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REPORT

from : Presidency
to : Permanent Representatives Committee

No. Cion prop.: 13840/10 EF 115 ECOFIN 539 CODEC 870

Subject : Proposal for a Regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps
- State of play

I. INTRODUCTION

1. On 20 September 2010 the Commission transmitted to the Council its proposal for a Regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps (doc. 13840/10 EFR 115 ECOFIN 539 CODEC 870).
2. The proposal has been examined by the Working Party on Financial Services at several meetings during the Belgian and Hungarian Presidencies.
3. The European Economic and Social Committee adopted its opinion on the proposal on 20 January 2011. The opinion of the European Central Bank is still pending. The ECON Committee of the European Parliament is expected to adopt its report on 7 March 2011.

4. In these circumstances the Presidency aims at an agreement on the Council's general approach on the proposal at the Council (Ecofin) on 15 March in order to allow the Presidency to start negotiations with the EP as soon as possible with a view to a first reading agreement.

II. STATE OF PLAY

5. Following the latest meeting of the Working Party on 24-25 February, there is now a large measure of agreement on the Presidency compromise as set out in doc. 6823/1/11 EF 18 ECOFIN 82 CODEC 272 REV 1.
6. There are nevertheless certain key issues, which need to be addressed at political level.
 - a) Restrictions on uncovered short sales and the issue of sovereign debt (Article 12)

A number of delegations – do not want to apply the restrictions on uncovered short sales to sovereign debt. These delegations either want to delete sovereign debt from the scope of Article 12, or at least to have softer location (availability) requirements and a carve-out of repos for uncovered short sale. Other delegations have clearly stated that the inclusion of sovereign debt in the scope of Article 12 is of utmost importance for them.

In its compromise proposal the Presidency has tried to find a balance between the views of delegations by maintaining the sovereign debt under the scope of Article 12, but introducing at the same time less stringent rules for sovereign debt as well as for the location (availability) requirements of shares and sovereign debt.

b) ESMA intervention powers in exceptional situations (Article 24)

A large number of delegations can agree to the Commission proposal whereby the intervention powers of ESMA would be based on Article 9(5) (Tasks related to consumer protection and financial activities) of the ESMA Regulation, whereas a group of delegations prefers Article 18 (Action in emergency situations) of the ESMA Regulation, which would require a Council decision before ESMA would be empowered to act.

This issue is related to the overall approach to the powers to be given to ESMA, some delegations calling for very strong powers to ESMA, some other delegations considering that powers of ESMA should be more strictly defined.

A specific issue in this context is the role of ESMA in intervening on the trade of sovereign debt instruments. A large majority of delegations agrees that ESMA should not be able to intervene until it has received the consent of the relevant national competent authority, at least one delegation being against any role for ESMA with regard to sovereign debt. Some delegations would, however, give ESMA the right to intervene even without the consent of competent authorities, as also proposed by the Commission.

The Presidency has maintained Article 9(5) of the ESMA Regulation as the basis for ESMA intervention powers, but has at the same time made the possibility for ESMA to act in trade of sovereign debt instruments dependant on the consent of national competent authorities. The compromise proposal of the Presidency is in line with the views expressed by Council Legal Service in its opinion (doc. 6941/11 JUR 70 EF 20 ECOFIN 90 CODEC 295).

7. There are also some other issues where the views of delegations are still divergent on certain details, but taken into account the fact that these views go to opposite directions, the Presidency finds that the current compromise text provides best way forward for an overall compromise.

III. CONCLUSION

8. Against this background the Permanent Representatives Committee is invited to:
 - resolve the outstanding issues and agree on the general approach with regard to the proposed Regulation;
 - recommend to the Council to confirm the agreement;
 - recommend to the Council to invite the Presidency to start negotiations with the European Parliament on the basis of this general approach with a view to reaching an agreement at first reading.
