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.**

Name of the person/ organisation responding to the questionnaire	**Investment Management Association**

At the beginning of several questions we have summarised one or more key points in German. The English text is our full response.
Wir haben unsere Hauptpunkte am Anfang jeder Frage auf Deutsch zusammengefasst. Die Englische Version ist unsere offizielle Einlage.

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?	*Es ist wichtig, dass bei der Initiative zur Anlageprodukten für Kleinanleger (PRIPs) Fortschritte gemacht werden, damit MiFID 2 sich den wichtigen Verbesserungen in Rahmen des Verbaucherschutzes anpassen kann.* The exemption for insurance undertakings remains necessary but it points to the need to progress the PRIPs initiative and ensure that MiFID 2 integrates well with this important enhancement to investor protection. We support the application of requirements analogous to certain MiFID provisions to nationally regulated exempt advisory firms.
	2) Is it appropriate to include emission allowances	*Wir halten es für richtig, dass strukturierte Einlagen mit einbezogen werden.*

	and structured deposits and have they been included in an appropriate way?	It is right to include structured deposits and with it alter the definition of trading on own account. But as in Q 1) above, the full PRIPs proposals will need to be considered.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	*Falls Verwahrung und Verwaltung mit in Abschnitt A der Wertpapierdienstleistungen und Anlagetätigkeiten aufgenommen werden sollten, würde dies in der Tat bedeuten, dass die restriktiven Auswirkungen der Drittlands Vorschriften viele Treuhänder ausserhalb der EU betreffen würden. Der Zugriff auf neue Märkten für Investoren innerhalb der EU muss weiterhin dringend gewährleistet sein.* Yes, including these activities as core services will mean the restrictive impacts of the 3rd country provisions will apply to many custodians outside the EU. It will be important to ensure that this does not prevent investors in the EU from accessing emerging markets. We also see the need for additional adjustments in order to provide for non-application of the appropriateness test to this area. Due to safekeeping of assets becoming a core service, the requirements for the appropriateness test in the newly drafted Article 25(2) would apply to the opening of client accounts. It would make no sense for investment firms to have to investigate the 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?	*Vermögensverwalter müssen regelmässig die Dienste von Firmen nutzen, die sich ausserhalb der EU befinden, (Drittlandsfirmen) um ihrer Verplichtung nachzukommen, professionell und im besten Interesse ihrer Kunden zu handlen, oder auch um auf die angemessenen Kenntnisse und Erfahrungen zugreifen zu können. Wenn ein Manager z.B eine Anlage in einem Schwellenmarkt kaufen möchte, benötigt er oft die Dienste eines Teilnehmers an dem dort ansässigen Markt. Anlageverwalter delegieren regelmässig das Management eines Anlageportfolios zu ortansässigen Experten, innerhalb oder ausserhalb des eigenen Unternehmens*

		<u>Lösungsvorschläge</u> • *Befreiung von Vertretern der Anlageverwalter* *Firmen in Drittländern, welche von Managern innerhalb der EU mit Vermögensverwaltung beauftragt worden sind, sollten von den Anforderungen befreit sein, selbst unter MiFID zugelassen zu sein.* • *Befreiung von Drittlands Brokers, deren Dienste von Vermögensverwaltern innerhalb der EU genutzt werden* *Wir halten hier die selbe Vorgehenweise wie oben für angemessen; eine vertragliche Regelung zwischen den Vermögensverwaltern und der dritten Person sollte hier genügen.* • *Präamble 74 sollte angepasst werden* *Wir merken an, dass Präamble 74 und Artikel 36(4) der Richtlinie besagen dass EU Personen Dienste auf eigene Initiative in Anspruch nehmen mögen, ohne das die Anforderungen der Richtlinie gelten. Dies beruhigt jedoch nicht die Bedenken der Industrie. Wir schlagen daher vor die Präamble dementsprechen umzuschreiben, dass auch die oben genannten Aktivitäten betroffen sind. Des Weiteren sollte klar gestellt werden, dass Kontakte im Rahmen existierender Vereinbarungen nicht betroffen sind.* In order to meet obligations to act professionally and in the best interests of clients and even to meet suitability requirements, EU asset managers frequently need to use the services of firms based outside the EU ("3rd country firms"). As an example, where the manager wishes to buy a security in an emerging market it may have to use a local exchange member (and national clearing arrangements may require that). Also managers routinely delegate all or part of the management of a portfolio to local experts. This may be within

