# Review of the Markets in Financial Instruments Directive

# Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

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** |
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| 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? | We welcome it that the full exemption of certain activities of intermediaries is limited under Article 3(1) of the MiFID II draft, since – irrespective of the type of distribution – **a comparable level of investor protection must be ensured**. This means that the MiFID rules should be applied in full in this respect, however. We therefore ask **to delete the exemption of Article 3 MiFID II draft**. |
| | 2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way? | The Commission's intention to extend securities legislation to cover so-called structured deposits also meets with reservations. This type of deposits is to be subject in future to the stringent provisions of securities law although the deposits themselves are fully secure. **The broad definition of the scope in Article 1(3) sentence 1 of the MiFID II draft leads to a disproportionate expansion of the requirements relating to financial instruments under the German Securities Trading Act** to deposits since, according to the wording, only deposits with a "rate of return which is determined in relation to an interest rate" are to be exempted. Strictly speaking, this exemption covers only deposits whose rate of return is |

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| | | linked to a benchmark such as Euribor, Eonia or the like. This is only the case with a minority of deposit products; the great majority are fixed-rate or variable-rate products that are not referenced to a benchmark. **These simple products (e.g. savings book, fixed-term deposits) are not structured and should therefore also be excluded from the scope of the MiFID rules.** The definition thus needs to be amended accordingly. We therefore suggest the following wording:<br><br>**Article 1 of the MiFID II draft**<br>**3. "The following provisions shall also apply to credit institutions authorised under Directive 2006/48/EC, when providing one or more investment services and/or performing investment activities and when selling or advising clients in relation to deposits <u>other than those with capital risk excluded and an unconditional payment of yield</u>."** |
| | 3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service? | We **share the Commission's view that entities holding securities accounts for their clients must be subject to a specific authorisation**. As all custodians are credit institutions that provide other investment services and are, therefore, authorised under MiFID, the proposed reclassification of the safekeeping and administration of financial instruments services as investment services will not lead to a stricter authorisation and supervision regime.<br><br>**The reclassification would, however, submit custodians and their clients to new requirements that are materially not applicable to custodian activities, thus leading to important uncertainties and additional costs also for the investors**. We stress that safekeeping and the provision of custody services differ significantly from the trading and distribution of financial instruments targeted by MiFID. These services are only very loosely associated with the investment decisions of clients. Placing safekeeping and custody firms under MiFID obligations such as, for instance, suitability or assessment of appropriateness would not enhance investor protection. The protection of custody clients, the obligations of intermediaries and custodians towards these clients, the protection of clients financial instruments and the entire holding chain of securities are expected |

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| | | to be further addressed in future regulation such as the one on Central Securities Depositories. The **amendment introduced in this respect to Annex 1 should, therefore, be undone**. |
| | 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? | **The rule** that the provision of services from outside the EU to Member States of the EU should only be possible if a branch is maintained within the EU **is unnecessarily burdensome**. Supervision of such service offerings via registration by the competent authorities would preferably have to be made possible at any rate where the provider concerned is in turn a branch of an investment firm already registered in an EU Member State. In the latter case, the provider is not a "third-country" provider but a fully consolidated provider under supervisory law who is controlled and supervised mainly from within the EU. Already existing client accounts should not at any rate be burdened by the introduction of such a provision, however, but should benefit from a **grandfathering clause**. In addition, consideration should be given to whether an equivalence assessment of the respective foreign jurisdiction is practicable or whether it would not be better to assess the organisation of a provider wishing to operate within the EU and the quality of the services it offers. |
| 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? | Concerning the requirements on corporate governance in MiFID draft the Commission has already made corresponding proposals in the draft CRD IV, which builds on the Commission's Green Paper of 2 June 2010 (COM 2010) (286 final). Under the definition in Article 1(a) of the draft CRD IV, they are to cover both banks and investment firms alike. **Parallel regulation of the same issues in MiFID is therefore unnecessary.** There is instead the danger that the different sets of rules may have contradictory regulatory thrusts. As regards the regulatory proposals in CRD IV, we should also like to point out that the requirements set under these fail to take sufficient account of the different management models (including the German two-tier board system) and legal forms of companies. |
| Organisation of markets | 6) Is the Organised Trading Facility category appropriately defined and differentiated | As regards the new category "organised trading facility", part of the banking industry sees the need to allow operators of OTFs to also trade **against their own** |

