Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Response by BVI Bundesverband Investment und Asset Mangement, Germany

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu **by 13 January 2012.**

Theme	Question	Answers
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	BVI is concerned about the impact of the proposed amendments to Article 3 para. 1 for exempted investment advisers. In Germany, the option under Article 3 MiFID has been utilised to exempt investment fund intermediaries from the scope of MiFID requirements. Such intermediaries are usually individuals or very small firms who hold authorisation for business under the German Trade Licensing Act (Gewerbeordnung). Due to the recent changes to this statute, fund intermediaries are now required to provide evidence of adequate professional qualification and must obey conduct of business obligations imposed by MiFID I. Under the Commission’s proposal, however, fund intermediaries shall be required to comply with a number of further burdensome MiFID rules, in particular:

		- standards for the management body in Article 9, - notification of qualifying shareholders in Article 10 and foremost, - contribution to an Investor Compensation Scheme (ICS) or an equivalent system. Concerning the latest, it must be kept in mind that the financial strength of individual intermediaries is fairly limited as compared to corporations and different treatment might be necessary for proportionality reasons. **Therefore, we think that investment advisers should not be under all circumstances required to contribute to an investor-compensation scheme, but instead, be allowed to ensure investor protection by means of professional indemnity insurance with certain minimum coverage.** Such approach would also warrant a level playing field as compared with distribution of insurance products. **Moreover, we see no reason to exclude the sole reception and transmission of orders from the scope of activities of exempted intermediaries.** From the investor protection point of view, it makes no sense to allow for exemption of investment advice, but not for reception of orders by self-advised clients. Also, the current wording appears to prohibit reception of subsequent subscription orders on the basis of past advice, or even mere redemption orders from clients.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	We deem it appropriate to include structured deposits in the scope of MiFID/MiFIR in order to ensure equal standards in the distribution of investment products targeted at retail clients. We have no specific views on inclusion of emission allowances.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	**Yes, we see the need for additional adjustments in order to provide for non-application of appropriateness test in Article 25 para. 2 of MiFID draft.**

		Due to safekeeping of assets being qualified as a licensable investment service, the requirements for appropriateness test in the newly drafted Article 25 para. 2 would apply to the opening of client accounts. However, in this case it makes no sense for investment firms to investigate into knowledge and experience of clients as the service of asset safekeeping should be considered appropriate regardless of the client's individual background.
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	**We do not perceive any evident need to regulate third country access to EU professional markets in a manner as strict as proposed by the Commission.** It is certainly reasonable to subject service provision by third country firms to retail clients in the EU to requirements warranting the necessary level of investor protection and competitive equilibrium with EU firms. However, it is not appropriate to expect that the same level of protection should apply in the business relationships with professional clients. Nonetheless, this appears to be the Commission's intention as the legislative proposal provides only for a specific regime for third country services to eligible counterparties (cf. Articles 36 et seqq. of MiFIR draft), but contains no rules for professional clients. On most occasions, asset managers act in the market as professional clients, be it that they request such treatment in order to ensure their investors benefit from best execution, be it in the context of portfolio management and investment advice where the eligible counterparty category does not exist. However, it is certainly not in the interest of the asset managers' clients who have chosen a professional to manage their assets and to conduct transactions on their behalf to be restricted in their business opportunities by rules designed to protect retail customers. **Consequently, we believe that a separate set of rules for**

		business contacts with third country firms by professional clients should be set up under MiFID/MiFIR. Moreover, it is important that the possibility of clients regardless of their categorisation for MiFID purposes to approach non-EU service providers at their own initiative be not subject to any regulatory impediments. In the Commission's proposal, this principle is laid down in Article 36 MiFIR pertaining to service provision for eligible counterparties and repeated in a more general manner in recital 74 of MiFID draft. **For the avoidance of doubt, this freedom of reverse solicitation should be endorsed in a MiFID article for all categories of clients.**
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	In BVI's opinion, the general regulatory approach to corporate governance should allow for more flexibility in order to account for different business models of investment firms and their corporate groups. Our specific comments in this regard focus on the Commission's proposal for Article 9 MiFID. **Primarily, we are against fixed limits for combination of directorship mandates as proposed in Article 9 para. 1 (a).** Such limits cannot sufficiently account for specificities of certain financial sectors and in particular, do not warrant proper treatment of directorships on boards of corporate-type investment funds. Under the proposed wording, it is very likely that such directorships could not be considered as one single directorship if the relevant corporate funds are managed by the same management company. **In order to reflect these specificities, we think that each investment firm should be required to determine individual limits to the number of directorships as proposed by MEP Bodu in its draft report on a corporate governance framework for European companies (2011/2181(INI)).**