		or outside their own groups. These two common arrangements, the use of a 3rd country broker and the use of a 3rd country manager delegate, are referred to throughout this paper. Currently under MiFID there is no requirement for 3rd country firms to obtain an EU authorisation in order to provide EU managers with such services. The EU manager remains responsible to the client to meet its EU regulatory obligations and has to ensure that these are achieved through its arrangements with 3rd country firms. Similarly, under AIFMD, EU AIFMs may delegate to 3rd country managers which have no EU authorisation. However, an AIFM can only do so under rigorous delegation requirements, designed to ensure that its obligations are not altered by the delegation. Under AIFMD, the 3rd country manager must be authorised by a regulator which meets the IOSCO standards for securities regulation. We assume that it is not the Commission's intention to cut across these arrangements, and indeed the Commission has recently confirmed that delegation arrangements should not be affected – see below. However MiFID II, as currently drafted, would change both these positions. A 3rd country broker providing execution services to an EU firm or a 3rd country manager acting under delegation from an EU manager would appear to be providing a core service under MiFID II whether the EU firm is a MiFID investment firm, an AIF manager under the AIFMD or a UCITS manager under UCITS IV. As MiFID II imposes far more onerous requirements than AIFMD or UCITS, it will govern what is allowed. This is a major change and will override the AIFMD dossier work.[1]

[1] The Commission has said that delegation arrangements would be exempted since they would fall under passive marketing arrangements (Recital 74). But, as it stands we believe this is too narrow and unclear.

		Accordingly, in the remainder of this note, the term "EU manager" is used to signify a MiFID investment firm, an AIF manager under the AIFMD or a UCITS manager under UCITS IV. <u>Solutions</u> • Exempt asset manager delegates 3rd country firms to whom asset management[2] has been delegated by an EU manager should be exempt from the requirement to be directly MiFID authorised themselves. The EU manager owes obligation to its clients under MiFID, UCITS or AIFMD and will continue to do so despite its choice to delegate some part of the mandate. As under AIFMD this delegation should not be seen as a loophole given the existing requirements which already lie on EU managers which prevent them from delegating their duties so that they become letter box entities (e.g. Article 20.3 AIFMD, Article 13.2 UCITS and Article 14.1 MiFID Level 2). Compliance will be achieved by contractual obligations under outsourcing agreements – there is no need for an additional overlay. The delegation requirements under MiFID II should be brought into line with those under AIFMD, as should the delegation requirements under UCITS. • Exempt third country brokers when used by EU managers We believe that an identical approach should be adopted for this scenario; it should be sufficient to rely on the contractual arrangements between the EU manager and the third party. So there should be a specific exemption

[2] Asset management includes discretionary portfolio management and related execution of orders, risk management and investment advice on a client portfolio.

		for third country brokers executing orders passed on by an EU manager acting under a client mandate. • Amend recital 74 The Commission confirmed recently to IMA that the intention was that delegation of asset management would fall within Recital 74 – so out of scope of MiFID II - in that they were provided at the exclusive initiative of the EU firm. We would suggest therefore that this Recital is also amended to cover these activities and also to make it clear that contact to professional investors in the course of existing arrangements is out of scope. <u>Other services</u> A range of other asset management related services used by investors will also be impacted by the MiFID II third country proposals, notably: situations where a client appoints a third country manager directly; or where a non-EU distributor sells products into the EU; or where an EU fund of funds invests in offshore funds. Unlike with the previous examples, the third country firm will be engaging directly with the underlying client, and there will be no intermediation by a MiFID authorised entity acting in a fiduciary capacity under a client mandate. In such cases we broadly support the approach in MiFID II, as regards retail clients, that the firm be authorised and subject to EU conduct of business requirements. But we are concerned that the proposal, as it stands, will be unworkable and may do much greater damage and lead to retaliatory measures.