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| and trading | from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why? | **books**, particularly when it is a question of helping arrange execution of client orders. Otherwise there is the danger that banks would be prevented from conducting transactions at the venues offered by them and thus from helping clients to conclude trades. Concerns about a possible conflict of interests can be allayed by adopting appropriate rules. |
| | 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? | No comments. |
| | 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? | We welcome the European Commission's intention to regulate algorithmic trading (Article 4(30) and Article 17 of the MiFID II draft). The Commission is evidently thus seeking, in particular, to strengthen **supervision of high-frequency trading**. This is an understandable aim in our view, and we regard many of the requirements for algorithmic trading as reasonable. For example, **we regard the required registration and supervision of all traders as appropriate**, along with the establishment of certain organisational requirements in respect to risk management, resilience of trading systems, compliance with trading limits and prevention of generation of erroneous orders. The prohibition of market abuse must of course apply to all types of trading.<br><br>At the same time, **we welcome the stronger harmonisation in Article 51 of the MiFID II draft of the use and design of circuit breakers** to temporality halt trading in financial instruments. These are necessary to allow fair and proper price determination. If a trading venue does not have adequate safeguards, the result may be sharp price fluctuations that do not accurately reflect the market situation. We believe that, together, suitable rules for algorithmic trading and circuit breakers are the right way to **protect all market participants against unjustified price fluctuations**.<br><br>**The Commission's proposal that algorithmic trading strategies should** |

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| | | **continuously post firm quotes** during trading hours and provide liquidity to the market **goes much too far**, however. It not only ignores the fact that algorithmic trading reacts to certain market situations but would also **effectively establish an unlimited market making requirement without any compensation**. This would also go well beyond the obligations of real market makers. Such a requirement would mean that algorithms would no longer be used. The consequences would be less liquidity, along with bigger spreads between bid and offer prices. Moreover, the arbitrage that takes place today to overcome fragmented markets would no longer be possible. Ultimately, poorer prices for all market participants, be they private investors or institutional investors such as insurance firms or pension funds, would be likely. This approach should therefore not be pursued any further.<br>**We therefore suggest deleting Article 17(3) of the MiFID II draft.**<br><br>In addition, **the scope of the rules for algorithmic trading in Article 4(30) of the MiFID II draft needs to be corrected** as the definition in sentence 1 also covers purely passive systems which, like best execution policy, are confined to meeting regulatory requirements or merely carry out clients' instructions.<br><br>The exemptions proposed by the Commission in sentence 2 should be supplemented accordingly. **We therefore suggest wording Article 4(30) of the MiFID II draft as follows:**<br><br>**30) "[…] Algorithmic trading" means trading in financial instruments where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention. This definition does not include any system that is only used for the purpose of routing orders to one or more trading venues or for the confirmation of orders <u>or to execute client orders or to fulfil any legal obligation through the determination of a parameter of the order;</u>"** |
| | 9) How appropriately do the requirements on | We consider these rules as **appropriate**. |

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| | resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved? | |
| | 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? | We take an **extremely critical view of the requirement to record securities orders placed by telephone** in Article 16(7) of the MiFID II draft. The arguments put forward at European level to justify such a requirement fail to convince in our opinion. This view is shared by BaFin, the German financial regulator (see dissenting opinion by BaFin in the CESR recommendations to the Commission). There are no plausible reasons why existing national discretion and, consequently, national powers should be further curtailed.<br><br>A look in this connection at the implications of such a requirement for the German banking industry makes the proposed provision all the more difficult to understand. Attention should be drawn firstly to the enormous costs associated with such a requirement. Besides costs of at least EUR 632 million for acquiring the necessary recording equipment, the German banking industry would face further operating costs of at least EUR 332 million annually. As a result, it is to be feared that many banks would no longer be able to broadly provide investment advice or non-advised services by telephone. These costs would be incurred despite the fact that there would be no real added value either for clients or for supervisors. It is therefore no surprise that German lawmakers refrained from introducing a voice recording requirement for investment advice in 2009. In our view, the written record of investment advice provided to clients in Germany is an at least equally suitable and, in addition, much less drastic approach.<br><br>Therefore the GBIC is strongly in favour of retaining Member States' discretion on this issue:<br><br>**Article 16**<br>**"7. <u>Member States have the right to impose obligations on investment firms</u>** |

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| | | **Records shall include the recording of telephone conversations or electronic communications involving, at least, transactions concluded when dealing on own account and/or client orders when the services of reception and transmission of orders and execution of orders on behalf of clients are provided.**<br>**Records of telephone conversations or electronic communications recorded in accordance with subparagraph 1 shall be provided to the clients involved upon request and shall be kept for a period of three years."** |
| | 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? | In our view, there is no **need for a requirement for derivatives to be traded on organised venues.** Transparency towards supervision is ensured by Trade Repositories and there is no need for transparency towards the market. |
| | 12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive? | The regulation seems to be helpful in principle – however, outcome depends on following (more precise) implementing rules. It must be the intention to build a **sustainable bond-market for SMEs**, therefore minimum qualifications for access should not be too low |
| | 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?<br>If not, what else is needed and why? Do the proposals fit appropriately with EMIR? | We welcome the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI. At the same time, we believe that these provisions **need to be fleshed out at Level 2**. A full assessment of the provisions is therefore only possible on completion of regulation at Level 2. |
| | 14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or | The GBIC is not supposed to say something about the prospective regulation on commodities. |

