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NOTE

From: Presidency

To: Permanent Representatives Committee

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)

- Confirmation of the final compromise text with a view to agreement

DIRECTIVE (EU) 2019/...
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

amending Directive 2014/65/EU on markets in financial instruments; Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) and Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing

(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 and requires post-trade data reporting services to be authorised as approved publication arrangements (APAs). In addition, 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. Directive 2014/65/EU also formalises transaction reporting channels to the competent authorities by requiring third parties that report on behalf of firms to be authorised as approved reporting mechanisms (ARMs).

- (2) The quality of trading data and of the processing and provision of those data, including cross-border data processing and 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 data provide users with an overview of trading activity across Union financial markets and competent authorities with accurate and comprehensive information on relevant transactions. Given the cross-border dimension of data handling, the benefits of pooling data-related competences including potential economies of scale - and the adverse impact of potential divergences in supervisory practices on both the quality of trading data and on the tasks of data reporting service providers, it is therefore appropriate to transfer the authorisation of, and the supervision of data reporting service providers, as well as data gathering powers, from competent authorities to ESMA except for those providers that benefit from a derogation under Regulation (EU) 2014/600.
- (3) To achieve a consistent transfer of such powers it is appropriate to delete respective provisions pertaining to the operational requirements for DRSPs and competences of competent authorities with respect to data reporting service 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).

- (4) The transfer of the authorisation and supervision of data reporting service providers to ESMA is congruent with ESMA's tasks. More specifically, the conferral of data gathering powers, authorisation and oversight from competent authorities to ESMA is instrumental to other tasks ESMA is performing under Regulation (EU) No 600/2014, such as market monitoring, ESMA temporary intervention powers and position management powers, as well as ensuring consistent compliance with pre-trade and post-trade transparency requirements. Directive 2014/65/EU should therefore be amended accordingly.
- (5) Directive 2009/138/EC of the European Parliament and of the Council⁴ (Solvency II) provides that in accordance with the risk-oriented approach to the Solvency Capital Requirement, it is possible, in specific circumstances, for insurance and reinsurance undertakings and groups to use internal models for the calculation of that requirement, instead of using the standard formula.
- (5-a) Directive 2009/138/EC of the European Parliament and of the Council (Solvency II) provides for a country component of the volatility adjustment. In order to ensure that this country component effectively mitigates exaggerations of bond spreads in the relevant country, an appropriate threshold for the risk-corrected country spread should be set for the activation of the country component.

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).

(5a) 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 foreseen where envisaged cross-border insurance activities are significant, in terms of the annual gross written premium subscribed in the host member state as compared to the total annual gross written premiums of the insurance company, in terms of the impact on the policyholder protection in the host Member State and in respect to the impact of the branch or activity of the respective insurance company, on the market of the host Member State in terms of freedom to provide services. 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.

- (5b) Where cross-border insurance activities are significant with respect to the market of the host Member State and require close collaboration between home and host supervisors, especially where an insurer may risk being in financial difficulties and detriment to policyholders and third parties could result, EIOPA should organise collaboration platforms.
- (10) To take account of the replacement of the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) by EIOPA, references in Solvency II to CEIOPS should be deleted.
- (11) Directive 2009/138/EC should therefore be amended accordingly.
- (11a) Following changes to Regulation (EU) No 1093/2010 of the European Parliament and of the Council, the European Banking Authority will have a new role in the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing, and subsequent changes will need to be made to Directive (EU) 2015/849.

HAVE ADOPTED THIS DIRECTIVE:

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 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 deleted;

(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 or market operator 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 or a market operator, 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) points (52), (53), (54) and (55)(c) are deleted;

(2) in Article 22, the following paragraph 1a is added:

'Member States shall ensure that the competent authorities where they are in charge of authorising and supervising the activities of APAs and ARMs, monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in Regulation EU 600/2014. Member States shall ensure that the appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of investment firms with those obligations.'

(3) Title V is deleted;

(4) Article 70 is amended as follows:

(a) in point (a) of paragraph 3, sub points (xxxvii) to (xxxx) are deleted;

(b) in paragraph 4, point (a) is replaced by the following:

'(a) Article 5 or Article 6(2) or Articles 34, 35, 39 or 44 of this Directive; or';

(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, or a regulated market, 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, 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 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), 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) 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 deleted;

(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 is deleted.

Article 2
Amendments to Directive 2009/138/EC

Directive 2009/138/EC is amended as follows:

(-1) In paragraph 4 of Article 77d, the first sentence is replaced by the following:

‘For each relevant country, the volatility adjustment to the risk-free interest rates referred to in paragraph 3 for the currency of that country shall, before application of the 65 % factor, be increased by the difference between the risk-corrected country spread and twice the risk-corrected currency spread, whenever that difference is positive and the risk-corrected country spread is higher than 85 basis points.’

(1) In Article 112(3a), the following paragraph is added:

‘In accordance with Article 35 (1) of Regulation (EU) 1094/2010 supervisory authorities shall inform EIOPA on the applications to use or change an internal model. Upon request from one or more supervisory authorities concerned, EIOPA may provide technical assistance to the supervisory authority or authorities, who requested the assistance, in the decision on the application in accordance with point (b) of Article 8(1) of Regulation (EU) 1094/2010.’

(1a) 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 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 Article 152a(2) of deteriorating financial conditions on other emerging risks, or

(iii) where the matter has been referred to EIOPA under Article 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.’
- (2) Article 231 is amended as follows:
- (a) the third subparagraph of paragraph 1 is amended as follows:

‘The group supervisor shall inform the other members of the college of supervisors, including EIOPA, of the receipt of the application and forward the complete application, including the documentation submitted by the undertaking, to college members, without delay. Upon request from one or more supervisory authorities concerned, EIOPA may provide technical assistance to the supervisory authority or authorities, who requested the assistance, in the decision on the application in accordance with point (b) of Article 8(1) of Regulation 1094/2010.’

