

Please find below the flash report of the 5th political trilogue on MiFID II that took place on 9 October in Strasbourg.

Participants –

Topics: market structure (SME growth markets, OTF category and trading obligation / OTC), corporate governance, investor protection (inducements, product intervention, product governance, boundary complex / non-complex instruments, client categorisation of local / municipal authorities), position limits regime for commodities, scope / exemptions (insurance investment products, definition of commodity derivatives, exemptions for energy firms, safekeeping)

Overall good meeting with most COM non-papers welcome. On market structure the EP wants to link the debate on the scope for Organised Trading Facilities (OTF) with the one on pre-trade transparency waivers. Both topics will be further discussed in a future trilogue meeting. Regarding investor protection a lot of progress was made with (near) agreement on most of the topics except with respect to the level of discretion left to MSs (Council wants more flexibility). With respect to position limits in commodity derivatives the Council could not support the EU harmonised approach envisaged in the COM non-paper and supported by the EP. On insurance-based investment products, the EP could support the COM proposal subject to some additions, while the Council needs more time to reflect. The COM was requested to further work on the delineation between commodity derivatives markets and physical markets. Regarding exemption for energy firms, the EP is taking a stricter approach and is opposed to the joint ventures exemptions introduced by the Council. Council and EP maintained their classification of safekeeping as an ancillary activity.

Market structure

- **SME growth markets:** overall regime agreed with definition of SME being a company with an average market capitalisation of less than EUR 200 million and the consent of the issuer to trade its financial instruments in other venues.
- **OTF category and trading obligation / OTC:** the EP wants to link the debate on OTF with the one on waivers. On the OTF they want to reduce the scope of application to fewer trades. One way to achieve this could be to limit the use of the OTF to large in scale transactions or to remove equities. The EP could support the use of proprietary trading for illiquid sovereign debt, but is not yet in a position to move on the use of matched principal trading (MPT) for illiquid bonds. The EP will table a non-paper on price improvement (transparency) for the next trilogue. The Council supports the use of MPT for all bonds and is opposed to a trading obligation for bonds. Agreement that both issues i.e. OTF and waivers will be discussed together in a future trilogue and that both sides will have to show some flexibility on both aspects.

Corporate governance

Both Council and EP support the COM non-paper and the proposed alignment with CRD IV. Work to be finalised at technical level.

Investor protection

- **Inducements:** the EP and Council support the COM non-paper with respect to the ban of inducements for independent advice and portfolio management. However, the Council could not agree with the proposed limitation of allowing for additional national requirements to the sole area of inducements. The COM explained the risk of undermining the EU passport if additional organisational requirements could be imposed by the host MS on branches (currently only conduct of business rules are within the competence of the host MS). The COM will prepare a non-paper explaining this issue and a complete version of Article 24 (“general principles and information to clients”) taking into account the COM non-papers.

[REDACTED]

- **Product intervention:** the Council and the EP could support the COM non-paper. Work to be finalised at technical level.
- **Product governance:** the Council and the EP could overall support technical group’s drafting suggestion. However the EP insisted to have a reference to these product governance principles in the articles dealing with conduct of business rules. The Council not in favour as this risks blurring the responsibilities between manufacturers and distributors. In addition the COM reiterated its concern to have host MS organisational requirements applied to branches. The Council will prepare a draft recital to clarify the link between these product governance principles and the general conduct of business obligations to try to get EP on board.
- **Complex / non-complex products for execution only:** the EP could support the Council text in that area i.e. structured UCITs would be classified as complex.
- **Client categorisation of local / municipal authorities:** the EP to reflect internally on the safeguard introduced by the COM proposal and supported by the Council, i.e. MSs may adopt specific criteria for the assessment of the expertise of local / municipal authorities requesting to be treated as professional clients.

[REDACTED]

Position limits regime for commodities

The EP general supportive of the COM non-paper with just a few minor technical questions (limits on gross versus net positions, end of day or real time reporting for position reporting by categories of trader, in favour of centralised publication by ESMA of such a report). The Council could not support the harmonisation of position limits at EU level (via ESMA technical standards) as proposed in the COM non-paper. EU harmonisation is an essential feature for the EP. However the EP is open to require ESMA to closely cooperate with trading venues when devising these limits if this can help the

Council. Issue to be re-discussed at political level once LT PRES will have tested within Council working group the flexibility they have.

Scope / Exemptions

- **Insurance-based investment products:** the EP could support the COM option, however sees two gaps: direct sellers and product governance / product intervention. This should be considered as a transitional regime until IMD2 was adopted. LT PRES will test again the approach suggested in the COM non-paper and if accepted it should be considered as a major Council concession. The COM was requested to further develop the non-paper in order to address the gaps identified by the EP. COM said that the structure of IMD1 should be taken into account.
- **Definition of commodity derivatives (derivatives vs physical instruments):** the EP could be more flexible on this issue if a narrower approach is agreed on the exemptions for energy firms. Both the EP and the Council still had question marks on the COM non-paper. The COM was requested to refine its non-paper bearing in mind the two objectives: level playing field between venues and not reduce the existing scope of MiFID I.
- **Exemptions for energy firms:** the EP strongly opposed to the exemptions introduced in the Council text for joint ventures of local electricity and gas companies and of Emission Trading Scheme operators. The EP also asking for a further narrowing down of the ancillary activity exemption (assessment of ancillary should not be based on the capital employed). LT PRES will test the Council flexibility on joint ventures and ancillarity.
- **Safekeeping:** the Council and the EP (except [REDACTED]) did not change their position in light of the COM non-paper. The EP said that the issue will be kept open until the end of the process, but the COM should take note of the EP and the Council position.

[REDACTED]

[REDACTED]