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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and the Banking Union (MiFID-MiFIR)
Subject:	Presidency non-paper accompanying the MiFIR compromise proposal

Presidency non-paper accompanying the MiFIR compromise proposal

This Working Party on Financial Services (CWP) meeting will discuss the MiFIR compromise legislative text proposed by the Presidency. This proposal is based on the latest version presented in the last CWP and contains further amendments resulting from the discussions.

Since the issue of PFOF will have been discussed with experts on November 17, the relevant provision is not incorporated in this compromise proposal (prepared before the VTC CWP on November 17); instead, a specific document is dedicated to PFOF.

The Presidency would like to emphasise that the compromise proposal needs to be perceived as a package where certain parts might (not) be (fully) agreeable to certain Member States. The Presidency has been trying to find a balanced approach that would alleviate most of the pressing concerns of the Member States. However, there is no magical solution that would make everyone satisfied. Therefore, the Presidency humbly asks Member States to consider the proposal as one package and try to see its benefits beyond the single provisions.

Substantial changes to the compromise proposal have not been made. The major changes consist of fine-tuning the text based on the written and verbal comments from the last CWP held on October 27th and the addition of recitals. Amendments were made in the final provision related to the deferrals provision and other situations where postponing of application would be necessary. Also, please note that the MiFID transposition period is – upon the request of Member States – set to 18 months.

The 3-column table as well as the MiFIR text containing changes is provided. In grey is the current MiFIR with changes proposed by the COM in black **bold** or ~~crossed out~~, in **blue** is the FR PRES compromise proposal, in **red** are the previous amendments made by the CZ PRES, and in **green** are the latest CZ PRES amendments.

Consolidated tape for shares, ETFs, and bonds

After the tour-de-table on the last CWP, the Presidency concluded that there is a stronger opposition to the 1-minute delayed consolidated tape (CT) than to the close-to-real-time CT containing the BBO/EBBO feature. Below you can find further clarification on how the CT would work and where in the legal text you could find the particulars.

Market data contributors are defined in Art. 2 para 1 point (34a) and in recital 13 as trading venues and APAs. This concept has been chosen in order to follow the current MiFIR structure and the fact that trading venues and APAs apply deferrals. SIs would not report any pre-trade data to a consolidated tape provider (CTP); therefore, there is no need for a direct link between the CTP and SIs.

The scope of reported data to the CTP is core market data (Art. 2 para. 1 point (36b) and recital 14) which includes BBO – best bid and offer from the trading venues having central limit order book or periodic auction system. The top of the book is the only pre-trade information provided by the CTP. The Presidency proposes to keep regulatory data within the scope of what is reported to the CTP. The CTP should know about starting and closing prices, as well as the type of system that is operated and the use of any breaks in the trading. Such data are for internal use of the CTP and are not to be made public.

A general provision for the Commission to further specify the terms via a delegated act is proposed – in case there would be a need, there is a possibility to further specify the BBO definition in Art. 2 para 2.

The publication – dissemination of the data by the CTP is specified in Art. 27h para 1 point (e), and as stated, the publication and usage of the data sent to CTP is limited. The Presidency finds a good reason for a broader scope of the data sent to the CTP, which is a necessity to check the data's quality. The scope of published data was slightly adjusted to accommodate the requirements placed in the PFOF provisions. Therefore, the investment firm receiving PFOF should be able to see the EBBO around the transaction in order to be able to comply with the requirement to be in the EBBO spread.

The synchronisation of the clock is set in Art. 22c and recital 16 which is applicable also for designated publishing entities as all these trades should be published and, ultimately, incorporated in the CT.

The opt-in mechanism in Art. 22a and recital 23 is still retained. Based on comments made by Member States, trading venues that benefit from the opt-in provision for shares should have the same possibility also for ETFs. This is because small trading venues only trade a very small number of ETFs (i.e., usually up to five titles as per the trading venue, if any), and requiring them to establish connection to the CTP for only these few ETFs would be disproportionate.

ESMA shall make public a list of trading venues benefiting from the possibility to opt in, as well as of those trading venues which decided to opt in. The list should be updated every 3 years.

The procedure for a situation where no entity is picked from the selection (even if repeated) was added in Art. 27da para 4 and the possibility to assess the data sent to the CTP and its usage by the Commission was added in para 7. Please note that this does not broaden the scope of the CT but allows the use of the data sent from market data contributors with strict limitations to what is already in the definition of the *core market data* and *relevant data*.

Based on the written comments, the Presidency did not substantially change the concept of the revenue-sharing mechanism as the written comments did not require us to do so. An amendment was made specifying that the difference between weights should be at least 7 points, so the weight for smaller trading venues should be at least 7 times bigger than the weight for trading venues providing listing and so on.

The Presidency is interested in your comment and concerns about this part of proposal.

Recitals 13, 13a, 19a, 20-28

Article 2(16a), (17), (34a)(36b)(36c), Articles 22a, 27da, 27h, and Article 1a Transitional measures

Market structure

Some Member States have indicated a willingness for a more flexible regime than the double volume cap (DVC) – as discussed in the CWP meeting in October. The current discussion will focus on proposals for new systems replacing the DVC.