		In particular, there needs to be a more pragmatic approach with regard to equivalence, reciprocity and physical presence.
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?	*Obwohl wir die Einführung des Artikels 9 (1), welcher überarbeitete Standarts für geschäftsführende Organe einführt, unterstützen, and anerkennen, dass viele dieser Standards der CRD IV Direktive entnommen sind, lehnen wir dennoch die eher beschwerlichen, detailierten Beschränkungen der Anzahl der Vorstandposten, welche eine Person beinhalten kann, ab. Eine solche Regelung könnte ein einfaches „Abhak-methode" einführen, welche zu vermeiden ist.* *Wir unterstützen die Verhältnismäßigkeitsregelungen in Artikel 9 (2). Diese müssen beibehalten werden.* *Ebenfalls unterstützen wir die Verhältnismäßigkeitsregelungen in Artikel 9 (3), allerdings sehen wir keine Vorteile in Regulierungsstandards, die von ESMA entwickelt werden, und empfehlen daher, Artikle 9 (4) zu löschen.* *Des weitern sollten die Corporate Governance Vorschriften mit denen anderer Richtlinien, wie z.B. der AIFMD, CRD IV etc, übereinstimmen. Die Regelungen der CRD IV sind denen des Artikel 9 sehr ähnlich, daher halten wir eine Wiederholungen der Vorschriften im Artikle 9 hier für unnötig.* Whilst we support the introduction in **Article 9(1)** of revised high level standards for management bodies, and recognise that many of these are picked up from CRD IV, we oppose the more onerous, detailed restrictions on the number of directorships to be held by individuals. It risks introducing "box-checking" approaches. We consider these proposals to have negative effect as follows: • Limits will cause particular problems for Investment Trust and Property

		Fund directors. Investment Trust Companies and Unit Trusts will not be counted within the intra-group allowance. • External directorships unconnected to financial services including those of an unremunerated nature (e.g. of charities or property management companies) would use up the permitted number of directorships. We note that Competent Authority *can* authorise more directorships, depending on the individual circumstances, nature, scale and complexity of the investment firm's activities, but this would have to be individually applied for. This in itself may absorb considerable resource at the competent authorities. We consider that the directive should stick to high level requirements on members of management bodies having 'sufficient time and resources'. We support the proportionality provisions in **Article 9(2)**. These must be retained. There will, of course, be many situations where some of the provisions are neither appropriate nor proportionate, e.g. for small subsidiary asset management companies, which do not have any non-executive directors, or for partnerships which have no directors. Such firms should be able, if they deem it appropriate, to set up nomination committees which are not entirely constituted of non-executive directors. In this regard we understand that discussions around the revised CRD are making it clear that the equivalent new rules in that Directive apply to a wider range of business structures, and that the rules should be applied appropriately. We support the proportionality provisions in **Article 9(3)**. Requirements on promoting gender, age, educational, professional and geographical diversity must not become overly prescriptive. It is incumbent on all management bodies to ensure that they have the appropriate experience to discharge their responsibilities and meet anti-discrimination legislation; imposing these extra requirements seems likely only to produce unnecessary paperwork and

		tokenism. In this regard we see no advantage in ESMA developing regulatory standards and would delete **Article 9(4)**. There also needs to be consistency with Corporate Governance elements of other directives, e.g. AIFMD, CRD IV etc. All our members are CRD firms as the UK takes the view that UCITS firms with the MiFID portfolio management permission must comply with CRD as an investment firm. The CRD IV proposal makes very similar demands to **Article 9**, so why have it in both directives? Compliance with CRD should be enough. Requiring firms to comply with several very similar, but slightly different, sets of regulations is going to lead to considerable unnecessary effort and expense, with no consequent benefit to investors, or market stability. The directives ought to be revised so that they cross-refer, as necessary, to one source of appropriate and proportionate governance requirements. The CRD IV reference is at Article 87 of the proposed directive.
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?	*Wir stimmen der G20 Entscheidung zu, dass der Grossteil des Handels on festgelegten Handelsplätzen stattfinden sollte. Dennoch haben wir erhebliche Bedenken, OTFs einzuführen.* *MiFID II sollte sich unserer Meinung nach, wenn es sich um die Equity-Märkte handelt, mit Broker-Crossing Netzwerken beschäftigen anstatt mit technischen internen crossing networks. Die Situation kann nur unüberschaulicher gemacht werden, wenn OFTs in die Diskussion einbezogen werden, obwohl sich die Regeln auf equity Broker-Crossing Netzwerke beziehen. Wir verweisen hier auf den Eigeninitiativ Report zum Thema Trading von Kay Swinburne MEP und die um einiges überschaubarbaren Vorschläge zu BCNs im Paragraph 7.* We support the G20 principle that as much trading as possible should be