		Moreover, the requirements for diversity policy in Article 9 para. 3 should be subject to a proportionality principle in line with the approach in Article 9 para. 2. In our view, it is incommensurate to require local investment firms such as savings or cooperative banks to promote geographical diversity on composition of their boards.
Organisation of markets and trading	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	BVI supports the introduction of a new category of trading venue "OTF". However, we think that the proposed definition of an OTF is not clear and requires further consultation with all relevant market participants. For example, it remains open if certain types of crossing networks may qualify as OTF or not. The buy-side needs trading facilities which provide access to specific user groups and where orders can be executed in a predictable way. **It should therefore be clarified that crossing networks for equity trade which are only open to institutional investors may qualify as OTF.**
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	OTC trading are all the trades which are not effected on regulated markets, MTFs or OTFs. We think that a OTF definition that captures a broad range of organised trading venues and incorporates competitive and attractive market models could enhance the proportion of trading that is appropriate for these venues.
	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	It is important to distinguish between algorithmic trading and High Frequency Trading. Algorithmic trading refers to order execution by algorithms, whereas High Frequency Trading is a method to deploy strategies in which computers make decisions to initiate orders. We think that the requirements for additional systems and risk controls when using algorithms should therefore be proportion-

		ate to the actual use of these algorithms. In the case of High Frequency Trading, higher regulatory standards are acceptable. It should be noted that investment fund management companies initiate trade orders on behalf of the (institutional) investors and are not able to meet the obligation to post firm quotes according to article 17 (3) MiFID. It is also important to distinguish clearly between market makers and HFT firms. BVI would not require that HFT firms need to register as market makers.
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	No comment.
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	No comment.
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	BVI supports the proposal that all eligible and standardised (OTC) derivative contracts should be traded on exchanges or electronic platforms (trading obligation) and cleared through central counterparties (CCPs) (clearing obligation), where appropriate. BVI believes, however, that in the foreseeable future not all OTC derivatives are fit for trading on exchanges and organised markets, e.g. because of lack of sufficient standardisation and /or low volume. **The buy-side – both financial and non-financial firms (e.g. corporate end users) – needs to retain the flexibility to conclude bi-lateral and non-standardised contracts to cover specific user needs.**
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as fore-	For small companies, access to capital markets is a key precondition for innovation, creating jobs and supporting the real econ-

	seen in Article 35 of the Directive?	omy. Thus, we want to maintain the so called "exchange regulated" market segments. However, we would like to caution against too much optimism on resolving the issues surrounding SME access to capital markets (lack of visibility, market liquidity and high costs of IPOs). We also think that adding new MTFs could result in fragmentation of liquidity for SMEs in a market where there are several trading platforms especially designed to provide access to capital in particular for SMEs (e.g. Entry Standard in Frankfurt, AIM in London, Alternext in Paris). BVI emphasizes that the same effective investor protection provisions applied by the above mentioned SME capital markets should be used if a new MTF SME growth market is introduced. Otherwise the investment risk could increase in new SME markets as opposed to other MTFs.
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	**1. Non-discriminatory access to a CCP: Article 28 MiFIR** BVI supports the proposal to require non-discriminatory access to a CCP. We think open access requirements have to ensure that a Central Counterparty must accept financial instruments for clearing, regardless of the trading venue on which they are traded. A trading venue has to provide data feeds and other assistance to any CCP that wants to clear the financial instruments in questions. BVI thinks that choice and efficiency in clearing in the EU may diminish if the current trend towards concentration in the provision of trading and clearing services continues and remains essentially unchecked by regulation that ensures access to such CCPs by other Central Counterparties. **2. Non-discriminatory access to and obligation to licence benchmarks: Article 30 MiFIR**

