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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)

- Approval of the final compromise text

The following statements are to be entered into the minutes of Coreper:

Déclaration de la France

Transparence pour les marchés financiers autres que les marchés d'actions (article 8 du règlement)

La France regrette que les propositions ambitieuses formulées par la Commission européenne pour renforcer la transparence des marchés financiers autres que les marchés d'actions, notamment les marchés de dérivés, n'aient pas été retenues par le Conseil et le Parlement européen.

La France est favorable à une révision du texte dans un avenir proche sur ce sujet, visant notamment à garantir un processus de formation des prix juste et efficace sur les marchés financiers.

Matières premières

Aux termes de l'article 59 de la directive, l'autorité européenne des marchés financiers (AEMF) doit définir la méthode de calcul des limites de position que les autorités nationales compétentes doivent appliquer. La France rappelle son attachement à ce que ce mécanisme soit appliqué dans les mêmes conditions dans toute l'Union européenne et à l'ensemble des marchés de produits dérivés ayant comme sous-jacents des matières premières.

S'agissant de l'annexe C de la directive établissant la liste des instruments financiers, la France regrette que certaines catégories de contrats dérivés sur matières premières à dénouement physique et négociés sur des OTF aient été retirés du champ des instruments financiers. La France attachera une attention toute particulière à ce que cette exemption soit la plus encadrée possible, à travers notamment l'acte délégué de la Commission prévu au considérant (8b) de la directive.

Sanctions

La généralisation de l'utilisation des sanctions administratives est décisive pour renforcer la protection des investisseurs et l'intégrité du marché et pour approfondir le marché intérieur européen.

C'est pourquoi la France regrette profondément qu'il n'ait pas été possible d'obtenir une harmonisation des sanctions administratives dans la directive MIF II. Elle souhaite donc souligner que, s'agissant des sanctions, la directive MIF II ne peut pas être considérée comme une référence ou un précédent.

Statement by Portugal and Spain

Portugal and Spain welcome the agreement on the revised rules for markets in financial instruments (MiFID/MiFIR), in particular the ambitious sanctions regime foreseen therein. Portugal and Spain also commend the efforts of the Hellenic Presidency in trying to achieve a balanced solution to address concerns in this regard.

Portugal and Spain note that the sanctions regime is highly sensitive. Member States operate under very different legal and institutional frameworks and these national frameworks need to remain coherent as harmonisation of the sanctions regime is pursued at European level. The difficulties of these discussions are well known and most Member States specificities have been addressed, in particular when they are grounded on constitutional concerns.

Portugal and Spain will strive to implement the permanent ban on the exercise of management functions in investment firms in conformity with national law.

Statement by Sweden

Access data traffic records held by providers of public electronic communications networks by public authorities amounts to a serious interference with the right to respect of private and family life and the right to protection of personal data. Issues of privacy and surveillance are highly sensitive topics that need to be dealt with in a consistent manner across all EU policy areas. Such powers should be restricted to investigations of crimes. Sweden is worried that this power is spreading to financial market files which do not deal with such matters.

Sweden assumes that the access does not cover data retained for the purposes of Directive 2006/24/EC (the Data Retention Directive), as this would circumvent the requirement in the Data Retention Directive of retention only for the purposes of investigating, detecting and prosecuting serious crimes.

It should be noted that there are cases pending in the ECJ where the validity of the Data Retention Directive has been questioned (cases C-293/12 and C-594/12). The outcome of those cases may necessitate, in the near future, a reassessment of the powers of competent authorities to require data traffic records held by operators.

Statement by the Commission

Non-discriminatory access to central counterparties, trading venues and benchmarks (Article 28 - 30 MiFiR)

One of the main purposes of the Commission proposal is to ensure the prohibition of discriminatory practices and the removal of barriers that limit competition in the clearing of financial instruments in order to increase competition for clearing of financial instruments so as to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in European markets.

While agreeing that a gradual transition towards a complete opening may be useful, the agreement reached by the co-legislators will not reach the purpose intended by the Commission proposal. Transitional periods of more than two years after the entry into application - 30 months have been agreed by the co-legislators, would further consolidate vested market positions.

Transparency on non-equity financial markets (Article 8 MiFiR)

Whereas the Commission has constructively worked with co-legislators to define limited exemptions from the proposed transparency regime to cater for overarching public interests such as to avoid affecting the refinancing of Member States, it regrets that its ambitious proposals to achieve fully transparent non-equity financial markets, in particular for derivatives, have not been endorsed by the co-legislators.

It will review this matter again in the near future against the objective of achieving effective and fair price formation on financial markets and make legislative proposals if appropriate.

Empowerments for delegated acts (Articles 66, 67, 68 MiFID and Articles 6, 10, 28, 29, 30 MiFIR)

The Commission notes that many empowerments for delegated acts under Articles 290 TFEU in its proposals have been changed into regulatory technical standards under Article 10 of Regulation 2010/1095 ("ESMA Regulation"). These amendments do not respect the limitations set out in that Regulation in so far as technical standards can only cover aspects requiring technical expertise and cannot imply strategic decisions or policy choices.