		undertaken on organised venues. However we have significant concerns with embedding a market structure that reflects trading conventions in the equity markets as at October 2011 across very different types of financial instruments. This neither reflects how real working markets operate now, nor allows sufficient flexibility for future developments. Our comments below are made in this context. **OTFs in fixed income and OTC derivatives markets** The application of the OTF regime as currently proposed to fixed income and OTC derivatives markets is not appropriate, as it does not reflect the way in which these markets operate or reflect the extremely variable nature of debt and OTC derivative instruments. For the OTF category to work for these markets it will need to accommodate the wide range of trading facilities currently available. These include request-for-quote systems, voice-brokered facilities and the use of proprietary capital to accommodate client trades. The current OTF proposals, together with the proposed SI regime for non-equity markets, will require the market structure to change and limit the range of trading venues available. This is very likely to have an adverse effect on liquidity in these markets, to the detriment of investors such as pension funds and UCITS. As a result, the ability of investors to manage risks will also be affected as will the ability of UCITS to manage inflows and outflows to funds. If capital markets are to work efficiently it is essential that there is liquidity for investors. In particular the prohibition on the execution of client orders against proprietary capital in an OTF for fixed income and OTC derivative markets could prove extremely damaging as it ignores the important role played by investment firms using risk capital to facilitate client business: • Fixed income markets have heavy reliance on dealer liquidity. These

		markets are dominated by large institutional investors such as pension funds and UCITS. The proposed structure for OTFs will force market making down the SI route, where only limited liquidity may be provided due to the onerous and disproportionate obligations regarding quotes placed on SIs under Article 17 MiFIR (see further below in our response to Questions 21 and 22). This is likely to reduce trading opportunities and increase the cost of transactions in these instruments for investors. This will have a direct impact on the pensions and savings of the underlying beneficiaries of pension funds and UCITS. • The OTC derivatives market also relies on liquidity provided by a relatively small number of institutions compared to equity markets. Although clearing is likely to result in a substantial degree of standardisation of derivatives such as interest rate swaps, a significant number of client trades are still likely to remain customised. This could reflect credit concerns, or it could be because there is limited demand: for example, no clearing house has yet developed a system for clearing inflation swaps. It is vital that there should still be a suitable range of venues available on which to execute OTC derivatives to enable investors to continue to access this market to manage their risks. Concerns over the use of proprietary capital and conflicts of interest are better addressed by the application of the best execution and client order handling rules that will apply to venues falling within the OTF category. In addition, we would support a requirement for more transparency to be provided from brokers to clients in relation to the use of proprietary capital, both pre- and post-trade. **OTFs in equity markets** In relation to the proposed OTF provisions for equity markets [Articles 7-8 MiFIR] there are circumstances where managers will not want to interact with

		A ty markets, before OTFs were mentioned, the policy discussions were about broker crossing networks (and not some technical internal crossing networks at managers). We suggest that that is what MiFID II should address. There is no need to confuse the situation by referring to OTFs when the policy is aimed at equity BCNs. In this regard, we refer to the Own Initiative Report on Trading under Kay Swinburne MEP and the much clearer proposals about BCNs at paragraph 7. As regards proprietary capital, the provisions might require the broker/dealer: first to make it clear if it ever participates in its own crossing network; then to provide that a client may always decline to allow any interaction with the broker's own market-making in the pool; and finally to require detailed disclosure to the client, setting out how trades generally as well as its own in OTFs have been filled (therefore post trade, indicating the respective weighting of client versus dealer liquidity utilised in the system).
	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?	*Eine Definition des OTC Handels halten wir nicht für nötig. Anstattdessen sollte es das erste Anliegen der Gesetzesvorschläge bezüglich der Markstrukturen und Transparenz sein, die Anforderungen und Gewohnheiten der jeweiligen Märkte widerzuspiegeln.* We do not believe that OTC trading needs to be defined: it is a description of what is not traded on an organised venue. The focus should be rather on ensuring that the proposals regarding market structure and transparency reflect the nature of the assets traded and the investor requirements of each specific market. In the case of fixed income and derivative markets, for example, as mentioned in answer to question 6 above, the OTF category is not appropriately designed for the markets as they currently operate.

		In the context of fixed income and derivative markets it is not clear what effect the OTF proposals will have on where trades are executed, as an OTF type of facility is not currently common in these markets (in equity markets an OTF is recognisable as a Broker Crossing Network).
	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?	***Artikle 17.3*** *sollte geändert werden. Das Ziel dieses Artikels ist es, den Hochfrequenzhandel zu regulieren, aber mometan betrifft er auch das algorytmische Handeln der Käuferseite.* Provisions about the need for effective systems and risk controls appear sensible but the rules risk going too far on obligations on understanding how they work, and disclosure to home Competent Authorities. We support the new ESMA guidelines on highly automated trading – MiFID II should be designed to underpin these more clearly. **Article 17.3** needs some amendment. It is designed to catch high frequency trading but, as drafted, would catch the buy-side's use of algos as well. There needs to be a distinction between using algos in trading and being an algo trader. Buy-side firms are only intermittent users of algos and use a variety of methods to execute trades and only undertake client business and therefore would never be in a position to meet the obligations to post quotes. If it is to remain, we suggest **Article 17.3** should make it clear that it only applies to investment firms which make markets by posting quotes using an algorithmic trading strategy: firms which merely use algos to place orders and facilitate trading do not post quotes and should, by definition, be excluded from any such requirement. We do not believe that it is necessary to refer to MAR in Article 17.4 in respect only of algo trading and would recommend those references be deleted. MAR covers all types of trading and this must not be diluted. Article 20 – see answer to Q 6.