(c) paragraph 3 is amended as follows:

(ii) 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.';

- (4) In Article 237, paragraph 3, the first sentence of the third subparagraph is replaced by the following:

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

- (5) In Article 248, the third subparagraph of paragraph 4 is deleted.

Article 2a

Amendments to Directive (EU) 2015/849

Directive (EU) 2015/849 is amended as follows:

- (1) Article 6 is amended as follows:
- (a) paragraph 3 is replaced by the following:

'3. The Commission shall make the report referred to in paragraph 1 available to Member States and obliged entities in order to assist them to identify, understand, manage and mitigate the risk of money-laundering and terrorist financing, and to allow other stakeholders, including national legislators, the European Parliament, the European Banking Authority ('EBA'), and representatives from Financial Intelligence Units, to better understand the risks. Reports shall be made public at the latest six months after having been made available to Member States, except for the elements of the reports which contain classified information.'

(b) in paragraph 5 the second sentence is replaced by the following:

'Thereafter, EBA shall issue an opinion every two years.'

(2) Article 7 is amended as follows:

(a) in paragraph 2 the second sentence is replaced by the following:

'The identity of that authority or the description of the mechanism shall be notified to the Commission, EBA, and other Member States.'

(b) paragraph 5 the first sentence is replaced by the following:

'5. Member States shall make the results of their risk assessments, including their updates, available to the Commission, EBA and the other Member States. '

(3) in Article 17 the first sentence is replaced by the following:

'By 26 June 2017, the ESAs, and thereafter EBA shall issue guidelines addressed to competent authorities and the credit institutions and financial institutions in accordance with Article 16 of Regulation (EU) No 1093/2010 on the risk factors to be taken into consideration and the measures to be taken in situations where simplified customer due diligence measures are appropriate. '

(4) in paragraph 4 of Article 18, the first sentence is replaced by the following:

'4. By 26 June 2017, the ESAs, and thereafter EBA shall issue guidelines addressed to competent authorities and the credit institutions and financial institutions, in accordance with Article 16 of Regulation (EU) No 1093/2010 on the risk factors to be taken into consideration and the measures to be taken in situations where enhanced customer due diligence measures are appropriate. '

(5) in Article 41, paragraph 1 is replaced by the following:

'1. The processing of personal data under this Directive is subject to Directive 95/46/EC, as transposed into national law. Personal data that is processed pursuant to this Directive by the Commission or by EBA is subject to Regulation (EC) No 45/2001.'

(6) Article 45 is amended as follows:

(a) paragraph 4 is replaced by the following:

'4. The Member States and EBA shall inform each other of instances in which the law of a third country does not permit the implementation of the policies and procedures required under paragraph 1. In such cases, coordinated actions may be taken to pursue a solution. In the assessing which third countries do not permit the implementation of the policies and procedures required under paragraph 1, Member States and EBA shall take into account any legal constraints that may hinder proper implementation of those policies and procedures, including secrecy, data protection and other constraints limiting the exchange of information that may be relevant for that purpose.'

(b) paragraph 6 is replaced by the following:

- '6. EBA shall develop draft regulatory technical standards specifying the type of additional measures referred to in paragraph 5 and the minimum action to be taken by credit institutions and financial institutions where a third country's law does not permit the implementation of the measures required under paragraphs 1 and 3.

EBA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 26 December 2016.'

(c) paragraph 10 is replaced by the following:

- '10. EBA shall develop draft regulatory technical standards on the criteria for determining the circumstances in which the appointment of a central contact point pursuant to paragraph 9 is appropriate, and what the functions of the central contact points should be.

EBA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 26 June 2017.'

(7) Article 48 is amended as follows:

(a) in the second subparagraph of paragraph 1a the final sentence is replaced by the following:

'Financial supervisory authorities of the Member States shall also serve as a contact point for EBA.'

(b) in paragraph 10 the first sentence is replaced by the following:

'10. By 26 June 2017, the ESAs and thereafter EBA shall issue guidelines addressed to competent authorities in accordance with Article 16 of Regulation (EU) No 1093/2010, on the characteristics of a risk-based approach to supervision and the steps to be taken when conducting supervision on a risk-based basis.'

(8) in Section 3 the title of Subsection II is replaced by the following:

'Cooperation with EBA';

(9) Article 50 is replaced by the following:

'The competent authorities shall provide EBA with all the information necessary to allow it to carry out its duties under this Directive.'

(10) Article 62 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. Member States shall ensure that their competent authorities inform EBA of all administrative sanctions and measures imposed in accordance with Articles 58 and 59 on credit institutions and financial institutions, including of any appeal in relation thereto and the outcome thereof.'

(b) paragraph 3 is replaced by the following:

'3. EBA shall maintain a website with links to each competent authority's publication of administrative sanctions and measures imposed in accordance with Article 60 on credit institutions and financial institutions, and shall show the time period for which each Member State publishes administrative sanctions and measures.'

Article 3 Transposition

1. Member States shall adopt and publish, by [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.

1a. Member States shall adopt and publish, no later than [6 months as of entry into force], the laws, regulations and administrative provisions necessary to comply with Article 2 point (-1) of 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 1 January 2022, with respect to Articles 2 and 2a from [18 months as of entry into force]. Member States shall apply the measures with respect to Article 2 point (-1) from [6 months and one day of entry into force of this Directive] at the latest.

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

For the Council

The President

The President
