Markets in financial instruments. Recast

2011/0298(COD) - 22/03/2012 - European Central Bank: opinion, guideline, report

OPINION OF THE EUROPEAN CENTRAL BANK

The ECB's opinion is given in response to requests from the Council of the European Union for opinions on the following :

- **this proposal for a directive** on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council;
- a proposal for a regulation on markets in financial instruments and amending Regulation (EMIR) on OTC derivatives, central counterparties and trade repositories;
- a proposal for a directive on criminal sanctions for insider dealing and market manipulation; and
- a proposal for a regulation on insider dealing and market manipulation (market abuse)

The ECB supports the proposed measures to improve the regulation of markets in financial instruments as an important step towards strengthening the protection of investors and creating a sounder and safer financial system in the European Union. It makes the following general observations:

Single European rulebook in the financial sector and ECB's advisory role: the ECB strongly supports the development of a single European rulebook for all financial institutions. It recommends ensuring that only framework principles reflecting basic political choices and substantive matters remain subject to the ordinary legislative procedure and that technical rules should be adopted as delegated or implementing acts as appropriate through the prior development of draft regulatory or draft implementing

standards by the European Supervisory Authorities (ESAs).

The ECB expects to be consulted as appropriate in due time on these proposed Union acts. Additionally, it recommends ensuring cross-sectoral consistency of Union financial services legislation.

Powers of competent authorities, role of ESMA and of macro-prudential authorities: the ECB welcomes that the proposed framework strengthens and aligns the powers of the authorities supervising investment firms and markets in financial instruments as well as the exercise of their investigatory powers, putting special emphasis on cross-border cooperation.

It supports the strong role of the European Securities and Market Authority (ESMA) in the proposed framework and notably with regard to the facilitation and coordination function and the development of technical standards. It recoomends:

- further improvements in the cooperation and exchange of information within the European System of Financial Supervision and between supervisory authorities and ESCB central banks, including the ECB, when this information is relevant for the performance of their respective tasks;

- setting up and enhancing adequate cooperation procedures with macro-prudential authorities where threats to the stability of financial system have to be assessed. This might imply cooperation between competent authorities and the national macro-prudential authorities or, in other instances, cooperation by ESMA with the European Systemic Risk Board (ESRB).

Moreover, to ensure transparency and consistency of the administrative sanctions adopted within the Union, Member States should notify the Commission and ESMA of the applicable national rules and any subsequent amendments to them.

Review of Directive 2004/39/EC: the ECB makes the following observations:

-Developments in market structure: the ECB supports the Commission's proposals aimed at upgrading the market structure framework in the light of financial innovation and the latest technological developments, and notably the intro-duction of regulatory proposals on a new trading platform, i.e. the organised trading facility (OTF), which would extend the scope of the Union regulatory framework.

-Transparency requirements and data consolidation: the proposed MiFID and the proposed MiFIR introduce provisions aiming to enhance the data consolidation for transparency information. According to these provisions, 'consolidated tape providers' (CTPs) will collect information from trading venues and, for the trades executed outside trading venues, from investment firms via approved publication arrangements.

The ECB considers that proper transparency can only be appropriately ensured with the establishment of one single CTP. It considers that experience since the transposition of Directive 2004/39/EC has shown a market failure in data consolidation that would justify legislative proposals already at this stage to address these issues.

-Transaction reporting: the ECB stresses the importance of ensuring that transaction reporting information can be easily accessed in a single system at European level appointed by ESMA, as soon as possible rather than following a possible review of the proposed MiFIR within two years of its entry into force.

-Exemptions for central bank transactions from disclosure and reporting obligations: the ECB would strongly recommend exempting ESCB central banks transactions from the transparency requirements. Transactions where an ESCB central bank is a counterparty should be exempt also from reporting obligations.

-Small and medium-sized enterprise markets: given the difficulties recently encountered by many SMEs in accessing finance, and assuming that such difficulties will arise again at times of market stress, the establishment of a trading venue specialising in SME issues is certainly timely.

-Trading of standardised OTC derivatives: the ECB supports the provisions underpinning the requirement that eligible OTC derivatives should be traded on regulated markets, MTFs and OTFs and entrusting ESMA with the identification of the precise scope of such trading obligation taking into account the liquidity. It notes that such an approach may need to be complemented to address the Financial Stability Board recommendation and considers that regular monitoring of the trading of non-standardised contracts outside a regulated market, an MTF or OTF should be carried out at Union level.

-Enhanced requirements for algorithmic trading, including high-frequency trading:

- the ECB is of the view that the regulatory framework should clarify that all entities engaged in AT on a professional basis should be considered within the definition of investment firms and thus fall

under the scope of the MiFID and be subject to supervision and monitoring of their activities by competent authorities;

- to facilitate cross-market surveillance and to prevent and detect market abuse, the ECB is of the view that such unique identifiers should be developed for the identification of trades generated by any AT within and across trading platforms;

- whilst the ECB considers that the Commission should be empowered to set a maximum ratio of unexecuted orders to transactions, the ECB is of the view that the setting of a minimum ratio of unexecuted orders to transactions is not necessary.

-Position limits and reporting on commodity derivatives: the ECB stresses the importance of properly addressing the risk of regulatory arbitrage and distortion of competition not only across Member States but also vis-à-vis other major financial centres. Reaching a common approach in this area is therefore of paramount importance. This may be achieved by providing a role for ESMA both in the elaboration of common principles at Union level and in the coordination of the measures taken by national competent authorities.

In addition, while the ECB supports the adoption of limits to position taking, there are some aspects that require further clarification. This applies in particular to the definition of an appropriate threshold, the period over which these limits should be applied and the use by market participants of the derivative contracts.

-Investor protection and supervisory framework: the ECB welcomes the empowerment of ESMA to temporarily prohibit or restrict the marketing, distribution or sale of certain financial instruments or a type of financial activity or practice. It recommends ensuring proper coordination with the ESRB on these aspects. The ECB:

- underlines the necessity of: (i) clarifying the definition of 'structured deposits'; (ii) specifying the consumer protection regime applicable to the financial products; and (iii) ensuring a consistent approach across the different Union legislative initiatives, such as the review of Directive 94/19 /EC on deposit-guarantee schemes and the ongoing work on packaged retail investment products on those aspects;

- highlights the importance of designing and implementing to the extent possible in close cooperation among the ESAs the regulatory and supervisory frameworks related to investor protection, in the area, for instance, of cross-selling practices;

- considers it might be useful to request Member States to establish criteria clarifying which categories of entities could be eligible for treatment as professional clients. ESMA could also be invited to provide guidance in this field.

-Third country firms: the ECB notes that ensuring an equal level of investors' protection and equal regulatory standards for the activities of third country firms compared to EU/EEA firms is of crucial relevance and necessary to avoid any market distortion.

It considers that, to ensure that retail investors would effectively receive the same degree of protection, the cooperation arrangements with the third country should ensure that the requirement for sufficient initial capital would effectively protect investors, given that only the third country firm, and not the branch, is the bearer of rights and obligations and this is ultimately responsible vis-à-vis the investors.