		No adverse comments on Articles 19 and 51.
	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?	These seem sensible on the basis of our understanding of these business models.
	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?	Own account trading must be recorded.
	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?	Whilst in principle we have no objection to the proposal that standardised OTC derivative contracts are traded on organised trading venues, and accept that this is part of the Commission's response to the G20 commitment to bring trading in such contracts onto organised trading venues, we are concerned that the proposals have not been sufficiently thought through at this stage. Firstly, as stated in answer to Questions 6, 7, 21 and 22, we feel there are significant issues with the proposals for OTFs and SIs as applied to OTC derivatives markets. These concerns need to be addressed before imposing a trading obligation which limits trading by reference to regulated markets, MTFs and OTFs. The requirement that trading of eligible OTC derivatives contracts between certain market participants may only be undertaken on the markets specified (RM, MTF, OTF) is too restrictive and does not allow such market participants to choose where and how best to execute these transactions, in contrast to other financial instruments where no such absolute restriction exists. It also does not allow for adverse market conditions when prices may not be available on these venues. (We note however that the SI regime applies to OTC derivatives which are admitted to trading or traded on an MTF and OTF. Does this mean that this option in only available to market participants

		who do not fall within the organised trading obligation under Article 24?) In Article 24 (MiFIR), little prominence is given to the fact that contract standardisation for trading purposes is significantly more complex than for clearing alone (EMIR and Article 24). It will require each venue to establish key commercial variables and contractual terms for each type of contract to ensure that the contracts traded under the same category are fundamentally the same. Where contracts are to be traded on a range of venues, as anticipated, this exercise will need to be carried out at the market level. The criteria for determining liquidity (Article 26(3) MiFIR) should also refer to where the contracts are currently traded and to current volumes. The technical standards to be developed by ESMA at level 2 should also factor in how long it will take market participants to put in place arrangements to trade only on an organised trading venue. The third country trading provisions need to be carefully considered in the context of developments in other jurisdictions, in particular Dodd Frank.
	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?	*Es ist entscheidend, dass hier die korrekten Schwellenwerte für kleine und mittelständische Firmen gesetzt werden, z.B. bis zu €100, um zu vermeiden, dass einige Unternehmen zu gross für den KMU Markt, jedoch zu klein für den geregelten Markt sind.* We see no harm in the proposal, but it should be recognised that the problems that SMEs encounter in raising capital relate to a lot more than having a specific MTF. Setting the correct boundary for what is an SME, for example less than €100m, is critical if some enterprises are not to find themselves too large for the SME market but too small for the main regulated markets.
	13) Are the provisions on non-discriminatory	The provisions are necessary, but we are not able to say if they will be

	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?	sufficient when combined with the powers of competition authorities.
	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?	*Während wir Positionsmanagementmaßnahmen für ein nützliches Regulierungsmittel halten, sind Positionsbeschränkungen unsere Meinung nach auf dem EU Markt nicht angemessen.* We question the value of position limits as a regulatory tool. Although position limits have been used in US markets from time to time, they have not typically been used in the EU and we know of no evidence to suggest that the US markets work better as a consequence. By contrast we support the use of position management by market regulators. This requires active monitoring of the market and an evaluation of the impact of large positions in real time, combined with appropriate intervention if necessary. Regulators and operators of regulated markets already have a number of intervention tools at their disposal, and these could include setting flexible, short-term limits. We therefore urge you to reject the use of position limits, but retain the reference to *'alternative arrangements with equivalent effect'* in the text. This should ensure that the use of position management is promoted across EU commodity derivative markets as a legitimate supervisory approach.
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?	*Die Einführung eines Verbots nur für unabhängige Anlageberater könnte dazu führen,das der Markt sich zungunsten von Bankberatern verzehrt. Dies würde zu einer geringeren Auswahl an Beratern für Investoren, sowie zu Marktverzerrung, geringeren Preisunterschieden and verstärkter Verwirrung bei den Investoren führen.* As regards portfolio management, we are concerned to ensure that the drafting

