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From:	General Secretariat of the Council
To:	Permanent Representatives Committee
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets - Mandate for negotiations with the European Parliament = Compromise proposal

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets

(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 114 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 Economic and Social Committee[1],

Acting in accordance with the ordinary legislative procedure[2],

Whereas:

(1) The Capital Markets Union initiative aims at reducing dependence on bank lending, at diversifying market-based sources of financing for all smaller and medium-sized enterprises ('SMEs') and at promoting the issuance of bond and shares by SMEs on public markets. Companies established in the Union that seek to raise capital on trading venues are facing high one-off and ongoing disclosure and compliance costs which can deter them from seeking an admission to trading on Union trading venues in the first place. In addition, shares issued by SMEs on Union trading venues tend to suffer from lower levels of liquidity and higher volatility, which increases the cost of capital, making this source of funding too onerous.

1 OJ C 440, 6.12.2018, p. 79.
2 Position of the European Parliament of ... (OJ ...) and decision of the Council of ...

(2) Directive 2014/65/EU of the European Parliament and of the Council[3] has created a new type of trading venues, the SME growth markets, a subgroup of Multilateral Trading Facilities ('MTFs'), in order to facilitate access to capital for SMEs and to facilitate the further development of specialist markets that aim to cater for the needs of SME issuers. Directive 2014/65/EU also anticipated that "*attention should be focused on how future regulation should further foster and promote the use of that market so as to make it attractive for investors, and provide a lessening of administrative burdens and further incentives for SMEs to access capital markets through SME growth markets*".

(3) It has however been noted that issuers admitted to trading on an SME growth market benefit from relatively few regulatory alleviations compared to issuers admitted to trading on MTFs or regulated markets. Most of the obligations set out in Regulation (EU) No 596/2014 European Parliament and of the Council[4] apply in the same manner to all issuers, irrespective of their size or the trading venue where their financial instruments are admitted to trading. That low level of differentiation between SME growth markets and MTF issuers acts as a disincentive for MTFs to seek a registration as an SME growth market, which is illustrated by the low uptake of the SME growth market status to date. It is therefore necessary to introduce additional alleviations to adequately foster the use of SME growth markets.

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3 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).

4 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

(4) The attractiveness of SME growth markets should be reinforced by further reducing the compliance costs and administrative burdens faced by SME growth market issuers. To maintain the highest standards of compliance on regulated markets, the alleviations provided for in this Regulation should be limited to companies listed on SME growth markets, irrespective of the fact that not all SMEs are listed on SME growth markets and not all companies listed on SME growth markets are SMEs. Pursuant to Directive 2014/65/EU, up to 50% of non-SMEs can be admitted to trading on SME growth markets to maintain the profitability of the SME growth markets' business model through, inter alia, liquidity in non-SMEs securities. In view of the risks involved in applying different sets of rules to issuers listed on the same category of venue, namely SME growth markets, the changes set out in this Regulation should not be limited to SME issuers only. For the sake of consistency for issuers and clarity for investors, the alleviation of compliance costs and administrative burdens should apply to all issuers on SME growth markets, irrespective of their market capitalisation.

(5) According to Article 10 (1) of Regulation (EU) No 596/2014, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties. Pursuant to Article 11 (4), disclosure of inside information in the course of market sounding shall be deemed to be made in the normal exercise of a person's employment, profession or duties. A market sounding comprises the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. During the negotiation phase of a private placement of bonds, issuers enter into discussions with a limited set of potential qualified investors (as defined in Regulation (EU) 2017/1129 of the European Parliament and of the Council[5]) and negotiate all the contractual terms and conditions of the transaction with those qualified investors. The communication of information in that negotiation phase of a private placement of bonds aims at structuring and completing the entire transaction, and not at gauging the interest of potential investors as regards a pre-defined transaction. Imposing market sounding on private placements of bonds can thus be burdensome and act as a disincentive to enter into discussions for such transactions for both issuers and investors. In order to increase the attraction of private placement of bonds, the disclosure of inside information to qualified investors for those transactions should be deemed to be made in the normal exercise of a person's employment, profession or duties and should be excluded from the scope of the market sounding regime, provided that an adequate non-disclosure agreement is in place.

[5] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12).