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| | 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? | |
| 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? | **Independent advice**<br>Germany has a strong retail market. This is why new rules in the field of investor protection are of more importance to banks in Germany than in many other EU countries. In Article 24(3) of the MiFID II draft, the European Commission intends to promote **independent (i.e. fee-based) investment advice**. In future, clients are to be made aware, through appropriate information, of whether advice is provided to them for a fee or whether it is free of charge for them but **the adviser may receive payments from a third party** if a transaction is subsequently concluded. If sales remuneration were no longer to be paid in future, the compensation for the various services, i.e. not only for independent advice, would have to be raised to maintain the same quality standards. In the end, large numbers of citizens will then no longer, or no longer be able to, make use of investment advice.<br><br>The GBIC takes the view that fee-based advice may be an option for some clients, particularly wealthy ones. **The "order-related advice" model**, whereby monetary benefits paid by third parties (inducements) are allowed for example if these are explained properly to clients, must be retained, however. It would therefore be counter-productive in our view to label fee-based advice "independent" and thus other types of advice "non-independent". **The label used must not be allowed to create any incorrect impression among clients about the quality of advice.** The type of "remuneration" (either direct remuneration on a fee basis or indirect remuneration via commission) is no criterion for the quality of advice. An |

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| | | independent adviser, too, may generate more in the way remuneration through the type of fees he charges and the number of times he advises clients, and he, too, is allowed to recommend products of his own or products of third parties with close links. For example, even advisers who in future sell closed-end funds for a fee and are not subject to the more stringent provisions of the German Securities Trading Act, would be allowed to call themselves "independent advisers", whilst the provision of advice by banks, which indicate the percentage rate of commission to clients before completing this service, would be stigmatised.<br><br>The advisory services labelled "non-independent" would also be so devalued that we expect clients to shy away from them. For many clients, particularly those most in need of protection, fee-based advice will not be an acceptable alternative, however, since it will be too expensive. The experience made with independent advice in Germany already shows that particularly retail clients who have only a small investment portfolio and only conduct a small number of transactions per year are reluctant to pay high fees for advice. It would therefore be better to adopt a descriptive and competitively-neutral term ("advice provided with/without third-party inducements") and to also increase transparency requirements at European level by requiring investment advice to indicate the size of third-party inducements in each case (in line with the provisions already applying in Germany as a result of rulings issued by the highest civil courts).<br><br>For the aforementioned reasons, we believe that the "independent advice" label is flawed and not in clients' interests. The GBIC is instead in favour of making clear to clients whether advice is provided with or without any inducements from third parties and therefore suggests adopting the following wording:<br><br>**Article 24(3): Clients and potential clients […]**<br>**- "[…] when investment advice is provided, information shall specify whether or not the advice <u>is provided in conjunction with the acceptance or receipt of third-party inducements</u> ~~on an independent basis, whether it is based on a~~** |

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| | | ~~**broad or a more restricted analysis of the market**~~ **and shall indicate whether the investment firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended to clients."**<br>**- …**<br><br>Because of the vagueness of Article 24(5), the **requirement for firms providing investment advice on an independent basis to assess a sufficiently large number of financial instruments available on the market will result in serious legal risks making the provision of such a service unattractive**. It makes sense to offer a selected number of recommended products. Investment advice, after all, presupposes in-depth knowledge of the recommended financial instruments. It is also advisable from an economic standpoint for firms to gear the choice of financial instruments to the demand from their own clients. A limited choice of products tailored to clients' needs is therefore more likely to enhance the quality of investment advice. It would ultimately be incompatible with market principles if banks were to be effectively forced to offer their competitors' products as well so as to avoid the incorrect "non-independent adviser" label.<br><br>Instead of the current "independent/dependent advice" labelling also with respect of the product portfolio, the GBIC would like to propose that investment firms have to inform their clients when providing investment advice whether restrictions or preferences in the investment advice exist with regards to recommended financial instruments and/or issuers.<br><br>**Portfolio management**<br>The Commission proposes a ban on third-party inducements in connection with portfolio management (Article 24(6)). Such a ban deprives the client of the chance to decide freely between – higher-priced – portfolio management without any fees, commissions or monetary benefits paid by third parties and portfolio management where part of the management fees paid stem from these third parties. In the latter case, details of these third-party inducements would of course have to be provided |