		is maintained so as not to ban non-monetary benefits but leave these to the more general inducements provisions that we presume will remain at Level 2. Research provided under commission sharing agreements or otherwise should be allowed if it enhances the service to clients. As regards advice, we agree that there have been failures in the mass retail marketplace that need to be addressed and that rules in this area need to be improved. What is clear is that many retail consumers do not have a real understanding of the inducements paid on an on-going basis to intermediaries and/or their purpose. Indeed, many are unaware that such payments are made at all, having received no more than a statement hidden in the "small print" of the original contract that refers to a very small percentage being deducted from their investment to pay the intermediary. We therefore agree that current arrangements regarding inducements are inadequate. We do not agree, though, that disclosure *per se* has failed or that a ban on inducements is warranted at this stage. Instead, we suggest that intermediaries be required to provide regular statements (e.g. annually) to their clients, perhaps in a standardised format, of the amounts they receive from different product providers from or out of their investments in particular products in which they are invested. This would remind consumers that such payments are being made and give them an immediate understanding of the amounts involved. It should also be considered whether on-going payments should be allowed other than where on-going service is being provided. Whatever the nature of the final requirements, it essential that they should apply to all advice-givers. To apply rules narrowly to those circumstances where advice is offered on an independent basis would not be sufficient to

		protect investors from conflicts of interest. The Commission's proposal (to ban inducements only for independent advisers) is predicated on the supposed potential for advice to be affected adversely by inducements and leading to mis-selling and product bias. Such inducements and bias are not confined to the area of independent advice, however this is defined. Financial inducements of many kinds, including volume over-ride, target bonuses, and rewards related to specific product sales, are prevalent in the non-independent advice sector. It is just as likely that mis-selling or product bias leading to consumer detriment could occur in this sector. There is evidence in a number of markets that this is the case. Moreover, the introduction of a ban only for independent advisers could lead to a shift of advisers toward non-independent status, which would result in a severe limitation of choice available for consumers, market distortion, pricing differentials and increased confusion on the part of consumers. There is also a real risk of product arbitrage, given that MiFID only covers certain products and financial instruments. So, for example, other non-MiFID products, e.g. insurance investment products, may be sold (in order to continue to get commission) ahead of those covered by MiFID, such as UCITS.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	*Wir verstehen, dass strukturierte OGAWs, wie in der KIID Regulierung fesgtelegt, als komplexe Finanzinstrumente gekennzeichenet werden.* *Angesichts der Wichtigkeit der OGAW Marke für die Europäische Union, sollten jegliche weitere Diskussionen über diese als Teil der anstehenden OGAW V Diskussionen stattfinden und nicht als Teil der MiFID Besprechungen.* We note, and welcome, the fact that the Commission has stopped short of its original proposal to ban execution-only sales completely and that such business can continue to be transacted provided certain conditions are met.

		We accept broadly the proposition that the definition of "structured UCITS" (as defined by the KIID regulations) leads to their being "complex" products and that they should therefore be excluded from being sold without an appropriateness test. However, we would underline that the UCITS framework has been designed to ensure that UCITS are generically appropriate for retail consumers. Given the importance of the UCITS brand to the EU, any further debate as to the UCITS framework itself should be conducted as part of the forthcoming "UCITS V" proposals and not within the MiFID review. More generally, it is incorrect to equate "risk" with "complexity". Many UCITS, and other investment products, have mitigation processes such as derivatives built into the product, which have the effect of lessening specific risks to the consumer.
	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?	*Wir unterstützen die in Paragraph 5 des Eigeninitiative Reportes beschriebenen Veränderungen über die über die Regulierung des Handels mit Finanzinstrumenten – „Dark Pools" etc: „verlangt, dass den Wertpapierfirmen, die Portfolioverwaltungsdienste erbringen und als Portfoliomanager agieren, von Seiten der Wertpapierfirmen, bei denen sie ihre Auftrage platzieren, die bestmögliche Ausführung gewährleistet werden muss, und zwar auch dann, wenn der Portfoliomanager von der MiFID-Richtlinie als geeignete Gegenpartei eingestuft wird."* We would welcome confirmation that the Level 2 provisions will remain as now. We continue to support the change identified at paragraph 4 in the Own Initiative Report on Regulation of trading in financial instruments which stated: "Demands that investment firms which provide a portfolio management service must be provided with best execution by the investment firms with whom they place orders notwithstanding that the portfolio manager is categorized by MiFID as an eligible counterparty". This would necessitate a change to **Article 30(2) bis** of MiFID so as to add a second sentence:

		"Such an entity when placing orders as part of providing the service of portfolio management may require the investment firm to treat it as a client whose business is subject to Articles 27 and 28." The IMA supports the amendments made in **Article 27** which should give clients a better understanding of how and where their trades have been executed. Clearer information will aid clients in choosing those execution arrangements which can best match their execution policies. We are involved with work proceeding in the standards area to implement these requirements electronically. **Article 27(5) bis**: These would not apply to the buyside since they are usually outside Article 27 but within the analogous Article 45 at Level 2. We would not expect Level 2 to include this since the information is of little relevance across a range of discretionary clients.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	*Örtliche Regulierungsbehörden sollen nun automatisch als Einzelhandelskunden eingestuft werden. Diesem stimmen wir nicht zu, da es die Kosten einiger Dienstleistungen erhöhen wird, teils aufgrund bestimmter Regelungen zu Meldungen von Geschäften, die für örtliche Behörden unangessen sind.* See question 17 above and the importance of altering **Article 30** so as to make A**rticle 27** apply to benefit portfolio managers' clients. We support the extended duties (of honesty etc.) owed to ECPs introduced in Article 30 MiFID. We note that it is proposed that local public authorities will be, by default, retail clients. We do not support this change as it will increase the cost of some services (due in part to the mandated reporting requirements that may not fit local authority needs).

		If the proposal were allowed, we would support the proposal to allow each member state to adopt its own criteria for assessing whether a local authority has the necessary expertise and knowledge to be a professional. We do not see the need for additional criteria compared with the MiFID test applying to all retail clients that can be opted-up to professional status.
	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?	*Wir halten eine stärkere Position für ESMA gegenüber nationalen Behörden für angemessen. Diese würde zu einem ausgeglicheren Kräfteverhältnis, bestärkten Kooperation auf europäischem Level sowie zu einem transparenzteren Entscheidungsprozess führen. Des Weiteren sollten jegliche Verbote nicht den Effekt existierender Regelungen beeinflussen und eine klare Vorgangsweise, ESMA's Entscheidugen anzufechten, sollte bestehen. Die Bestätigung jeglicher Verbote sollte von den zuständigen Gerichten beschlossen werden.* We have concerns that, for both ESMA and competent authority requirements, the proposals for the decision-making process and accountability are not transparent. We are also concerned that there is a danger that regulatory arbitrage could occur through a competent authority prohibiting or otherwise intervening in the marketing of a product which had been appropriately authorised in another Member State, such as a UCITS. Therefore, there should be a stronger role for ESMA vis-à-vis national authorities, providing for a better balance in powers and wider cooperation at European level, coupled with transparent decision-making processes. 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 provided for. This appeal process should permit a stay on any restriction or ban to be provided by the courts.
Transparency	20) Are any adjustments needed to the pre-trade	*Momentan gibt Artikel 4 keine Auskunft darüber, welche Ausnahmen erlaubt*

	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?	*sind. Artikel 4 sollte besagen, dass die vier existierenden Ausnahmensklassen beibehalten werden. Die Referenzpreis - Ausnahme sollte innerhalb des Spreads erlaubt sein. Die genaue Kalibrierung signifikanter Verspätungen sollten Regulierungsstandards überlassen werden, da Fehler, welche durch übereilte Analyse begangen werden, erhebliche Auswirkungen auf Liquiditätsvorkehrungen haben könnten, was im Besonderen KMUs treffen könnte. Wieder berufen wir uns auf den Eigeninitiativsreport von Kay Swinburne, welcher im Paragraph 10 den Art von Referenzpreis - Ausnahme gestatten werden sollte.* At present Article 4 is almost entirely silent as to what waivers might be allowed. Article 4 should state that the four existing classes of waivers should remain. The reference price waiver should be permitted within the spread. The precise calibration of large in scale delays should be left to standards as mistakes arising from rushed analysis could have large impacts on liquidity provision particularly for SMEs. We refer again to the Own Initiative Report and paragraph 10 which supports allowing the reference price waiver within the spread. We are concerned that, while the Commission will make the rules as to which waivers are to be allowed, Competent Authorities will grant the waivers after notifying ESMA of their intended use 6 months before they come into effect. This will raise questions of what will be allowed and on how harmonisation across markets will be achieved. The delay will stifle market developments and raise barriers to new entrants at a time when entry costs should be coming down. No comments on Articles 3 and 13.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading	*Während wir die Einführung von Nachhandels-Transparenz in non-equity Märkten unterstützen, lehnen wir die Einführung von Vorhandels Transparenz nachdrücklich ab. Aus den folgenden Gründen denken wir, dass diese nicht*