(6) Some liquidity in an issuer's shares can be achieved through liquidity mechanisms such as market-making arrangements or liquidity contracts. A market-making arrangement involves a contract between the market operator and a third party who commits to maintaining the liquidity in certain shares and benefits from rebates on trading fees in return. A liquidity contract involves a contract between an issuer and a third party who commits to providing liquidity in the shares of the issuer, and on its behalf. To ensure that market integrity is fully preserved, liquidity contracts should be available for all SME growth markets issuers across the Union, subject to a number of conditions. Not all competent authorities have, pursuant to Article 13 of Regulation (EU) No 596/2014, established accepted market practices in relation to liquidity contracts , which means that not all SME growth market issuers have currently access to liquidity schemes across the Union. That absence of liquidity schemes can be an impediment to the effective development of SME growth markets. It is therefore necessary to create a Union framework that will enable SME growth market issuers to enter into a liquidity contract with a liquidity provider in another Member State in the absence of an accepted market practice established at national level. Under this EU framework, a person entering into such a liquidity contract with a liquidity provider would therefore not be deemed to engage in market manipulation. The Union framework on liquidity contracts for SME growth markets should however not replace, but rather complement, existing or future accepted market practices. Competent authorities should keep the possibility to establish accepted market practices on liquidity contracts to tailor their conditions to local specificities or to extend such agreements to illiquid securities other than SME growth market shares.

(7) In order to ensure a uniform application of the Union framework for liquidity contracts referred to in recital 6, Regulation (EU) No 596/2014 should be amended to empower the Commission to adopt implementing technical standards developed by the European Securities and Markets Authority, setting out a template to be used for the purposes of such contracts. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 of the Treaty and in accordance with Article 15 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.[6]

[6] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and

(8) According to Article 17(4) of Regulation (EU) No 596/2014, issuers can decide to delay the public disclosure of inside information if their legitimate interests are likely to be prejudiced. Issuers are however required to notify the competent authority thereof and to provide an explanation of the rationale supporting the decision. The obligation for issuers, who have their financial instruments admitted to trading only on an SME growth market to document in writing the reasons why they have decided to delay the disclosure can be burdensome. It is considered that a lighter requirement for issuers who have their financial instruments admitted to trading only on an SME growth market consisting in an obligation to only explain the reasons for the delay upon request by the competent authority would have no significant impact on the ability of the competent authority to monitor the disclosure of inside information, while reducing the administrative burden for SME growth markets issuers, provided that competent authorities are still notified of the decision to delay and are in a position to open an investigation if they have doubt as regards that decision.

(9) The current less stringent requirements for SME growth markets issuers to produce, in accordance with Article 18(6) of Regulation (EU) No 596/2014, an insider list only upon the request of the competent authority, is of limited practical effect, because those issuers are still subject to ongoing monitoring of the persons who qualify as insiders in the context of ongoing projects. It would be burdensome to expect SME growth market issuers to establish and promptly update the insider list in accordance with the precise format set out by the Commission in the Commission Implementing Regulation (EU) 2016/347. The existing alleviation should therefore be replaced by a reduced amount of required information and the possibility for SME growth market issuers to use free format for the establishment and update of the insider list.

Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(10) Pursuant to Article 19(3) of Regulation (EU) No 596/2014, issuers have to make public transactions carried out by persons discharging managerial responsibilities ('PDMRs') and persons closely associated with them ('PCAs') within three days after the transaction. The same deadline applies to PDMRs and PCAs as regards their duty to report their transactions to the issuer. Where issuers and emission allowance market participants are notified late by PDMRs and PCAs of their transactions, it is technically challenging for those issuers and emission allowance market participants to comply with the three-day deadline, which may give rise to liability issues. Issuers and emission allowance market participants should therefore be allowed to disclose transactions within two days after those transactions have been notified by the PDMRs or the PCAs.

(10a) Article 1(4) (for offers of securities to the public) and 1(5) of Regulation (EU) 2017/1129 of the European Parliament and of the Council allow an issuer, under certain conditions, not to draft a prospectus, in case of an exchange offer, merger or division. Instead, a document containing minimum information describing the transaction and its impact on the issuer must be made available to the market. Such document is neither reviewed, nor approved by a national competent authority and its content could be alleviated compared to a prospectus. An unintended consequence of such exemption is that, in some circumstances, a non-listed issuer company can carry out an initial admission of its shares to trading without producing a prospectus, thus depriving investors of the useful information contained in a prospectus, while avoiding any review by a national competent authority of the information provided to the market. It is therefore appropriate to introduce a requirement to draft a prospectus for a non-listed issuer which seeks admission to trading following exchange offer, merger or division.