		We agree with the proposal to provide for a non-discriminatory access to and obligation to license benchmarks for the purpose of trading and clearing on other trading venues and CCPs than the index owner`s platform. BVI supports the idea that access to the relevant information should be granted on a reasonable commercial basis. We believe that all organisations providing such information and products may charge fees for the services provided to market participants on a cost recovery basis plus reasonable profits only. Cost recovery refers to costs directly attributable to the services rendered under the index service products. It should also be ensured that besides CCPs and trading venues also the users of these CCPs and venues will benefit from the future regulation in this regard.
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	We do not support possible requirements to introduce limits on how much prices can vary. We believe that position limits would reduce the efficient functioning of these markets, while others only support a trading interruption (cool down period) as it is currently being implemented on equity exchanges, after which trading resumes. Price discovery is a key driver for market participants in their choice of trading venue and as such, liquidity will move to those venues providing the commodity derivative contracts best satisfying that demand.
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	***1. Independent advice*** **BVI believes that the new requirements on independent advice ensure sufficient and appropriate investor protection while maintaining healthy competition among different distribution channels.** Under the Commission’s approach, it shall be up to the business decision of each investment firm whether or not it is willing to

		market itself as independent adviser. In these circumstances, it appears acceptable to require investment advisers presenting themselves as independent to clients not to accept third-party payments as remuneration for their services. In the area of non-independent advice, on the other hand, provision-based remuneration must remain possible in order to maintain the basic supply of financial products to the public which is indispensable for ensuring old age provision of the European population. **More radical steps, such as a general ban on inducements, must be expected to have massively negative impact on the demand for investment advice by retail clients and would result in grave competitive disadvantages for investment products as compared with distribution of insurance products and saving accounts.** It must be noted that even the envisaged alignment of distribution standards for PRIPs would not produce any remarkable relief as the application of PRIPs to straightforward life insurance policies is still unclear and traditional banking products such as fixed-term deposits are not covered by the PRIPs initiative. This competitive disequilibrium appears also severely detrimental from the investor protection point of view as non-PRIPs saving products would be also saved from the duty to provide product information modeled after the KIID for UCITS which ensures comparability of the essential product features, including costs and charges. As it stands, no common standards for insurance cost disclosure exists throughout the EU. European customers are not able to fully conceive the cost of buying insurance policies, let alone to make meaningful comparisons with investment products. As regards bank saving accounts, most banking clients are not even aware of any charges being associated with their deposits. Hence, a strict prohibition of inducements in relation to invest-

		ment advice might lead to a drastic decrease of retail clients' involvement in capital market investments which should have severe consequences for the old-age benefits available to EU citizens. It could also create incentives for distributors to promote allocation of client assets outside the PRIPs universe which would significantly deteriorate the level of effective investor protection. ***2. Portfolio management*** Also with regard to portfolio management, we agree that it is consistent with the fiduciary position of asset managers not to receive payments from third parties which might conflict with the duty to act in the best interest of the client. Seen from that perspective, however, the prohibition in para. 6 should not be relevant to reception of commissions with the sole purpose of passing on those payments to clients as such practice is certainly in the clients' best interest. In our opinion, the same treatment should apply to commission payments being not directly forwarded to clients, but retained by the portfolio manager in exchange for reduction in the management fee charged to client accounts. Also in this event, reception of commissions does not harm the best interest of the clients, but serves the purpose of lowering the costs of portfolio management services to be ultimately borne by the client. Retention of such payments should be subject to explicit consent by the client. **The Commission proposal should be modified in order to expressly allow for monetary inducements to be deemed part of the portfolio manager's remuneration subject to client consent.**