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| | | to enable the client to make such a decision on a transparent basis. |
| | 16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why? | From our point of view the question is not whether a product is complex or non-complex. It rather depends on **how risky the product might be for the investor**. „Risk“ should be considered as a criterion.<br><br>Furthermore the in Art. 25(3) MiFID draft envisaged restriction of execution-only-services to such providers who do not offer ancillary services as described in Annex 1 Section B (1), like loan providing, is considered as problematic. **German institutions, mostly universal banks, typically offer overdraft credits in connection with current accounts.** The provision urgently needs to be confined to a loan specifically provided for investment purposes (Lombard loan).<br><br>Finally, all **UCITS are typical non-complex financial instruments**. They fulfil all relevant requirements for this classification, are in line with the current definition pursuant to Article 38 of the MiFID Implementing Directive and are all now being fitted with KIID (Key Investor Information Document) to ensure better investor protection under UCITS IV. Any differentiation on a case-by-case basis would merely create unnecessary red tape and devalue the existing UCITS brand, without any improvement to investor protection or the effectiveness thereof. The proposal to remove “structured” UCITS from the catalogue of financial instruments (Art. 25 para. 3 clause a lit iv), which are non-complex by their very nature (and hence, to restrict the execution-only sales of structured UCITS) needs to be deleted. |
| | 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? | The requirement set in Article 27(5) of the MiFID II draft for investment firms to summarise and make public the top five execution venues for each class of financial instruments, **misses its target of enhancing investor protection**. In the area of best execution, practical experience shows that two groups of investors can be distinguished: professional investors and semi-professional retail clients who usually make decisions on their own and therefore tell the bank exactly where they want their orders to be executed. These clients do not need the information that is called for, nor do retail clients, who do not give any such execution instructions |

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| | | and are thus not interested in the customary information on best execution policy. It is therefore highly likely that any further information geared to individual classes of financial instruments will meet with very little interest. At the same time, this provision is a good example of how well-meant information leads to the **information overkill**, criticised particularly by investor protection organisations, that "buries" actually important information. **The provision should therefore be deleted.** |
| | 18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated? | The legal framework for investor protection should be geared to all highly different groups of investors and, for the benefit of all, keep bureaucracy costs in mind at the same time. The broad term "retail investor" appears problematic in this connection, as it covers both clients requiring a high level of protection and those such as local authorities, for example, which only require protection for particular products. If serious legal consequences such as, for example, possible product bans under Articles 31 and 32 of the MiFIR draft are now to be attached to this broad retail investor category, it may legitimately be asked whether this approach does justice to all investors to the same extent. **Consideration should therefore be given to further differentiation of the retail investor category.** |
| | 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? | Cncerning the issue of product bans at supervisory level we wish to draw attention to the establishment of **highly problematic empowerment bases in Articles 31 and 32 of the MiFIR draft.** The focus of our criticism is not on possible product bans themselves, but mainly on the endless scope of the empowerment bases. Product bans should only be imposed if there is no less severe measure to achieve the necessary level of investor protection.<br>Large sections of the banking industry are in favour of **putting authority to issue product bans in the hands of national supervisors**. Otherwise direct supervision of banks by ESMA would be established in a particular area. This would be at odds with the present system. National supervisors also have the required knowledge of markets. **It is important that ESMA is given a coordinating role**, as already envisaged in Article 9 of the ESMA Regulation, so as to – if necessary – ensure a |

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| | | uniform European approach. **A European patchwork of different product bans should be avoided.**<br><br>The GBIC therefore proposes that, should the envisaged power to issue product bans be retained, the relevant enabling clause should be worded as follows:<br><br>**Article 31 of the MiFIR draft**<br>**"2. […]**<br>**a) the proposed action ~~addresses a threat to investor protection~~ is essential to avert serious threats to retail investor protection and cannot be achieved by other proportionate means or addresses a threat…**<br><br>**Article 32 of draft MiFIR**<br>**2 […]**<br>**a) […] a financial instrument, activity or practice ~~gives rise to significant investor protection concerns~~ gives rise to shortcomings in retail investor protection and such shortcomings can only be remedied by a prohibition or restriction or**<br>**[…]"** |
| 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 make them workable in practice? If so what changes are needed and why? | In it's English version Art. 13(3) sentence 3 MiFIR contains an imprecision. The English version calls for publication of a "firm bid and offer price", whereas the German version refers to a "verbindlichen Geld- und/oder Briefkurs" (firm bid and/or offer price). **The German version contains the correct wording in our view. We therefore believe that the English version should be amended the following way:**<br><br>**„For a particular share, (…) each quote shall include a firm bid and/or offer price or prices for…".** |
| | 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, | Whilst MiFID has so far contained legal consequence-related obligations for so-called systematic internalisers (SIs) for equity trading only, the scope is now to be extended considerably. It is also to cover, among other things, bond trading, which in Germany usually takes the form of bilateral transactions. We assume that fixed- |

