operator, approved publication arrangements or approved reporting mechanisms which are appointed in accordance with national law, which are empowered to set the entity's strategy, objectives and overall direction, and which oversee and monitor management decision-making and include persons who effectively direct the business of the entity.

Where this Directive refers to the management body and, pursuant to national law, the managerial and supervisory functions of the management body are assigned to different bodies or different members within one body, the Member State shall identify the bodies or members of the management body responsible in accordance with its national law, unless otherwise specified by this Directive;

(37) ‘senior management’ means natural persons who exercise executive functions within an investment firm, a market operator, an approved publication arrangement or an approved reporting mechanism and who are responsible and accountable to the management body for the day-to-day management of the entity, including for the implementation of the policies concerning the distribution of services and products to clients by the firm and its personnel;’;

(c) point(53) is deleted;

(d) point (55)(c) is amended as follows:

in the case of an APA or an ARM:

(i) if the APA or ARM is a natural person, the Member State in which its head office is situated;

(ii) if the APA or ARM is a legal person, the Member State in which its registered office is situated;

(iii) if the APA or ARM has, under its national law, no registered office, the Member State in which its head office is situated;

(3) Title V is deleted;

Article 59-63: all references to 'data reporting services' are replaced by 'approved publication arrangements or approved reporting mechanisms';

Article 65 is deleted;

(4) Article 70 is amended as follows:

(a) in point (a) of paragraph 3, sub point xxxix is deleted;

(c) in paragraph 6, point (c) is replaced by the following:

'(c) in the case of an investment firm, a market operator authorised to operate an MTF or OTF, a regulated market, an approved publication arrangement or an approved reporting mechanism, withdrawal or suspension of the authorisation of the institution in accordance with Article 8, and Article 43;';

(5) in Article 71, paragraph 6 is replaced by the following:

'6. Where a published criminal or administrative sanction relates to an investment firm, market operator, approved publication arrangements, approved reporting mechanisms, credit institution in relation to investment services and activities or ancillary services, or a branch of third-country firms authorised in accordance with this Directive, ESMA shall add a reference to the published sanction in the relevant register.';

(6) in Article 77, in the first subparagraph of paragraph 1, the introductory sentence is replaced by the following:

‘Member States shall provide, at least, that any person authorised within the meaning of Directive 2006/43/EC of the European Parliament and of the Council*, performing in an investment firm, an approved publication arrangement, an approved reporting mechanism or a regulated market the task described in Article 34 of Directive 2013/34/EU or Article 73 of Directive 2009/65/EC or any other task prescribed by law, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which that person has become aware while carrying out that task and which is liable to:

* Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L 157, 9.6.2006, p. 87).!;

(7) Article 89 is amended as follows:

(a) paragraph 2 is replaced by the following:

‘2. The delegation of power referred to in Article 2(3), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4), Article 54(4), Article 58(6), and Article 79(8) shall be conferred on the Commission for an indeterminate period of time from 2 July 2014.’;

(b) paragraph 3 is replaced by the following:

'3. The delegation of powers referred to in Article 2(3), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4) Article 54(4), Article 58(6), Article 64(7) and Article 79(8) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.';

(c) paragraph 5 is replaced by the following:

'5. A delegated act adopted pursuant to Article 2(3), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4), Article 54(4), Article 58(6) , Article 64(7) and Article 79(8) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.';

(8) in Article 90, paragraphs 2 and 3 are replaced by the following:

2. The Commission shall, after consulting ESMA, present reports to the European Parliament and the Council on the functioning of the consolidated tape established in accordance with Regulation (EU) No 600/2014 Title IVa. The report relating to Regulation (EU) No 600/2014 Article 27g(1) shall be presented by 3 September 2019. The report relating to Regulation (EU) No 600/2014 Article 27g(2) shall be presented by 3 September 2021.

The reports referred to in the first subparagraph shall assess the functioning of the consolidated tape against the following criteria:

- (a) the availability and timeliness of post trade information in a consolidated format capturing all transactions irrespective of whether they are carried out on trading venues or not;
- (b) the availability and timeliness of full and partial post trade information that is of a high quality, in formats that are easily accessible and usable for market participants and available on a reasonable commercial basis.

Where the Commission concludes that the CTPs have failed to provide information in a way that meets the criteria set out in the second subparagraph, the Commission shall accompany its report by a request to ESMA to launch a negotiated procedure for the appointment through a public procurement process run by ESMA of a commercial entity operating a consolidated tape. ESMA shall launch the procedure after receiving the request from the Commission on the conditions specified in the Commission's request and in accordance with Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council (1).

