



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from: Presidency

to: Coreper (part 2)

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Subject: 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

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**I. INTRODUCTION**

1. The Commission transmitted the abovementioned 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 and CY 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 Presidency aims at an agreement on the Council's general approach on the proposals at the Council (Ecofin) on 4 December 2012. 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. 15275/12 REV 3 (MiFID) and 15274/12 REV 3 (MiFIR).

## II. STATE OF PLAY

5. Following the latest meeting of the Working Party on Financial Services (Attachés) on 9 November 2012 there was not yet a qualified majority supporting an overall compromise mainly because of the following key outstanding issues:

a) Standardised derivatives and clearing obligation (MiFIR, Articles 28-30)

In order 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 provides in the Regulation (MiFIR) that Central Counterparties (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 licenses 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, delegations being split into two groups. One group is in favor of maintaining the provisions of Articles 28 and 29 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.

The Presidency has proposed an alternative option in which the provisions of Articles 28-29 of MiFIR in relation to non-discriminatory clearing access for financial instruments are to a large extent aligned with the relevant provisions of EMIR.

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

b) Organised Trading Facility (OTF, MiFID, Articles 18 and 20)

The Commission has proposed a new trading venue category, the Organised Trading Facility (OTF), in order to make European markets more transparent and to level the playing field between various venues offering trading services that are very similar to each other.

Delegations have been largely divided in two groups regarding the OTF proposal. One side is in favour of the introduction of OTF, but would like to make the OTF rules less strict. The other side would like to make the OTF rules stricter or perhaps even remove this new trading venue category and ensure that organised trading can only take place on the existing types of execution venues, Regulated Markets (RM) and Multilateral Trading Facilities (MTF). These delegations have particular concerns on the possibility to execute clients' orders in an OTF against the proprietary capital of the investment firm or market operator.

The overall aim of the Presidency is to ensure that as much as possible of the trading will in the future take place on open, transparent and regulated platforms, i.e. RM, MTF and OTF. For this purpose the Presidency has proposed to keep the new OTF category in the text, and also allow the trading against proprietary capital, but under very strict conditions. Furthermore, the Presidency has limited the OTF category only to non-equity instruments and thus, it introduced the definition of OTC trading in order to ensure that trading, especially on equity instruments, will take place on transparent and regulated platforms.

c) Transparency for trading venues (MiFIR, Articles 3-10)

The proposals aim to improve the transparency of trading activities in equity markets and to introduce a new trade transparency regime for non-equity markets. Pre and post trade transparency requirements are extended to all instruments and all trading venues and waivers to these requirements will only be allowed under prescribed circumstances.

There are four types of pre-trade transparency waivers currently allowed for equities markets: (1) large in scale waiver, (2) reference price waiver, (3) negotiated price waiver, and (4) order management system waiver. These waivers have been defined by the Commission in existing implementing Regulations but the Commission has now proposed to deal with issue in the Regulation (MiFIR) itself. The Commission and several delegations would, however, like to maintain only the so-called large in scale waiver, whereas a group of delegations would like to keep also the others, in particular the so-called reference price waiver and the so-called negotiated transactions waiver.

The Presidency has proposed to maintain all the existing four waivers, but to narrow down their scope.

Delegations would also like to limit the pre-trade transparency waivers for non-equity markets. The Presidency has proposed to allow for waivers that are justified and narrowed down.

### **III. CONCLUSION**

6. Against this background the Permanent Representatives Committee is invited to:
- resolve the outstanding issues or provide the necessary guidance for further work at the Working Party level, and
  - to revert to the files at its meeting on 28 November in view of preparing the ECOFIN on 4 December.
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