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| | 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? | price transactions with private investors could also fall under the definition of systematic internalisation. **The pre-trade transparency requirements for SIs in the non-equity sector would, however, be seriously detrimental to functioning markets.**<br><br>For institutional investors active in the bond markets, Article 17(1) and (2) of the MiFIR draft could, in particular, prove problematic in practice: if an investor asks an SI for a firm quote, **the SI shall make this firm quote available to its other clients, with the size of the quote being of no importance, as we understand it.** The "size specific to the instrument" is only introduced in Article 17(3) of the MiFIR draft as a criterion for the firmness of the quote in relation to other clients of the SI.<br><br>Investors would accordingly have to assume that their request for a quote will become known to all the SI's other clients even if the size involved is likely to have market impact. The price for the investor requesting the quote could thus deteriorate while he thinks over the quote or obtains a quote from other SIs. **Moreover, there would be scope for arbitrage if clients of an SI are informed about quotes of any size but only quotes up to the threshold referred to in paragraph 3 explicitly have to be made public under Article 17(5) of the MiFIR draft.** Such far-reaching pre-trade transparency in bond trading is not called for either by investors or by trading banks (and thus potential future SIs), as far as we know. Because of the special characteristics of the non-equity markets, CESR too voiced its opposition to EU-wide pre-trade transparency requirements in its recommendations to the Commission.[1]<br><br>With regard to fixed-price business with retail clients, it should be noted that retail clients are unlikely to compare prices quoted by several different SIs because for them to actually be able to compare quotes bonds would have to be identical. This |

[1] see CESR-Technical Advice to the European Commission in the Context of the MiFID-Review – Non Equity Markets Transparency CESR/10-799 from 29 July 2010, page 6.

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| | | will virtually never happen in practice, however. While creating this kind of transparency would be extremely burdensome, it would not deliver any tangible benefits. The burden would be particularly heavy for institutions that are organised in a group and where execution of a securities order very often involves a chain of fixed-price transactions. Such a chain runs, for example, from a central institution to a local institution and from it to the client, which would trigger the SI's obligations at least twice. We therefore believe that, given the disproportionate nature of a provision that also affects retail business, a limitation geared to the group of clients concerned would be advisable.<br><br>As far as the scope of Article 17 of the MiFIR draft is concerned, we wish to point out that **to ensure a level playing field it should cover contracts for difference.** At least clarification to this effect is required.<br><br>Finally, we should like to draw attention in connection with the rules on pre-trade transparency as a whole to an inaccuracy in Article 13(3) of the MiFIR draft regulating pre-trade transparency for SIs. The English version calls for publication of a "firm bid and offer price", whereas the German version refers to a "verbindlichen Geld- und/oder Briefkurs" (firm bid and/or offer price). The German version contains the correct wording in our view. We therefore believe that the English version should be amended accordingly. |
| | 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? | Should the idea of pre-trade SI transparency also for these non-equity markets nevertheless be retained, it should be made clear that quotes only have to be made available to the SI's clients if the size involved is below the threshold referred to in Article 17(3) of the MiFIR draft.<br><br>The functioning of bond trading in future would then depend to a crucial extent on how the "size specific to the instrument" is defined. At Level 1, it should at least be stipulated what purpose the size specific to the instrument is to serve (e.g. protecting retail clients) and which criteria are to be taken into account when fixing the details at Level 2. **The size threshold must be set in such a way that the** |

