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THE EUROPEAN UNION**

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NOTE

from : Presidency
to Permanent Representatives Committee (part 2)
Subject : Revised rules for markets in financial instruments (MiFID/MiFIR)
a) Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast) (MiFID)
b) Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (MiFIR)
- General approach

I. INTRODUCTION

1. The Commission transmitted the above mentioned proposals to amend the current MiFID to the Council on 20 October 2011. The objective of this legislative package is, inter alia, to further the integration, competitiveness, and efficiency of EU financial markets by responding to the challenges created by developments in financial markets, and dealing with the weaknesses the financial crisis has exposed.

2. The legislative package amending MiFID has two parts:
 - A Regulation sets out requirements in relation to the disclosure of trade transparency data to the public and transaction data to competent authorities, removing barriers to non-discriminatory access to clearing facilities, the mandatory trading of derivatives on organised venues, specific supervisory actions regarding financial instruments and positions in derivatives.
 - A Directive amends specific requirements regarding the provision of investment services, the scope of exemptions from the current Directive, organisational and conduct of business requirements for investment firms, organisational requirements for trading venues, the authorisation and ongoing obligations applicable to providers of data services, powers available to competent authorities, sanctions, and rules applicable to third-country firms operating via a branch.
3. Intensive negotiations have been going on during the PL, DK, CY and IE Presidencies aiming at an agreement on the Council's general approach, which would allow the Presidency to start negotiations with the European Parliament with a view to reaching a first reading agreement. The EP ECON Committee voted on its reports on 26 September 2012, and the EP position was further confirmed by the Plenary on 26 October 2012.
4. During the discussions at the Working Party on Financial Services the Presidencies have tabled several overall compromise proposals and other texts in order to make progress on the file. The latest Presidency compromise proposals are set out in docs. 7743/13 REV 2 (MiFIR) and 7744/13 REV 2 (MiFID).

II. STATE OF PLAY

5. While significant progress has been made towards achieving agreement on a Council general approach, during the latest meeting of the Working Party on Financial Services (Attachés) on 11 April 2013, there was not yet a qualified majority supporting an overall compromise in particular because of the key outstanding issue of access to trading venues and central counterparties (CCP) (MiFIR, Articles 28-30).

6. Access (Articles 28-30 MiFIR)

To avoid any discriminatory practices and to remove various commercial barriers that can be used to prevent competition in the clearing of financial instruments, the Commission Proposal provided in the Regulation (MiFIR) that CCPs should accept to clear transactions executed in different trading venues, to the extent that those venues comply with the operational and technical requirements by the CCP. Access should only be denied if certain access criteria are not met (Article 28 MiFIR).

Trading venues should also be required to provide access including data feeds on a transparent and non-discriminatory basis to CCPs that wish to clear transactions executed on the trading venue (Article 29 MiFIR).

In addition, access to licences of, and information relating to, benchmarks that are used to determine the value of financial instruments should be provided to CCPs and trading venues (Article 30 MiFIR).

The non-discriminatory clearing access for financial instruments has proved to be a difficult issue throughout the negotiations on MiFIR, with delegations being split into two groups. One group is in favor of maintaining the provisions of Articles 28 and 29, as proposed by the Commission, for the reasons mentioned above, whereas the other group is in favor of deleting these Articles as they believe that non-discriminatory access will lead to fragmentation at the trading level and to reduction in liquidity.

Furthermore, some delegations have doubts on the relationship between Article 30 (non-discriminatory access and obligation to licence benchmarks) and intellectual property rights whereas other delegations consider that Article 30 is necessary as it tackles the issue of monopolies and thus enhances competition.

The Presidency has proposed a compromise solution in Articles 28-30 of MiFIR (doc. 7743/13 REV 2), which is based on a non-discriminatory access to CCPs, trading venues and licence benchmarks, providing at the same time necessary safeguards related to orderly functioning of the markets and liquidity fragmentation. This solution is acceptable to several delegations, but there are, however, a number of delegations which have outstanding concerns, and to whom the deletion of Articles 28-30 would be the preferred option.

7. In these circumstances, the Presidency considers that its compromise solution is the only viable option to address this issue. However, the Presidency acknowledges that there are still serious concerns. If these concerns are not resolved the Presidency suggests that at the time of the agreement on the general approach, a statement as set out in the Annex would be entered into the minutes of Coreper.
8. Apart from the abovementioned issue there are certain other issues that require further work. The Presidency considers that this work can be completed at Working Party level, if an agreement on Articles 28-30 in MiFIR can be achieved at Coreper.

III. CONCLUSION

9. The Presidency therefore suggests that the Permanent Representatives Committee:
- agrees on Articles 28-30 in MiFIR as set out in doc. 7743/13 REV 2;
 - in the event that agreement is not reached on articles 28-30 MiFIR, agrees on the content of the statement set out in Annex, which is to be entered into the minutes of Coreper at the time of final agreement on the general approach, and
 - invites the Working Party on Financial Services (Attachés) to finalise the the text, and submit the general approach for agreement by Coreper in the very near future .
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Statement by the Council

The Council notes the divergent positions of Member States on certain aspects of the Presidency's proposed general approach, in particular as regards to clearing access provisions (articles 28-30).

It invites the Presidency to start negotiations with the European Parliament on the basis of this general approach, taking into account the need for further work to try to resolve outstanding issues.