		Moreover, it is our understanding that the proposed ban on inducements in relation to portfolio management shall be confined to monetary benefits, whereas the acceptance of non-monetary benefits remains permitted subject to the conditions laid down in Article 26 of the Level 2 Directive. **It is essential not to further restrict the ability of asset managers to receive financial analyses and other research tools from brokerage firms in connection with order execution.** Such "soft commissions" are obtainable on much more favourable terms as compared with direct purchase and used for the benefit of clients in the course of portfolio management. Hence, a significant cut-down in broker research would prompt further rise in fees for portfolio management services.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	BVI would like to focus its comments on the treatment of UCITS proposed in Article 25 para. 3 (a) (iv). **First and foremost, we do not deem it necessary to change the UCITS status as non-complex instruments eligible for execution-only services.** All UCITS are conceived as retail products, are very strictly regulated and provide a uniquely high degree of investor protection. UCITS are also very liquid (redemptions possible usually daily, but at least twice a month), do not involve any liability exceeding the acquisition cost, are subject to stringent risk management rules and, above all, are designed to be well diversified. UCITS are also by far the most transparent financial instruments and the recent introduction of the Key Investor Information Document (KIID) makes them even easier for retail investors to understand. It is the primary objective of KIID to ensure that investors are "reasonably able to understand the nature and the risks of the investment product that is being offered to them, and consequently, to take investment decisions on an informed basis." Therefore, UCITS can easily fulfill all the requirements of Art. 38 of the Level 2 Direc-

		tive in order to qualify as non-complex. It must also be noted that deprival of the non-complex status would render certain UCITS ineligible for some of their main distribution channels (e.g. fund trading platforms which due to their set-up do not perform appropriateness tests), thus requiring major operational adjustments for UCITS managers. **Nonetheless, should the automatic non-complex status be restricted to certain types of UCITS, it is essential that such assessment is based upon clear and readily applicable criteria.** Given the fact that distribution of complex products shall entail enhanced information and reporting obligations to be developed at Level 2, all fund distributors must be capable of easily determining whether the funds they are advising or selling to clients are to be treated as complex or non-complex. For this purpose, **building upon the structured UCITS category which is subject to distinct requirements in terms of KIID presentation appears to be a feasible approach**.
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	We think that the best execution requirements put in place under MiFID are sufficient. Therefore we welcome the additions made in the COM-Draft with regard to MTFs and OTFs. The additional obligation for investment firms under Article 27 para. 5 to *“summarize and make public on an annual basis, (…), the top five execution venues (…)”* goes too far. **Investment firms already publish their best execution policies in order to inform their clients about their execution principles.** Any additional information would be of **no additional value** for most of the clients and would only produce a costly and burdensome publication process for the investment firm. **Therefore, we propose to introduce a provision for investment firms to give additional information upon the client’s request** and to let it

		be sufficient to provide this information via internet.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	The level of protection required by the Commission's proposal does not always reflect the needs of different categories of clients. **In particular, the new standards for cross-selling services in Article 24 para. 7 of MiFID draft should apply solely in relation to retail clients** as it is evident from the text in recital 54 that this legislative measure has been prompted by concerns about the lack of transparency in retail distribution. It is obvious that retail clients purchasing investment products or services "in a package" should receive sufficient information about the separate components in order to be able to make informed investment decisions. Professional clients, on the other hand, do not need these protective measures as they are in a position to negotiate their information supply by means of individual agreements. **The same consideration is valid for the proposed requirement in Article 25 para. 5 to specify how the advice meets the personal characteristics of clients**. When providing investment advice to professional clients, investment firms are anyway entitled to assume that the client has the necessary knowledge and experience, and is capable of bearing the risk associated with its investment objectives (cf. Article 35 para. 2 of MiFID Level 2 Directive). **Furthermore, the requirements for third country firms requesting access to EU markets lack specific provisions for professional clients.** The consequence of such undifferentiated approach might be that relations of professional clients with non-EU firms would need to follow rules designed for retail protection which appears glaringly inappropriate for asset managers subject to strict quality standards and public supervision. For fur-