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| | | **above-mentioned adverse effects on pricing for investors are avoided** and the firmness of quotes up to this threshold does not become an unacceptable business risk for the SI.<br><br>In addition, it should be made clear that the rules on access to quotes under Article 16(1) and (2) of the MiFIR draft also apply to SIs in the non-equity sector. Since, it must be ensured that scaled pre-trade quotation is possible so as to take into account the different credit risk of investors. The same goes for trading in derivatives, especially as this involves highly specialised bilateral contracts whose transparency does not deliver any added value to the market. |
| | 23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why? | No comments. |
| | 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)? | The implementation period of two years with respect to Article 67(2) MiFID as determined in Article 97(1) MiFID should be reduced to "as soon as possible" since this measure will simplify the disclosure obligations for banks as well as the information gathering for interested persons. |
| | 25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data? | a) Post-trade transparency for transactions in shares<br>Articles 28, 30 and 45 of the existing MiFID stipulate that transactions in shares – whether they are concluded on a regulated market, an MTF or bilaterally between two contracting parties – must be made known immediately to all interested investors. Under Article 45(2) of MiFID in conjunction with Article 28 of Regulation (EC) no. 1287/2006, Annex II, table 4 of this Regulation defined thresholds which, if exceeded, allow for deferred publication of transactions by firms subject to transparency requirements. For this purpose, it created several classes of shares in terms of average daily turnover to determine the exact delays for publication. In the case of particularly large blocks of shares, delays until the end of the third trading day next after the trade are possible. |

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| | | Provision for deferred publication enables market participants to bear the risks of large trades since they are not required to disclose these immediately. **Publication too early harbours the danger of "cornering". A market participant who has entered into a position could be undermined by other market participants in his intention to close the position.** That goes for anonymous publication as well, as the market can still identify the traders concerned. This would lead to the danger of market participants no longer being prepared to expose themselves to the risk of a position. **Such a reduction in the number of potential counterparties affects liquidity in block trading in particular**. This would be detrimental particularly to institutional investors such as insurance firms or pension funds.<br><br>Article 19(2) of the MiFIR draft, in conjunction with Article 10 of the MiFIR draft, provides for deferred post-trade transparency of transactions in shares in certain cases. This provision is in principle to be welcomed. At the same time, Article 10(2) of the MiFIR draft should regulate more precisely which criteria must be taken into account when fixing the details at Level 2. We are concerned that unnecessarily restrictive rules could be adopted. For example, CESR proposed in its advice to the European Commission[2] that deferred reporting should generally take place no later than the end of the trading day (or beginning of the next trading day if the transaction is concluded after 3pm). These delays do not accommodate the risks associated with some transactions. The longer delays provided for today are only applied in exceptional cases, but it is precisely then that they are needed. **It must be ensured that market participants can continue to make available liquidity in block trading in the future.** To enable them to do so, the associated risks need to remain acceptable through adoption of appropriate delays. We therefore recommend that the wording of Article 10(2) of the MiFIR draft should take this into account.<br><br>Finally, we wish to point out that **the scope of Article 19 of the MiFIR draft is** |

[2] See CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets (CESR/10-802) of 29 July 2010, p. 24/25, table 5.

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| | | **not clear enough**. We are against the inclusion of "other similar financial instruments". When putting the transparency requirements into practice, firms subject to them should be able to clearly define the financial instruments covered. This is not possible with the broad wording "other similar financial instruments". We also do not believe it is necessary to make the scope so broad to achieve the intended regulatory purpose. We therefore suggest deleting the words "or other financial instruments" in Article 19(1) and (2) of the MiFIR draft.<br><br>**b) Post-trade transparency for transactions in bonds, structured finance products and derivatives**<br>The existing post-trade transparency requirements in relation to other market participants for transactions in shares are to apply in similar form in future also to many other financial instruments, including bonds (Article 20 of the MiFIR draft). **In regard to bonds, we are concerned even more than in the case of equity trading that the establishment of unreasonable transparency rules will cause liquidity in bond trading to dry up.**<br><br>The purchase and sale of bonds, not only in the case of transaction large in scale, usually takes place in the form of bilateral transactions. Banks provide the market with liquidity by buying and selling bonds; for this purpose, they take risks on to their own books. That goes both for transactions with private investors and for transactions with institutional investors. If banks were to be required to disclose their transactions to other market participants too early, the risk of the market moving against them and of their only being able to unwind their positions at unreasonable prices would be too high. As a consequence, banks would avoid exposing themselves to such risks, so that liquidity would dry up. This would, however, be seriously detrimental to bond issuers, be they companies, the public sector or banks. |

[3] See CESR Technical Advice to the European Commission in the Context of the MiFID Review – Non-Equity Markets Transparency (CESR/10-799) of 29 July 2010, p. 4/5.