The opinions are split on this in the written comments. Some Member States have expressed concerns about the potential implications of removing the volume cap system altogether and rise of dark trading. This concern is legitimate, but for the sake of ensuring competitiveness with the UK, a more flexible regime would allow reaction in case of need rather than an inflexible one.

Based on such Member States' concerns, emergency powers were added in Art. 40 for ESMA, to allow a swift reaction to limit the levels of dark trading. These should be a sufficient tool for ESMA to respond quickly before the Commission is able to react. The duration of the application of this emergency tool is six months, and this could be prolonged.

Based on the comments from the Member States, the package order was returned to the proposal of Art. 9 except for point (iii), as there are no pre-trade transparency requirements for RFQ anymore. According to the current proposal, competent authorities would therefore have the possibility to grant a waiver in case of package orders. The waiver may also be applied to each individual component of the package order.

The Presidency is interested in your comment and concerns about this part of proposal.

Recitals 1 – 7b, 10, 12, 12b, 14-18, 35a

Articles 4, 5, 8, 9, 17a, 18, 19, 21a, 22b, 22c, 27, 40(1)(c)

Deferrals

No substantial changes were made to the last proposal except for the deferral times in Art. 11, which were modified based on the requests of Member States. The call for alignment of price and volume was accommodated in the medium size trades; there will be deferral 15 minutes for both price and volume. The jumbo trades' volume deferral was shortened to 6 weeks. This maximum deferral could be shortened further, yet there are serious concerns about the possible consequences. The Presidency reiterates that these deferrals are mere maximums (caps) set in Level 1 to be precisely calibrated by ESMA based on market data analysis. For the legislator it is very hard (i.a. due to the lack of relevant data) to calibrate the appropriate deferrals or foresee any possible future developments in the markets. Therefore, the caps in Level 1 need to be long enough for safety, so that there is no need for a quick fix in the future. However, if the market data justifies it, there may not even be any deferrals at all, and all trades can be published in real-time. The reference to currency and investment grade has been removed based on the comments of the Member States. There are no other substantial changes to the proposal.

Recitals 8, 9, 9a, 18a

Articles 10, 11, and 11a

And article 2 of revising regulation.

Derivatives

The proposed changes in Art. 8a are based on comments from Member States and are only of technical nature to clarify that those criteria for OTC derivatives under transparency are cumulative. The reference to Art. 31 was considered unnecessary as Art. 31 clearly states what type of transactions should be exempted from transparency.

Changes made in Art. 26 are of technical nature and some Member States raised questions about clarity of the scope of reporting obligation under Art. 26 of MiFIR. The aim is to properly define the scope in line with the purpose of MiFIR reporting. We use the concept of "concluded on a trading venue" for derivatives as, under this wording, it is clear that only derivative contracts concluded by means of trading protocols operated by trading venues are reported. Regarding a derivative contract that is concluded outside the trading venue, only the derivative contract which belongs to the group of instruments under point (b) or (c) should be reported, and the derivative contract which falls into the category as defined in Art. 8a, i.e., the derivative contract, which is subject to transparency. The rest of the derivative contracts concluded outside trading venues should not be reported to follow the purpose of Art. 26. For example, transactions in shares which are not admitted to trading on a trading venue and not traded on any trading venue in the EU are not reported under Art. 26. So, transactions in derivative contracts should follow the same logic. It should be reiterated that there is no loophole as all derivatives are reported under Regulation (EU) No 648/2012. Hence, all data about those derivatives that would not be reported under Art. 26 of MIFIR are available in trade repositories.

The suspension mechanism, which can be triggered under Art. 32a, in case of conflicting trading obligations, should also apply to dealers at dealer markets. This allows EU dealers to, in particular, remain competitive in the global CDS markets.

Recitals 7c, 7d, 12a, and 18a -19a, 30-33

Articles 8a, 21, 26(reporting of derivatives), 31, 32a

Payment for order flow (PFOF)

At the virtual meeting on 17th November, the Presidency presented a compromise proposal regarding the regulation of PFOF, based on comments from Member States and ongoing discussions. The Presidency is aware that the proposal has come rather late; therefore, Member States are welcome to provide their general comments on the issue, with the possibility to be more specific in their written comments.

IFR change

Member States, in general, supported the need to have a Council position on the IFR threshold problem, and there was substantial support during the last CWP on the substance of the proposal. Even though having it as part of the MiFIR package is far from the optimal solution, it is nevertheless a legally possible solution. The Presidency endeavours to coordinate thoroughly with the upcoming SE Presidency on MiFIR and the banking package to ensure the overlap of these two files is appropriately addressed.

Based on the comments of Member States a possible solution is the combination of two approaches – the limitation of the assets taken into consideration for the threshold on EU assets and also incorporating the discretion of NCAs to assess the situation of the particular IFR. The Presidency in separate non-paper therefore streamlines the text also in relation to the branches. Member States are welcome to comment on the substance and the process.