(10b) Article 14 of Regulation (EU) 2017/1129 of the European Parliament and of the Council does not currently allow the use of a simplified prospectus for issuers whose equity securities are admitted to trading on either a regulated market or an SME Growth market and that would seek to issue securities giving access to equity. Such securities are useful financing tools for EU companies, and especially for smaller firms and the exclusion of convertible bonds from Article 14 would run against the objectives of the Capital Markets Union. As a consequence, Article 14 should be amended to allow issuers whose equity securities have been admitted either on a regulated market or an SME Growth Market continuously for at least the last 18 months to use the simplified prospectus for the issuance of non-equity securities or securities giving access to equity.

(11) SME growth markets should not be perceived as a final step in the scaling up of issuers and should enable successful companies to grow and move one day to regulated markets to benefit from greater liquidity and a larger investors' pool. To facilitate the transition from an SME growth market to a regulated market, growing companies should be able to use the simplified disclosure regime for the admission on a regulated market, as set out in Article 14 of Regulation (EU) 2017/1129 of the European Parliament and of the Council, provided that those companies have offered shares to the public that have been admitted to trading on an SME growth market for at least three years and have fully complied with reporting and disclosure obligations over the full period of being listed. That period should enable issuers to have a sufficient track record and to provide the market with information on their financial performance and reporting requirements under the rules of Directive 2014/65/EU.

(12) According to Regulation (EC) No 1606/2002 of the European Parliament and of the Council[7], SME growth market issuers are not obliged to publish their financial statements in International Financial Reporting Standards. However, to avoid departing from regulated market standards, SME growth markets issuers that would want to use the simplified disclosure regime for a transfer to a regulated market should prepare their most recent financial statements, including comparative information for the previous year in accordance with that Regulation, provided they would be required to prepare consolidated accounts. SME growth market issuers that would not have to prepare consolidated accounts should comply with the national law of the Members State in which the company is incorporated.

[7] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

(12a) The EU Growth Prospectus, as set out in Article 15 of Regulation (EU) 2017/1129 of the European Parliament and of the Council, is one of the key elements to encourage smaller issuers to access public markets, through a tailor-made prospectus. Pursuant to Article 15, a EU Growth Prospectus can be used by an SME. An SME is defined either as a company meeting at least two of the three following conditions: (i) less than 250 employees, (ii) a total balance sheet not exceeding EUR 43 million, and (iii) an annual net turnover not exceeding EUR 50 million (point (i) of Article 2(f)); or as a company that had an average market capitalisation of less than EUR 200 million on the basis of end-year quotes for the previous three calendar years (point (ii) of Article 2(f)). As non-listed issuers do not have a market capitalisation, they can only draw up a EU Growth prospectus if they meet two of the three criteria set out in Article 2(f)(i). However, that latter definition is too restrictive because issuers seeking an admission to trading on an SME Growth Market tend to be larger than traditional SMEs. As a result, in regards of public offers, immediately followed by an initial admission to trading on an SME Growth Market, smaller firms would not be able to use the EU Growth prospectus, even if their market capitalisation after their initial admission to trading tend to be lower than EUR 200 million. As a consequence, Article 15 of the Regulation (EU) 2017/1129 of the European Parliament and of the Council should be amended to allow firms seeking an initial public offer with a tentative market capitalisation of below EUR 200 million to draw up an EU Growth Prospectus.

(13) Regulations (EU) No 596/2014 and (EU) No 2017/1129 should therefore be amended accordingly.

(14) The amendments set out in this Regulation should apply 8 months after the entry into force of this Regulation to provide sufficient time for incumbent SME growth market operators to adapt their rulebooks.

