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PROPOSAL

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 8 March 2018

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL amending Directive 2014/65/EU on markets in financial
instruments

Delegations will find attached document COM(2018) 99 final.

Encl.: COM(2018) 99 final



EUROPEAN
COMMISSION

Brussels, 8.3.2018
COM(2018) 99 final

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2014/65/EU on markets in financial instruments

(Text with EEA relevance)

{SWD(2018) 56} - {SWD(2018) 57}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The Commission has today 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". The package includes this proposal, as well as a proposal for an enabling EU framework on covered bonds, a proposal to facilitate the cross-border distribution of investment funds, a proposal on the law applicable to the third-party effects of assignments of claims and a Communication on the applicable law to the proprietary effects of transactions in securities.

This initiative is related to part of the Commission's priority of establishing a Capital Market Union (CMU), which aims to broaden access to finance for innovative companies, start-ups and other unlisted firms.

Today, access to finance remains difficult for these firms, particularly when they move from a start-up into the expansion phase, due to structural information asymmetries. Over-reliance on short-term unsecured bank lending is often overly expensive for start-ups and more generally for small and medium enterprises (SMEs). In addition, bank lending volumes to both start-ups and SMEs have been severely affected by the 2008 financial crisis, making the lack of funds an important reason as to why start-ups failed.

In the light of these market failures, crowdfunding has evolved into an established form of crowdsourcing and of alternative finance. The crowdfunding model normally involves the project owners that propose the project to be funded, investors that support the proposed project through funding and a moderating platform that brings the parties together to finance and launch the project in question. Crowdfunding platforms are increasingly used as a tool to finance various activities for small and nascent firms.

As a response, some Member States have already introduced domestic bespoke regimes on crowdfunding. However, Member States tailor their regulatory frameworks to the characteristics and needs of local markets and investors, which results in differences of how the rules are designed and implemented with respect to the conditions of operation of crowdfunding platforms, scope of permitted activities and licencing requirements. As a result of the different regulatory approaches, platform business models are not easily passportable across the Union. Given the uncertainty and high compliance costs for platforms in a cross-border setting that arise due to the lack of an appropriate EU framework for crowdfunding activity, crowdfunding services providers are facing difficulties in scaling their operations and cross-border flows remain limited.

The European Parliament and the Council adopted Regulation (EU) XXX/XXX on European crowdfunding service providers¹ with a view, among others, to set out proportionate requirements to the provision of crowdfunding services and to facilitate their provision on a cross-border basis, while managing operational risks and ensuring a high degree of transparency and investor protection. Regulation (EU) XXX/XXXX [Regulation on European crowdfunding service providers] provides for uniform, proportionate and directly applicable requirements for authorisation and supervision together with a single point of supervision.

In addition, given the need to ensure a clear separation of services in order to manage conflicts of interest and to ensure effective supervision, a person authorised as a crowdfunding service provider

¹ Regulation (EU) No XXXX/XXXX of the European Parliament and of the Council on European crowdfunding service providers (OJ L [...], [...], p. [...]).

under Regulation (EU) XXX/XXXX [Regulation on European crowdfunding service providers] should not be authorised under Directive 2014/65/EU, and vice versa.

In the interest of legal certainty and in order to avoid the application of requirements stemming from Directive 2014/65/EU to the provision of crowdfunding services, it is necessary to explicitly specify that Directive 2014/65/EU does not apply to persons authorised as crowdfunding service providers as defined in Regulation (EU) XXX/XXX,

To this end, this proposal exempts crowdfunding service providers from the obligations under Directive 2014/65/EU on the markets in financial instruments.

- **Consistency with existing policy provisions in the policy area**

The provision of crowdfunding services across the Union is regulated by Regulation (EU) XXXX/XX on European crowdfunding service providers, in relation to which the present Proposal is complementary.

- **Consistency with other Union policies**

The proposal is consistent and complementary to Regulation (EU) XXXX/XX on European crowdfunding service providers in the European Union, which aims to broaden access to finance for innovative companies, start-ups and other unlisted firms, in line with the Commission's priority of establishing a CMU. By providing crowdfunding service providers with a more enabling legal framework such Regulation complemented by the proposal seek helping start-ups and SMEs to access to alternative sources of capital in line with other initiatives that have sought to facilitate access to finance for these entities, such as the framework for European Venture Capital Funds.

The initiative is also part of the European Commission's FinTech Action Plan, designed to help better understand and enable technology to support the financial services sector. In effect, the financial services sector is the largest user of digital technologies and represents a major driver in the digital transformation of our society. These new technologies are changing the way consumers and firms access services, as well as improving the ability to understand and measure risks. The Commission aims to opt for a more innovation-oriented approach to FinTech by facilitating a regulatory environment where innovative financial services, products and solutions can be rolled out across the EU in a safe, financially stable environment for investors and firms alike.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for this proposal is Article 53(1) of the Treaty on the Functioning of the European Union (TFEU), which allows the adoption of measures for the approximation of national provisions concerning the access to the activity of investment firms, regulated markets and data service providers.

- **Subsidiarity**

Under Article 4 TFEU, EU action for completing the internal market must be appraised in the light of the subsidiarity principle set out in Article 5(3) of the Treaty on European Union (TEU). It must be assessed whether the objectives of the proposal could not be achieved by the Member States in the framework of their national legal systems and, by reason of their scale and effects, are better achieved at EU level.