		ther details, please refer to our answer to question 4 above.
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	According to the Commission's proposal, powers to intervene in financial products or activities shall be primarily vested with national authorities, with ESMA's role being limited to coordinating and possibly supplementing national measures. **We are concerned that this approach might further amplify national differences as regards distribution of financial products and hence represents a real threat to the Single Market for financial services.** It could also undermine the general regulatory approach by other EU Directives such as UCITS Directive and AIFMD. The UCITS Directive relies on the principle of funds receiving the EU passport for cross-border distribution on the basis of product authorisation by their home State competent authorities. This general qualification of UCITS for marketing to EU retail clients might be overruled under the proposed MiFID rules for product intervention. In view of the pan-European nature of most financial services, it seems that supervisory intervention should be equally effective throughout the EU. **The intervention powers should thus be attributed to ESMA in order to ensure a coordinated EU response to investor protection concerns or systemic risks.** The COM draft proposals should therefore be amended to include a stronger role for ESMA, providing for a better balance in powers and wider cooperation at European level. Furthermore, any restriction or ban should not change the effect of other existing financial regulation, and a clear process to appeal ESMA decisions should be foreseen.
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to	BVI supports in principle the proposal by the EU Commission for the pre-trade and post trade transparency regime. We agree to improve the pre-trade transparency waiver regime and believe

	make them workable in practice? If so what changes are needed and why?	that a more precise description of the waivers would provide greater clarity to the market. **However we disagree with the requirement that all quotes need to be made public.** Institutional investors trade usually in large sizes. If the quotes received from brokers were made public, liquidity and their ability to transact business would be seriously damaged. Concerning the transparency requirements for ETFs, please refer to our comments on on Article 10 para. 1 (11) of the draft Regulation below.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	BVI believes that the introduction of a transparency regime for non-equity instruments should be carefully calibrated depending on each relevant non-equity class and should not be rushed, given the current market environment. We think that non-equity markets are generally not as liquid as equity markets. In illiquid non-equity markets a relatively small transaction could have a deep impact on the price formation process of the traded financial instrument. Any new introduction of a transparency regime for such non liquid financial instruments could harm the trading of such financial instrument. Therefore we believe that the introduction of pre trade transparency obligations for non-equity instruments should be only made mandatory if the financial instrument is sufficiently liquid. We think that well functioning capital markets need an appropriate balance between trade transparency and protection from public disclosure of trading intentions of large institutional block orders. As trade transparency is a key driver for price formation, institu-

		tional investors trading large block orders have to try to minimize the negative impact of their orders on the asset price. Depending on the asset type, its liquidity and the characteristics of the market (venue trading vs. market-making/dealer liquidity), the negative impact can vary, but likely includes both a negative price impact (wider spreads) and a loss of liquidity. There are major differences between equity and non-equity markets. Asset managers have a duty of best execution towards their clients and market impact minimization is a key part of that duty. Knowledge of large institutional orders may move the price very quickly. Therefore we think that the proposed measures (e.g. waivers) are necessary in order to enable asset manager to execute large institutional block orders.
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	Please see our comments to question 21.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	BVI believes that the definition of large scale order waivers needs to be clear. The ability of professional investors to execute large institutional block orders needs to be maintained.
	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	BVI supports the proposals to require a functioning consolidated tape for post-trade data through the use of APAs and CTPs, as well as harmonised data standards. We also support commercial solutions for CTPs in principle, but fear that commercial drivers towards comprehensive CTPs will be insufficient. Therefore we think that a mandate for single consolidated tape should also be considered and a review clause should be included in MiFID II for this purpose.

		In this context we support that the European Fund and Asset Management Association EFAMA has published the blue-print for a European Consolidated Tape intended to permit greater certainty amongst investors as to prices, best execu-tion, valuation and performance measurement, leading to further reductions in direct and indirect costs of trading for investors. We are in favour of unbundling of trade information to stimulate price competition as customers would be able to tailor better what they purchase of their specific requirements. We also sup-port the free availability of post trade information after 15 min-utes. We note with regret that a number of exchanges recently started to require individual contracts for price feeds instead of continued centralized price feed purchase through data vendors thereby increasing cost with effects the investors. BVI supports the proposal to report all trades executed on regu-lated markets, MTFs and OTFs to competent authorities. We support the introduction of the new approved publication ar-rangements (APA) which will not lead to excessive costs in the relation to the benefit to the final investors. We favour the use of CCPs, exchanges, MTFs or OTFs as reporting channels for the buy side transactions to Trade Repositories.
	25) What changes if any are needed to the post-trade transpar-ency requirements by trading venues and investment firms to ensure that market participants can access timely, reli-able information at reasonable cost, and that competent au-thorities receive the right data?	Asset managers require good quality post trade data information both to value their portfolio and funds and as valuable input for their trading activities. However we think that large institutional block orders should not be penalized by the post trade transparency regime. We believe that an appropriate publication delay depending on each finan-cial instrument could be supported before the disclosure of the