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) No 596/2014

Regulation (EU) No 596/2014 is amended as follows:

1. in Article 10, the following paragraph 1a is inserted:

"1.a Where an offer of securities is addressed solely to qualified investors as defined in Article 2(e) of Regulation (EU) 2017/1129 of the European Parliament and of the Council*, communication of information to those qualified investors for the purposes of negotiating the contractual terms and conditions of their participation in an issuance of bonds by an issuer that has financial instruments admitted to trading on a trading venue, or by a third party acting on its behalf or account, shall be deemed to be made in the normal exercise of a person's employment, profession or duties pursuant to paragraph 1. This communication should therefore not constitute a market sounding nor unlawful disclosure of inside information. That issuer shall ensure that the qualified investors receiving the information are aware of, and acknowledge in writing, the legal and regulatory duties entailed and are aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information.";

2. in Article 13, the following paragraphs 12 and 13 are inserted:

"12. Without prejudice to national accepted market practices established in accordance with paragraphs 1 to 11, an issuer whose financial instruments are admitted to trading on an SME growth market is authorised to enter into a liquidity contract for its shares where all of the following conditions are met:

(a) the terms and conditions of the liquidity contract comply with the criteria set out in Article 13(2) of this Regulation and in Commission Delegated Regulation (EU) 2016/908**;

(b) the liquidity contract is established in accordance with the template as referred to in the paragraph 13;

(c) the liquidity provider is duly authorised by the competent authority in accordance with Directive 2014/65/EU and is registered as a market member with the market operator or the investment firm operating the SME growth market;

(d) the market operator or the investment firm operating the SME growth market acknowledges in writing to the issuer that it has received a copy of the liquidity contract and agrees to that contract's terms and conditions.

The issuer referred to in the first subparagraph of this paragraph shall be able to demonstrate at any time that the conditions under which the contract was established are met on an ongoing basis. That issuer and the investment firm operating the SME growth market shall provide the relevant competent authorities with a copy of the liquidity contract upon their request.

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* Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12).";

13. In order to ensure uniform conditions of application of paragraph 12, ESMA shall develop draft implementing technical standards setting out a contractual template to be used for the purposes of entering into a liquidity contract to ensure compliance with the conditions set out in Article 13, including as regards the transparency and performance of the liquidity provision. ESMA shall submit those draft implementing technical standards to the Commission by [...]. Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.";

3. in Article 17(4), the following subparagraph is added:

"Where an issuer whose financial instruments are only admitted to trading on an SME growth market has delayed the disclosure of inside information under this paragraph, it shall inform the competent authority specified under paragraph 3, immediately after the information is disclosed to the public, that the disclosure of information was delayed. A written explanation of how the conditions set out in the first paragraph were met is to be provided only upon request of the competent authority specified in accordance with paragraph 3. The issuer shall not be required to keep a record of that explanation as long as the issuer is able to document its decision to delay in another way.";

4. in Article 18, paragraphs 1 to 6 are replaced by the following:

"1. Issuers and any person acting on their behalf or on their account, shall:

(a) draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies (insider list);

(b) promptly update the insider list in accordance with paragraph 4; and

(c) provide the insider list to the competent authority as soon as possible upon its request.

Issuers may exclude from their insider lists persons already included in the insider lists drawn by persons acting on behalf or account of those issuers if at least one natural person or the name of the entity acting on behalf or for the account of the issuer is mentioned on the insider list of the issuer.

2. Issuers and any person acting on their behalf or on their account, shall take all reasonable steps to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information.

Where another person is requested by the issuer to draw up and update the latter's insider list, the issuer remains fully responsible for complying with this Article. The issuer shall always retain a right of access to the insider list that the other person is drawing up.

3. The insider list shall include at least:

(a) the identity of any person having access to inside information;

(b) the reason for including that person in the insider list;

(c) the date and time at which that person obtained access to inside information; and

(d) the date on which the insider list was drawn up.

4. Issuers and any person acting on their behalf or on their account shall update the insider list promptly, including the date of the update, in the following circumstances:

(a) where there is a change in the reason for including a person already on the insider list;

(b) where there is a new person who has access to inside information and needs, therefore, to be added to the insider list; and

(c) where a person ceases to have access to inside information.

Each update shall specify the date and time when the change triggering the update occurred.

5. Issuers and any person acting on their behalf or on their account shall retain the insider list for a period of at least five years after it is drawn up or updated.

6. Issuers whose financial instruments are admitted to trading on an SME growth market shalldraw up their lists of insiders using either the format developed by ESMA according to paragraph 9, or another format of their choice, and specifying at least the following information:

- name and one of either the date of birth or national identification number of any person having access to inside information,

- information referred to in points (b), (c) and (d) of paragraph 3,

- contact information for persons listed as insiders, provided they do not work for the issuer under a contract of employment.

