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NOTE

From: General Secretariat of the Council
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
- Mandate for negotiations with the European Parliament

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL DIRECTIVE
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive
2014/65/EU on markets in financial instruments and amending Directive 2013/36/EU on
access to the activity of credit institutions and the prudential supervision of credit institutions
and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC
and 2006/49/EC**

(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 Economic and Social Committee¹,

Having regard to the opinion of the European Central Bank²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

(1) In its 2020 CMU Action Plan³, the Commission announced its intention to table a legislative proposal to create a centralised data base which was meant to provide a comprehensive view on prices and volume of equity and equity-like financial instruments traded throughout the Union across a multitude of trading venues ('consolidated tape'). On 2 December 2020, in its conclusion on the Commission's CMU Action Plan⁴, the Council encouraged the Commission to stimulate more investment activity inside the Union by enhancing data availability and transparency by further assessing how to tackle the obstacles to establishing a consolidated tape in the Union.

(2) In its roadmap on 'The European economic and financial system: fostering openness, strength and resilience' of 19 January 2021⁵, the Commission confirmed its intention to improve, simplify and further harmonise capital markets' transparency, as part of the review of Directive 2014/65/EU of the European Parliament and of the Council⁶ and of Regulation (EU) No 600/2014 the European Parliament and of the Council⁷. As part of efforts to strengthen the international role of the Euro, the Commission also announced that such reform would include the design and implementation of a consolidated tape, in particular for corporate bond issuances to increase the liquidity of secondary trading in euro-denominated debt instruments.

³ COM/2020/590 final.

⁴ Council Conclusions on the Commission's CMU Action Plan, 12898/1 of /20 REV 1 EF 286 ECOFIN 1023: <https://data.consilium.europa.eu/doc/document/ST-12898-2020-REV-1/en/pdf>;

⁵ COM/2021/32 final.

⁶ 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).

⁷ 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).

(3) Regulation (EU) No 600/2014 was amended by Regulation (EU) XX/XXXX of the European Parliament and of the Council⁸ removing the main obstacles that have prevented the emergence of a consolidated tape. That Regulation therefore introduced mandatory contributions of market data to the consolidated tape provider and enhanced the data quality including harmonizing the synchronisation of the business clock. In addition, that Regulation reduced the recourse to possibilities to waive pre-trade transparency for venues and systematic internalisers. Furthermore, it introduced enhancements to the trading obligations. Since Directive 2014/65 also contains provisions related to consolidated tape and transparency, the amendments to Regulation (EU) No 600/2014 should be reflected in Directive 2014/65/EU.

⁸ Regulation (EU) XX/XXXX of the European Parliament and of the Council amending Regulation (EU) No 600/2014 as regards enhancing market data transparency, removing obstacles to the emergence of a consolidated tape, optimising the trading obligations and prohibiting receiving payments for forwarding client orders (COM 727)

(4) Article 1(7) of Directive 2014/65/EU requires operators of systems in which multiple third-party buying and selling trading interests in financial instruments are able to interact ('multilateral systems') to operate in accordance with the requirements concerning regulated markets ('RMs'), multilateral trading facilities ('MTFs'), or organised trading facilities ('OTFs'). However, market practice, as evidenced by the European Securities and Markets Authority ('ESMA') in its final report on the functioning of the organised trading facility⁹ has shown that the principle of multilateral trading activity requiring a license has not been upheld in the Union, which has led to an uneven playing field between licensed and unlicensed multilateral systems. In addition, that situation has created legal uncertainty for certain market participants as to the regulatory expectations for such multilateral systems. To provide market participants with clarity, safeguard a level-playing field, improve the internal market functioning and ensure a uniform application of the requirement that hybrid systems can only perform multilateral trading activities where they are licensed as a regulated market, a multilateral trading facility ('MTF') or an organised trading facility ('OTF'), the content of Article 1(7) of Directive 2014/65/EU should be moved from Directive 2014/65/EU to Regulation (EU) No 600/2014.

