



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 7 May 2014
(OR. en)**

**Interinstitutional File:
2011/0296 (COD)**

**9343/14
ADD 1 REV 1**

**CODEC 1191
EF 140
ECOFIN 437**

"I/A" ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: 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 (**first reading**)
- Adoption of the legislative act (**LA + S**)
= Statements

Statement by the Commission

Non-discriminatory access to central counterparties, trading venues and benchmarks (Article 35 - 37 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 9 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 64, 65, 66 MiFID and Articles 7, 11, 35, 36, 37 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.

Statement by Italy

Italy appreciates the global agreement reached on the revision of the Markets in Financial Instruments Directive (MiFID/MiFIR). Nevertheless Italy seconds the Commission in regretting that some of the proposals aiming at enhancing the transparency of non-equity financial markets, including the sovereign debt market, have not been endorsed by the co-legislators.

Italy is in favour of a proper review of the mentioned matter in the future, with a view to fulfilling the ambitious objectives of the Commission initial proposal.

Statement by Sweden

Access to 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. The judgment of the European Court of Justice on the 8th of April in which the ECJ declares the Data Retention Directive (2006/24/EC) to be invalid further reinforces this view (see Cases C-293/12 and C-594/12).

Statements by France

Transparency on non-equity financial markets (Article 8 of the Regulation)

France regrets that the ambitious proposals drafted by the European Commission to enhance the transparency of non-equity financial markets, in particular for derivatives, have not been endorsed by the Council and the European Parliament.

France favours a review of this matter in the near future, aimed in particular at guaranteeing fair and effective price formation on financial markets.

Commodities

Under Article 57 of the Directive the European Securities and Markets Authority (ESMA) must determine the method of calculating the position limits to be applied by the competent national authorities. France recalls its commitment to ensuring that this mechanism is applied under the same conditions throughout the European Union and to all derivatives markets with commodities as underlying instruments.

As regards Annex C to the Directive laying down the list of financial instruments, France regrets that certain categories of physically settled commodity derivative traded on the OTFs have been withdrawn from the scope of the financial instruments. France will focus in particular on ensuring that this exemption is as precisely defined as possible, notably by means of the delegated act of the Commission provided for in recital (10).

Sanctions

The generalised used of administrative sanctions is key to strengthening investor protection and market integrity and to deepening the European internal market.

That is why France deeply regrets that it has not been possible to achieve harmonisation of the administrative sanctions in the MIF II Directive. We therefore wish to emphasise that, where sanctions are concerned, MIF II cannot be regarded as a reference or a precedent.

Declaración de España

España apoya los textos mediante los que se aprobarán la revisión de Directiva 2004/39/CE del Parlamento Europeo y del Consejo relativa a los mercados de instrumentos financieros (MiFID) y su Reglamento asociado. No obstante, España tiene que manifestar su preocupación por la confusión que la versión española de las normas pudiera generar sobre el término empleado para designar aquellas operaciones que tienen lugar fuera de los mercados regulados, sistemas multilaterales de negociación, sistemas organizados de contratación e internalizadores sistemáticos. Estas operaciones suelen denominarse *over-the-counter (OTC)* mientras que la versión española utiliza el término *extrabursátil*, en paralelo a lo que ya hace el Reglamento (UE) nº 648/2012. Dado que la terminología no siempre es unívoca es conveniente recordar que en ocasiones pueden existir diferencias entre lo que el Reglamento (UE) nº 648/2012 denomina “derivados extrabursátiles” y lo que la normativa que se aprueba denomina “extrabursátil” (es el caso por ejemplo de “negociación extrabursátil”). Por ello manifestamos nuestra consideración de que el término que más precisamente define a las operaciones que tienen lugar fuera de los mercados regulados, sistemas multilaterales de negociación, sistemas organizados de contratación e internalizadores sistemáticos es OTC.