3. The Commission shall, where the procedure outlined in paragraph 2 is initiated, be empowered to adopt delegated acts in accordance with Article 89 amending Articles 59 to 64 and Section D of Annex I of this Directive, and point (19) of Article 2(1) and articles 27a to 27e and 27g of Regulation (EU) No 600/2014, by specifying measures in order to:

- (a) provide for the contract duration of the commercial entity operating a consolidated tape and the process and conditions for renewing the contract and the launching of new public procurement;
- (b) provide that the commercial entity operating a consolidated tape shall do so on an exclusive basis and that no other entity shall be authorised as a CTP in accordance with Article 27a of Regulation (EU) No 600/2014;
- (c) empower ESMA to ensure adherence with tender conditions by the commercial entity operating a consolidated tape appointed through a public procurement;
- (d) ensure that the post-trade information provided by the commercial entity operating a consolidated tape is of a high quality, in formats that are easily accessible and usable for market participants and in a consolidated format capturing the entire market;
- (e) ensure that the post trade information is provided on a reasonable commercial basis, on both a consolidated and unconsolidated basis, and meets the needs of the users of that information across the Union;

(f) ensure that trading venues and APAs shall make their trade data available to the commercial entity operating a consolidated tape appointed through a public procurement process run by ESMA at a reasonable cost;

(g) specify arrangements applicable where the commercial entity operating a consolidated tape appointed through a public procurement fails to fulfil the tender conditions;

(h) specify arrangements under which CTPs authorised under Article 27a of Regulation (EU) No 600/2014 may continue to operate a consolidated tape where the empowerment provided for in point (b) of this paragraph is not used or, where no entity is appointed through the public procurement, until such time as a new public procurement is completed and a commercial entity is appointed to operate a consolidated tape.;

(9) in paragraph 1 of Article 93, the second subparagraph is replaced by the following:

'Member States shall apply those measures from 3 January 2018.';

(10) in Annex I, Section D point (2) is deleted.

Article 2

Amendments to Directive 2009/138/EC

Directive 2009/138/EC is amended as follows:

The following Section 2a of Title I, Chapter VIII is inserted:

*“Section 2a
Notification and collaboration platforms”*

the following Article 152a is inserted:

““Article 152a

Notification

- (1) Where the supervisory authority of the home Member State intends to authorise an insurance or reinsurance undertaking whose scheme of operations indicates that a significant part of its activities will be based on the freedom to provide services or the freedom of establishment in another Member State and where the scheme of operations also indicates that these activities are likely to be of relevance with respect to the host Member State's market, the supervisory authority of the Home Member State shall notify EIOPA and the supervisory Authority of the relevant Host Member State .

- (2) The supervisory authority of the home Member State shall also notify EIOPA and the supervisory authority of the relevant host Member State where it identifies deteriorating financial conditions or other emerging risks posed by an insurance or reinsurance undertaking carrying out activities based on the freedom to provide services or the freedom of establishment that may have a cross-border effect. The supervisory authority of the host Member State may also notify the supervisory authority of the relevant home Member State where it has serious and reasoned concerns with regard to consumer protection. The supervisory authorities may refer the matter to EIOPA and request its assistance in case no bilateral solution could be found.
- (3) These notifications shall be sufficiently detailed to allow for a proper assessment.
- (4) The notifications pursuant to paragraphs 1 and 2 are without prejudice to the supervisory mandate attributed to the national competent authorities of the home and host Member States in Directive 2009/138/EC.

The following Article 152b is inserted:

“Article 152b

Collaboration platforms

- (1) Where an insurance or reinsurance undertaking carries out or intends to carry out activities which are based on the freedom to provide services or the freedom of establishment and which are
 - (i) of relevance with respect to the market of a host Member State , or

- (ii) where a notification by the home Member State has been made under Art 152a(2) of deteriorating financial conditions on other emerging risks, or
- (iii) where the matter has been referred to EIOPA under Art 152a(2),

the Authority may, in case of justified concerns about negative effects on policyholders, on its own initiative or at the request of one or more of the relevant supervisory authorities, set up and coordinate a collaboration platform to strengthen the exchange of information and an enhanced collaboration between the relevant supervisory authorities.

- (2) The requirement of paragraph 1 does not prejudice the right of the relevant supervisory authorities to set up a collaboration platform where they all agree on its establishment.
- (3) The establishment of a collaboration platform under paragraphs 1 and 2 is without prejudice to the supervisory mandate attributed to the national competent authorities of the home and host Member States in Directive 2009/138/EC
- (4) Without prejudice to Article 35 of Regulation (EU) No. 1094/2010, at the request of the Authority the relevant supervisory authorities shall provide all the necessary information in a timely manner to allow for a proper functioning of the collaboration platform.”

Article 231 is amended as follows:

(a) paragraph 3 is amended as follows:

(i) the first sentence of the third subparagraph is replaced by the following:

'Where EIOPA does not adopt a decision as referred to in the second subparagraph in accordance with Article 19(3) of Regulation (EU) No 1094/2010, the group supervisor shall take a final decision.';

Article 3

Transposition

1. Member States shall adopt and publish, by 12/18 months as of entry into force, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive.
2. Member States shall apply the measures with respect to Article 1 from 36 months as of entry into force and with respect to Article 2 from [the date of application of amendment to the EIOPA Regulation].

Article 4

Entry into force

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

Article 5

Addressees

This Directive is addressed to the Member States. Done at Brussels,

For the European Parliament
The President

For the Council
The President