		positions for the global interests of the market mechanism.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	In light of the envisaged extension of MiFID distribution standards to sales of packaged insurance products (insurance PRIPs), it appears desirable to ensure proper involvement of EIOPA in the forthcoming discussions on Level 2 measures to MiFID/MiFIR 2. **The objective should be that the ultimate distribution standards adopted at Level 2 can be equivalently applied to insurance intermediation.**
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	In our opinion, the proposed text already provides for significant improvements of supervisory tools available to competent authorities.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	In the context of the PRIPs initiative, the MiFID 2 reform is meant to serve as a blueprint for adaptation of IMD in order to ensure the same level of investor protection in distribution of comparable investment products. **Hence, any conduct of business rules relevant to distribution must allow for equivalent application to sales of insurance PRIPs** (cf. our answer to question 26 above). From the viewpoint of the asset management industry, there are also important interactions with provisions of AIFMD and UCITS Directive relating to delegation of tasks to third country providers. The recently adopted AIFMD regime allows for delegation of portfolio management to third country entities subject to the condition that the delegate is authorised or registered for the purpose of asset management, or approved by the AIFM competent authority and cooperation between the competent authorities in and outside the EU is ensured. Similar principles apply to the delegation of portfolio management under the UCITS Directive. It must be noted, however, that provision of portfolio management even on delegated basis is considered a MiFID ser-

		vice in accordance with Annex I Section A No. 4 MiFID. In view of the Commission's proposal for third country firms, this flexible approach adopted by the EU investment fund Directives is under the threat of being undermined by the very strict MiFID/MiFIR rules on access to EU markets. **Therefore, a separate, more liberal regime governing the relationship of third country firms with professional clients is indispensable in order to maintain competitiveness of the EU financial sector** (for details, see our reply to question 4 above).
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	As regards access of third country firms to EU markets, it must be borne in mind that any excessive requirements e.g. for establishment of branches or equivalence of regulation might prompt third country regulators to take similar steps in order to restrict access of EU firms to their national markets. This could result in significant operational impediments and loss of business opportunities for EU players.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	The new sanctioning regime is set up in an appropriate manner but for Article 75 para. 1 (n) of MiFID draft. **In this context, we disagree with considering an investment firm's failure to obtain the best possible results when executing client orders as infringement of MiFID requirements**. According to Article 27 para. 1 of the revised MiFID text, investment firms are under the obligation to take "all reasonable steps" to obtain the best possible result for their clients. Hence, the MiFID provisions on best execution imply an "obligation of means", not an "obligation of result" on each and every execution of transactions.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	It is difficult to assess the balance between Level 1 and Level 2 measures as the amendments at Level 2 are still outstanding. From the viewpoint of the asset management industry, it will be

		particularly **important to achieve a properly balanced regime for the acceptance of monetary and non-monetary inducements in relation to portfolio management and independent advice**. With monetary inducements meant to be strongly cut down at Level 1, we would expect that the Level 2 principles governing legitimacy of non-monetary inducements remain broadly unchanged. **Equilibrium between different levels of regulation is also required in terms of distinction between complex and non-complex products for the purpose of execution-only distribution.** The question of whether instruments excluded from the non-complex list in Article 25 para. 3 (a) subparagraphs (i) to (iv) of MiFID draft shall be admitted to the general complexity test at Level 2 requires thorough consideration. **Especially for shares in non-UCITS collective investment undertakings which shall be excluded from the non-complex list, it would be incomprehensible to deny undergoing the complexity test, but to allow such text for contractual-type non-UCITS issuing units instead of shares.** Also, it will be important to clarify the relationship between the Level 2 complexity test (currently stipulated in Article 38 of Level 2 Directive) and the ESMA guidelines for assessment of financial instruments envisaged in Article 25 para. 7 of MiFID draft.