The varying approaches taken by the Union Member States and their different interpretations of crowdfunding activity have made difficult for crowdfunding service providers to pass port their

services through the EU. The Commission Services have been monitoring the market since 2013 and have recognised increasing divergence and amplification of problems that warrant EU-level intervention. Moreover, there is no coordination effort undertaken so far among Member States on rules for lending services by non-deposit-taking institutions and the application of MiFID rules to investment-based crowdfunding platforms remains insufficiently uniform to enable cross-border activity. Further action taken by the Member States can only remedy their own internal market, which would not be sufficient to reduce the negative impact on the functioning of the Single Market.

Therefore, the objective of easing access to seed and early stage financing for innovative companies, start-ups and other unlisted firms as well as the provision of a clear, uniform and transparent regulatory environment for investors wishing to support these projects cannot be reached through individual action by the Member States.

- **Proportionality**

Under the principle of proportionality, the content and form of EU action should not exceed what is necessary to achieve the objectives of the Treaties.

Crowdfunding is about smaller capital raising activities for new start-ups or small scale up businesses. However, in some Member States, providers would have to apply the existing sectorial legislation, such as MiFID II and MiFIR. Those rules might be disproportionate for small activities. Furthermore, these rules may not be fit for purpose. Crowdfunding encompasses many different business models, which might not all be addressed, and could therefore have unpredictable regulatory spill-over effects. As a result, it may not be possible to capture, in a proportionate way, a growing number of platforms mixing different business models, which may involve lending and investment-based dealings as well as the use of newly emerging, undefined instruments.

For these reasons, the exemption of crowdfunding service providers from MiFID obligations, and the subsequent exclusive application of the Regulation (EU) XXXX/XX over these persons, would result in a more proportionate regulatory environment for crowdfunding service providers.

Moreover, this would determine a rather swift and sizeable reduction of market entry costs (regulatory and supervisory costs) for crowdfunding platforms operating (or intending to operate) cross-border, since they would only be authorised once, and would benefit from the reduction of regulatory uncertainty.

- **Choice of the instrument**

Article 53(1) of TFEU allows for the adoption of acts in the form of a directive or regulation. Amendment of the scope of Directive 2014/65/EU can be achieved, in the most straightforward and legally coherent manner, by virtue of a Directive of the European Parliament and of the Council amending Directive 2014/65/EU.

3. IMPACT ASSESSMENTS

- **Impact assessment**

The main economic and social impacts have been thoroughly examined in the IA accompanying the proposal for a Regulation of the European Parliament and of the Council on European crowdfunding service providers.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

There is no relevant impact on fundamental rights from this initiative.

4. BUDGETARY IMPLICATIONS

This proposal does not have implications for the Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Not applicable.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 is the only substantial provision of the proposal. It modifies the scope of Directive 2014/65/EU by adding crowdfunding service providers authorised under the Regulation (EU) XXX/XXXX [Regulation on European crowdfunding service providers] to the list of exempted entities to which the scope of Directive 2014/65/EU does not apply. Article 2 requires Member States to ensure transposition of the provisions of the Directive. Article 3 sets out the date of the entry into force of the amended Directive 2004/65/EU.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2014/65/EU on markets in financial instruments

(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) 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 Bank²,

Having regard to the opinion of the European Economic and Social Committee³,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Crowdfunding provides alternative access to finance for businesses, thereby contributing to the objectives of the Capital Markets Union (CMU).
- (2) Under Regulation (EU) XXX/XXX of the European Parliament and of the Council⁴ legal persons can choose to apply to the European Securities and Markets Authority for an authorisation as crowdfunding service providers.
- (3) Regulation (EU) XXX/XXXX [Regulation on European crowdfunding service providers] provides for uniform, proportionate and directly applicable requirements for authorisation and supervision of crowdfunding service providers and centralises supervision of those crowdfunding service providers by the European Securities and Markets Authority.
- (4) To provide legal certainty as to the scope of persons and activities falling within the respective scope of Regulation (EU) XXX/XXXX and of Directive 2014/65/EU of the European Parliament and of the Council⁵, and in order to avoid that the same activity is subject to different authorisations within the Union, legal persons authorised as crowdfunding service providers under Regulation (EU) XXX/XXXX [Regulation on European crowdfunding service providers] should be excluded from the scope of Directive 2014/65/EU.
- (5) As the amendment provided for in this Directive is directly linked to Regulation (EU) XXX/XXXX [Regulation on crowdfunding services in the European Union], the date from

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

⁴ Regulation (EU) XXX/XXX of the European Parliament and of the Council on European crowdfunding service providers (OJ L [...], [...], p. [...]).

⁵ 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).

which Member States are to apply the national measures transposing that amendment should be deferred in order to coincide with the date of application laid down in that Regulation,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

In Article 2(1) of Directive 2014/65/EU, the following point (p) is added:

“(p) crowdfunding service providers as defined in Article 3(1)(c) of Regulation (EU) XXX/XXX of the European Parliament and of the Council*.”

* Regulation (EU) XXX/XXX of the European Parliament and of the Council on European crowdfunding service providers (OJ L [...], [...], p. [...]).”

Article 2

1. Member States shall adopt and publish, by [Publications Office: 6 months from entry into force of the Crowdfunding Regulation], the laws, regulations and administrative provisions necessary to comply with this Directive.

Members States shall apply those measures from [Publications Office: date of entry into application of the Crowdfunding Regulation].

2. Member States shall communicate to the Commission and to ESMA the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the twentieth 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