That list shall be provided to the competent authority as soon as possible upon its request.";

5. in Article 19(3), the first subparagraph is replaced by the following:

"The issuer or emission allowance market participant shall have two business days after receipt of a notification as referred to in paragraph 1 to make public the information contained in that notification.".

** Commission Delegated Regulation (EU) 2016/908 of 26 February 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council laying down regulatory technical standards on the criteria, the procedure and the requirements for establishing an accepted market practice and the requirements for maintaining it, terminating it or modifying the conditions for its acceptance (OJ L 153, 10.6.2016, p. 3). ";

Article 2

Amendments to Regulation (EU) No 2017/1129

Regulation (EU) 2017/1129 is amended as follows:

1. in Article 1, the following points 6(bis) and 6(ter) are added:

"6(bis). The exemptions set out in point (f) of paragraph 4 and in point (e) of paragraph 5 shall only apply with respect to shares where:

(a) the shares offered have already been admitted to trading on a regulated market prior to the takeover and transaction, and the takeover is not considered to be a reverse acquisition transaction within the meaning of paragraph B19 of IFRS 3, Business Combinations as endorsed by the European Union, or

(b) the competent authority has issued a prior approval of the document referred to in point (f) of paragraph 4 or point (e) of paragraph 5 in the exercise of powers other than the powers conferred by this Regulation.

6(ter). The exemptions set out in point (g) of paragraph 4 and in point (f) of paragraph 5 shall apply only with respect to shares in the following cases:

(a) the shares of the absorbing entity have already been admitted to trading on a regulated market prior to the transaction;

(b) the shares of the entity subject to the division have already been admitted to trading on a regulated market prior to the transaction;

(c) the merger does not qualify as 'reverse acquisition transaction' as defined in paragraph B19 of IFRS 3, Business Combinations as approved by the European Union;

(d) the competent authority has issued a prior approval of the document referred to in point (g) of paragraph 4 or point (f) of paragraph 5 in the exercise of powers other than the powers conferred by this Regulation.";

2. in Article 14(1), point (b) is replaced by the following:

"(b) without prejudice to Article 1 (5), issuers whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities or transferable securities giving access to equity securities fungible with the existing equity securities of the issuer already admitted to trading;";

3. in the first subparagraph of Article 14(1), the following point d is added:

"(d) issuers whose shares have been offered to the public and admitted to trading on an SME growth market continuously for at least three years, and have fully complied with reporting and disclosure obligations over the full period of being admitted to trading, and who seek admission of existing or new shares of the same class to trading on a regulated market.";

4. in the second subparagraph of paragraph 2, the following sentence is added:

"For issuers as referred to in point (d) of the first subparagraph of paragraph 1 whose securities have been admitted to trading on an SME growth market and which will be required to prepare consolidated accounts according to Directive 2013/34/EU after their securities' admission to trading on a regulated market, the most recent financial statements pursuant to Article 14(3)(a), containing comparative information for the previous year included in the simplified prospectus, shall be prepared in accordance with the International Financial Reporting Standards as endorsed in the Union pursuant to Regulation (EC) No 1606/2002***.

For issuers as referred to in point (d) of the first subparagraph of paragraph 1 whose securities have been admitted to trading on an SME growth market and which will not be required to prepare consolidated accounts according to Directive 2013/34/EU after their securities' admission to trading on a regulated market, the most recent financial statements pursuant to Article 14(3)(a), containing comparative information for the previous year included in the simplified prospectus, shall be prepared in accordance with the national law of the Member State in which the company is incorporated."

5. in paragraph 1 of Article 15, the following point (bb) is added:

"(bb) issuers making an offer of shares to the public and requesting admission to trading of such shares on an SME growth market, provided that they have no shares already admitted to trading on an SME growth market and that the product of the following two components is below EUR 200 million:

- the final offer price, or the maximum price in the case referred to in point (i) of Article 17(1)(b), as included in the prospectus;

- the total number of outstanding shares immediately following the offer of shares to the public, as calculated based either on the amount of shares offered to the public, or on the maximum amount of shares offered to the public, in the case referred to in point (i) of Article 17(1)(b), as included in the prospectus.".

*** Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1). ”.

Article 3

Entry into force and application

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

It shall apply from 8 months after entry into force.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*