In addition to our answers to questions above, we would like to make the following comments:

Detailed comments on specific articles of the draft Directive

Article number	**Comments**
Article 16 para. 7 :	The new recording requirements are highly relevant for third-party fund distributors who receive subscription or redemption orders from clients and transmit them to the management company or the depositary of a fund. In this regard, we are concerned that the costs of recording and recordkeeping of telephone and electronic conversations could prove excessively high especially for small

	intermediaries such as savings or cooperative banks. It should be taken into account that recording of subscription and redemption orders is already the obligation of fund managers under the UCITS Directive who also must send written confirmation of transactions to clients[1]. Equivalent provisions are now under discussion for subscriptions and redemptions of non-UCITS funds[2]. **On this basis, we believe that orders for subscriptions and redemptions of fund units should be exempted from the recording requirements under Article 16.** Fund orders do not raise issues in terms of market abuse as they are executed directly with the management company/depositary and not placed on secondary markets. Moreover, investor protection is sufficiently warranted by the recording requirements for product providers which in future will cover all investment funds sold in the EU.
Article 24 para. 5:	**As regards the diversification test for independent advisers, due consideration should be given to different types of investment funds available in the market.** EU retail investment funds cover the whole range of financial markets and offer also alternative investment opportunities, especially in the field of real estate. Therefore, advisers offering services in relation to various fund vehicles such as equity funds, bond funds, money market funds, balances funds et al launched by different fund providers should be deemed to meet the diversity requirement in Article 24 para. 5 (i) of MiFID draft. **In addition, independent advisers should be allowed to cooperate with execution platforms in assessing financial instruments under Article 24 para. 5 (i).** In our view, such cooperation does not in any way jeopardize the investment adviser's independence as execution platforms facilitate solely execution of orders given by clients as a result of investment advice. Influence by product providers will in future be excluded for execution platforms as for other distribution models by the general ban on monetary inducements in Article 24 para. 5 (ii) of MiFiD draft. The same provision will ensure that investment advisers are not misguided to choose an execution platform on the basis of possible financial benefits.
Article 25 para. 7:	As mentioned in our reply to question 18, **we believe that the proposed new information duty in terms of cross-selling should be relevant only in relation to retail clients**. It is obvious from the considerations in recital 54 that any concerns on this subject matter relate to protection of retail clients and their ability to make informed choices. Also, we think that the requirement to provide evidence of costs and charges for each component of the package should apply only if it is possible to order the respective components on separate terms.
Article 25 para. 5 :	It is not appropriate to require periodic communications to clients for each type of investment services. Especially in case of investment advice, the service provision is limited in time and does not involve any ensuing obligations, except the investment adviser offers to provide the client with continuing assessment of suitability on a voluntary basis (as presumed in Article 24 para. 3, first in-

[1] Art. 15 and 24 of Directive 2010/43/EU (UCITS Implementing Directive).

[2] Cf. ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive (ESMA/2011/209), Boxes 53 and 54 on p. 110-112.

	dent of MiFID draft). **Hence, the requirement to submit periodic reports should affect only services implying continuing obligations towards clients.**
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 2 para. 1 (11):	The proposed definition of exchange-traded funds (ETFs) is extremely wide and unspecific. The characteristic of being “freely negotiable on capital markets” could be potentially interpreted as applying to units of all German investment funds which are generally issued as bearer instruments and thus are freely negotiable between any parties. Moreover, as the term “capital markets” remains undefined, it is not at all clear which venues would be relevant for qualification as ETF. **In our opinion, only funds admitted to trading on regulated markets with at least one market maker should be considered exchange-traded for the purpose of MiFIR.** In any case, the definition of “exchange-traded funds” in the Commission draft applies only to pre- and post-trade transparency requirements which shall be extended in scope to cover other instruments beside equities. We would deem it inappropriate to expand this broad understanding of ETFs to other regulatory action, especially regarding product-specific requirements discussed under the UCITS Directive.