⁹ https://www.esma.europa.eu/sites/default/files/esma70-156-4225_mifid_ii_final_report_on_functioning_of_otf.pdf.

(5) Article 2(1), point (d), point (ii), of Directive 2014/65/EU, exempts persons dealing on own account from the requirement to be licensed as an investment firm or credit institution, unless those persons are members of or participants in a regulated market or an MTF or have direct electronic access to a trading venue. Non-financial entities that are members of or participants in a regulated market or an MTF to execute transactions for the purpose of liquidity management or for the purpose of reducing risks directly relating to the commercial activity or treasury financing activity should not be required to be licensed as an investment firm as such a requirement would be disproportionate. Regarding direct electronic access to a trading venue, Articles 17(5) and 48(7) of Directive 2014/65/EU require that providers of direct electronic access are licensed investment firms or credit institutions. Investment firms or credit institutions that do provide direct electronic access are responsible for ensuring that their clients comply with the requirements laid down in Articles 17(5) and 48(7) of Directive 2014/65/EU. That gatekeeper function is effective and makes it unnecessary for clients of the direct electronic access provider, including persons dealing on own account, to become subject to Directive 2014/65/EU. In addition, removing that requirement would contribute to a level playing field between third country persons accessing EU venues via direct electronic access, for which Directive 2014/65/EU does not require a license, and persons established in the Union.

(6) Due to the removal of multilateral systems from the scope of Article 1(7) of Directive 2014/65/EU and into Regulation (EU) No 600/2014, it is equally logic to move the corresponding definition of ‘multilateral system’ into that Regulation.

(7) Article 27(3) of Directive 2014/65/EU contains the requirement for execution platforms to publish a list of details relating to best execution. Factual evidence and feedback from stakeholders has shown that those reports are rarely read and do not enable investors or any users of those reports to make meaningful comparisons based on the information provided in those reports. As a consequence, Directive (EU) 2021/338 of the European Parliament and of the Council²² suspended the reporting requirement for two years in order for that requirement to be reviewed. Regulation (EU) XX/XXXX¹⁰ has amended Regulation (EU) No 600/2014 to remove the obstacles that have prevented the emergence of a consolidated tape. Among the data that the consolidated tape is expected to provide is post-trade information regarding all transactions in financial instruments. That information may be used for documenting best execution. The reporting requirement laid down in Article 27(3) of Directive 2014/65/EU will therefore no longer be relevant and should be deleted.

²² Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

¹⁰ COM 727

(8) The correct functioning of market data consolidation via a consolidated tape depends on the quality of the data the consolidated tape provider receives. Regulation (EU) No 600/2014 sets out requirements for the quality of data that contributors to the consolidated tape should adhere to. In order to ensure that investment firms and market operators operating an MTF or an OTF, and RMs, effectively meet those requirements, Member States should require that those investment firms and market operators have the necessary arrangements in place to do so.

(9) The receipt of high quality data is of the utmost importance for the functioning of the consolidated tape and the internal market. That includes the need for all market data contributors and the consolidated tape provider to timestamp their data in a synchronized manner and thus to synchronise their business clocks. Regulation (EU) XX/XXX¹¹ has therefore amended Regulation (EU) No 600/2014 to extend that requirement, which under Directive 2014/65/EU only applied to trading venues and their members, to systematic internalisers, approved publication arrangements and consolidated tape providers. Since that requirement is now laid down in Regulation (EU) No 600/2014, it can be removed from Directive 2014/65/EU.

¹¹ COM 727

(9a) Investment firms trading on own account are crucial to the well-functioning of the capital market as they provide liquidity to the market even during market stress conditions when other liquidity providers usually leave the market as it has happened during COVID 19 liquidity shortage on trading venues. To ensure legal certainty for these liquidity providers, there should be clarity about calculation of the threshold from which they should be required to apply for a credit institution license and which assets should be included in the calculation.