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| | | The aim must consequently be to achieve the best possible transparency. **Appropriate scope for deferred trade reporting is therefore essential. The delays applying to transactions in shares today show that differentiated transparency solutions** that meet market needs in terms of each class of products **are required.** The existing differentiated system provides good guidance. A differentiated approach is also required for transactions in bonds. CESR, on the other hand, proposed in its advice to the European Commission[3] that deferred reporting should generally take place no later than the end of the trading day. This delay is unsuitable for many transactions because of the risks associated with these. It must instead be ensured that liquidity does not dry up in this market either in future. The wording of Article 10(2b) of the MiFIR draft should take this into account. **Instead of absolute volumes, thresholds should also be possible (above X and below Y EUR) for deferred trade reporting.** In addition to the threshold arrangements provided for bonds and derivatives in Article 20(1) of the MiFIR draft, which we welcome, we believe that a higher threshold is required in each case to select the most liquid securities that are suitable for market transparency requirements. This additional threshold should be fixed by ESMA.<br><br>Also completely new is the planned extension of the post-trade transparency requirements in Article 20 of the MiFIR draft to transactions in, among other things, structured finance products and derivatives. It must be borne in mind that all structured finance products are individually designed and not standardised. Because of their bespoke structure, price information disclosed after trading is rather meaningless since completely identical instruments do not exist and conclusions about the market value of other instruments are virtually impossible. **The informational value of post-trade prices for market participants is therefore very limited.** Transparency, i.e. details of trades concluded, could even be harmful for the market as structured products cannot automatically be compared with each other. Slight differences in the design of products may have significant economic implications for a product. If, therefore, only market data on similar but |

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| | | not identical products are available under a more stringent transparency regime, interested market participants run the risk of making their decisions on an incorrect basis. It is, moreover, not clear how transparency is actually to be established for these financial instruments. The details are only to be fixed at Level 2. Given the considerable differences between the financial instruments covered by Article 20 of the MiFIR draft, **we believe that a differentiated approach is advisable at Level 1** and suggest, firstly, gearing the wording of Article 20 of the MiFIR draft more strongly to the existing differences between financial instruments and, secondly, making it more concrete. |
| 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? | No comments. |
| | 27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately? | Functioning financial markets require functioning supervision. To monitor trading, particularly to keep an eye on prohibited insider transactions, **supervisors need details of transactions concluded**. Since the entry into force of MiFID, the requirement to report transactions has been regulated by Article 25(3) of MiFID. This provision is supplemented by Article 13(1) and Annex I, table 1 of European Commission Regulation (EC) No. 1287/2006.<br><br>These rules were transposed into German law by means of Section 9 of the German Securities Trading Act and the Securities Trading Reporting Regulation. The annex to the latter contains the form to be used for filing reports, showing how the details of trades have to be transmitted to BaFin. The data record enables reporting institutions to report all transactions concluded by them to BaFin in a standardised electronic format, irrespective of how the transactions were executed. BaFin can therefore automatically see all the details of a transaction, no matter whether it was concluded on- or off-exchange, for clients or for own account, through the intermediary of commission agents or brokers or directly. Complicated |

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| | | transaction chains can also be tracked with the help of the data record. All transactions in securities and derivatives admitted to trading on a stock exchange and all transactions in 'pure' open market securities are reported to BaFin. In 2010, BaFin received around 5.15 million reports from reporting institutions every trading day. **These are automatically analysed and examined for abnormalities. In this way, consistent market supervision is ensured.**<br><br>Article 23(8) of the MiFIR draft says that the data set required for reporting will be harmonised at European level in future. We recommend bearing in mind in connection with the envisaged stronger harmonisation that **high-quality supervision can only be achieved in all EU Member States if reporting institutions can submit high-quality reports.** To enable them to do so, key terms such as "transaction" first need to be defined clearly at Level 1 as these are essential for generating clear reports. It must then be ensured that more strongly harmonised reporting requirements make allowance for nationally designed types of transaction. The rule that the reporting data record should be geared to the type of transaction must apply in future as well. Otherwise it is to be feared that use of established transaction types such as intermediate commission-based transactions, which are not common in all EU Member States, will no longer be possible due to their "unreportability". It should therefore also be ensured at Level 1 that the reporting record to be developed at Level 2 satisfies such requirements. This is the only way to make sure that, firstly, clients have continued access to established transaction types and, secondly, that BaFin can continue to perform high-quality supervision in future as well.<br><br>Article 22(2) of the MiFIR draft requires the operators of regulated markets, MTFs and OTFs to record certain data relating to orders and refers in this respect to Article 23(1) of the MiFIR draft, which provides for an obligation to report the details of a transaction that are ultimately to be specified further via the harmonised EU data set. Article 23(3) of the MiFIR draft, which says that reports should include a designation to identify clients, thus also plays a role. When it |