(10) Within the framework regulating the Union's markets in financial instruments, many substantive requirements laid down in Regulation (EU) No 600/2014 are supervised and sanctioned at national level and in accordance with Articles 69 and 70 of Directive 2014/65/EU. Regulation (EU) XX/XXXX¹² has amended Regulation (EU) No 600/2014 to include new rules on the volume cap mechanism, on mandatory contributions of core market data to the consolidated tape, on data quality standards to which those contributions are subject. As the supervision of the relevant entities lies with national authorities, those new substantive requirements should be added to the list in Directive 2014/65/EU of provisions for which the Member States should provide sanctions at national level.

¹² COM 727

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2014/65/EU

Directive 2014/65/EU is amended as follows:

- (1) in Article 1, paragraph 7, is deleted;
- (2) in Article 2(1), point (d), point (ii) is replaced by the following:
'(ii) are members of or participants in a regulated market or an MTF, except for non-financial entities who execute transactions on a trading venue which are part of liquidity management or which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of those non-financial entities or their groups;';
- (3) Article 4(1) is amended as follows:
 - (a) point (19) is replaced by the following:
'(19) multilateral system' means a multilateral system as defined in Article 2(1), point (11), of Regulation (EU) No 600/2014;';
 - (b) point (20) is replaced by the following:
'(20) 'systematic internaliser' means an investment firm which, on an organised, frequent and systematic basis, deals on own account in equity instruments by executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system or which opts into the status of systematic internaliser. ';

(3a) in Article 16, the following paragraph is inserted:

‘10a. An investment firm that is a market data contributor as referred to in Article 2(1)(34a) of Regulation (EU) No 600/2014 shall have arrangements in place to ensure they meet the data quality standards as set out in Article 22b of that Regulation.’;

(4) Article 27 is amended as follows:

(a) paragraph 3 is deleted;

(b) in paragraph 10, point (a) is deleted;

(5) in Article 31(1), the following sentence is added:

‘Investment firms and market operators operating an MTF or an OTF shall have arrangements in place to ensure they meet the data quality standards as set out in Article 22b of Regulation (EU) No 600/2014.’;

(6) in Article 47(1), the following point (g) is added:

‘(g) to have arrangements in place to ensure they meet the data quality standards as set out in Article 22b of Regulation (EU) No 600/2014.’;

(6a) Article 49(2) is amended as follows:

(a) in subparagraph (b), the period is replaced by a semicolon;

(b) the following subparagraph (c) is added:

‘(c) for shares with a non-EEA ISIN, or shares referred to in Article 23(1)(a), for which the venue that is the most relevant market in terms of liquidity is in a third country, have the same tick size that applies on that venue.’;

- (7) Article 50 is deleted;
- (8) in Article 70(3), point (a), point (xxx) is deleted;
- (9) in Article 70(3), point (b), the following points (iia), (xvia), (xvib), (xvic) and (xxviia) are inserted:
- ‘(iia) Article 5;’;
- ‘(xvia) Article 22a;’;
- ‘(xvib) Article 22b;’;
- ‘(xvic) Article 22c;’;
- ‘(xxviia) Article 39a;’;

Article 2

Amendments to Directive (EU) 2013/36/EU

Directive 2013/36/EU is amended as follows:

In Article 8a, paragraph 1 point (b) is replaced by the following:

‘(b) the average of monthly total assets calculated over a period of 12 consecutive months is less than EUR 30 billion, and the undertaking is part of a group in which the total value of the consolidated assets of all undertakings in the group that are established in the EU and that individually have total assets of less than EUR 30 billion and that carry out any of the activities referred to in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU is equal to or exceeds EUR 30 billion, both calculated as an average over a period of 12 consecutive months.’

Article 3

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [18 months after the date of entry into force of this Directive] at the latest.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

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