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| | | comes to reporting a trade, the requirement to indicate a client ID is not a problem: it is already indicated today under Section 9 of the German Securities Trading Act. Article 22(2) of the MiFIR draft refers to the reporting of trades, and not orders, however.<br><br>**We wish to point out in this connection that no obligation whatsoever to indicate a client ID when routing an order to a trading venue is necessary today.** The order which the bank routes to the venue contains only data relating to the order. Purely client-related data such as the client ID is included after execution of the order during processing by the bank through which the client placed his order, but not on the regulated market, MTF or OTF. It is not clear what reasons there could be for calling this tried and tested system into question. **Transmission of client details to trading venues is not necessary for execution of orders, but would lead instead to massive interference in order execution processes at both banks and trading venues.** We see no need for this and therefore suggest including clarification in Article 22(2) of the MiFIR draft that makes transmission of client data unnecessary in future as well.<br><br>Finally, we take a critical view of Article 23(9) of the MiFIR draft. High-quality supervision can, in our opinion, only be ensured by national supervisors. We therefore believe that it would be better to first allow sufficient time to observe and evaluate application of the changed reporting rules in practice. A period of two years is not enough to conduct a proper examination. We therefore suggest deleting Article 9. Alternatively, the period in question should be extended to at least four years. |
| | 28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2? | No comments. |
| | 29) Which, if any, interactions with similar requirements in major jurisdictions | No comments. |

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| | outside the EU need to be borne in mind and why? | |
| | 30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive? | No comments. |
| | 31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2? | The GBIC calls for further specification of the bases for empowerment at Level 2, some of which are too broadly worded. At present, it is in many cases not clear enough to addressees what the exact content or purpose of the rules to be drafted at Level 2 are to be.<br><br>Also the content and therefore the scope of the Level 1 provisions should be clarified.<br><br>See also our answers to the other questions or our further comments which deal with this item. |
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| **Detailed comments on specific articles of the draft Directive** | | |
| **Article number** | **Comments** | |
| Article 25: | Article 25(5) sentence 2 of the MiFID II draft leaves completely open so far in which cases periodic reports must be sent to clients on the service provided to them. In our view, such a requirement can only be set for portfolio management or – where offered by the investment firm to its clients and expressly agreed with them – also for investment advice (for the relevant information requirement, see Article 24(3) of the MiFID II draft). Only then is it actually possible for banks to offer this service without facing enormous liability risks. For banks with a broad client base, monitoring in the case of investment advice is only possible with the help of completely new IT systems and special agreements on the content of the service, as in investment advice – unlike in portfolio management – the client himself decides on the composition of his portfolio and his decisions may differ from the personal recommendations made by the adviser. In addition, the client may buy and sell financial instruments at any time without using the adviser's services. If a requirement to notify the client periodically without any contractual agreement to this effect with him were to be introduced, it would not be possible in Germany, because of court rulings in connection with banks' standard terms and conditions of business, to make any charge for the additional information service, which would impose a considerable extra cost | |

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| | burden. A distortion of competition to the detriment of German banks could then not be ruled out. |
| Article 97: | Article 97(1) entails a provision to write in the date at which the new requirement will be apply, i.e. the investment firms must have implemented the new requirements, but does not yet state a definite implementing period for the investment firms. In our view, the exact period can only be set once the content and scope of the new requirements becomes clear (see our answer to question 31).<br><br>The GBIC would like to highlight that the implementing period can only start once the Level 2 implementing measures have come into force. It is further necessary that Member States transpose the Directive into national within the fixed transposition period.<br>Our experiences with MiFID I has shown us that although the deadline for the application of the MiFID I was two years and was then even further extended by 18 months, the investment firms had only a few months to implement the new provisions. Such an inappropriate short implementing period must be avoided with respect of MIFID II/MiFIR. |
| Exclusion of national gold plating: | Experience with the current MiFID has shown that some Member States tend to national gold plating. Article 4 of the MiFID Implementing Directive intended to prohibit such practises has sadly proven ineffective. Member States are likely to argue that the new/previous requirements have not been regulated in MiFID I and that Article 4 therefore does not apply. As far as we are able to see, there has been no progress within the Commission's proposals with regards to MiFID II/MiFIR on this subject.<br><br>The GBIC would welcome if Member States were obliged to report to the Commission any additions or modifications in their national provisions, including any additions intended to be retained even after MiFID II/MiFIR comes into force. The Commission needs to ensure that all Member States are compliant with the narrow conditions under which national gold plating is allowed (cf. Art. 4 MiFID Implementing Directive) and non-compliance with these rules leads to effective sanctions to ensure the intended level playing field within the EU. This should be therefore already regulated at Level 1. |
| **Detailed comments on specific articles of the draft Regulation** | |
| **Article number** | **Comments** |
| Article 46: | We refer to our remarks to Art. 97 MiFID II draft which should also apply to the Regulation. |
| Exclusion of national gold plating : | We refer to our remarks to the MiFID II draft which should also apply to the Regulation. |