	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?	*im besten Interesse der Investoren ware:* • *Die geplante Gesetzgebung gibt vor, mehr Informationstransparenz in die Märkte einzufuehren. In Wirklichkeit aber würde sie die Arbeitsstruktur der Märkte verändern. Der potentielle Nutzen dieser Vorschläge wurde hier nicht gegen die Auswirkung auf die Märkte und im besondern auf Marktnutzer, wie z.B. Investoren abgewogen und ist daher unzureichend.* • *Investoren schätzen Informationen über reele Märkte (Nachhandels-Transparenz). Vorhandels-Transparenz ist von geringerer Wichitigkeit, da ein Verlassen auf die veröffentlichen Informationenen nur bei sehr kleinen Handelsabschlüssen angemessen ist. Wir haben daher keine Einwände gegen die Einführung von Vorhandels-Tranparenz für Einzelhandelskunden.* • *Die gleichzeite Einführung von Vorhandels- und Nachhandels-Transparenz wird eine Evaluierung der Effektivität beider Maßnahmen erschwerlichen und somit zukünfitge Anpassungen und Verbesserungen verkomplizieren.*
	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?	Yes, changes will be needed. Whilst we support the introduction of post-trade transparency in non-equity markets (provided that it is implemented with appropriate calibration of parameters for deferred publication) we strongly oppose the proposals as they stand for the introduction of pre-trade transparency in these markets, and believe that they will not be in the best interests of investors for the following reasons: • Whilst presented as bringing greater transparency of information to these markets, the legislation in reality introduces change to the actual structure of working markets. The proposal has not sought to evaluate the proposed

		• rket trades (post-trade data). They place much less value on pre-trade information as only the smallest trades are likely to permit reliance on the information published (we therefore have no issue with introducing rules on pre-trade information for retail customers). • Imposing changes to pre-trade data at the same time as introducing better quality post-trade data means that it will be difficult or impossible to work out the impact of either change – and therefore make adjustments in the future with any degree of certainty about their effect. Well-functioning securities markets must find an appropriate balance between trade transparency and protection following public disclosure of trading intentions for large orders. Moreover the needs of retail and institutional investors are different, with direct retail investors making up a very small percentage of European securities markets, but the arrangements must work for both. We have no issue as such with pre- and post-trade disclosure in respect of retail size trades; the same does not apply in relation to wholesale trades (for institutional investors), which will be many times larger. Institutional investors, typically pension funds and UCITS, trading in large volumes must 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 in this

		respect and these differences need to be properly reflected in the proposals (as envisaged by Recital 14 of the draft Regulation). Changes in transparency requirements should always take into account asset and market characteristics, and carefully weigh the possible costs to investors (such as pension funds and UCITS). Furthermore, they should take into account whether the possible structural (not temporary) impact on liquidity is adverse. For instance in the bond markets, particularly in the wholesale corporate bond market, increased pre-trade transparency (particularly in the context of the requirement to disclose quotes under the SI regime) is extremely likely to result in a diminution of liquidity provision as it will significantly increase the risk of making markets. This in turn will lead market makers (banks) to reduce the capital they deploy to support this activity and to widen spreads, as higher returns will be required on the capital that is deployed to reflect the increased risk. A big reduction in liquidity would affect the ability of certain investors, such as UCITS, to invest in this asset class, since liquidity is essential to support daily dealing in fund units. This would in turn directly impact capital flows to companies issuing corporate bonds. Likewise, in the OTC derivative markets we have serious concerns that the proposed SI and OTF regimes will in practice result in a diminution of liquidity provision as banks and investors will not want to make public large potential trades prior to their execution, for fear of pricing moving against them between the trade being made public and execution. This in turn is likely to lead banks to reduce the capital they deploy to support this activity and to widen spreads as a means of covering the increased risk. There are also concerns that a move towards mandated pre-trade transparency will have significant and detrimental unintended consequences in terms of execution behavior with investors using a number of smaller transactions rather than one large trade to achieve the desired result. This will ultimately increase market

		and operational risks and costs to investors. <u>Possible solutions</u> Mechanisms such as waivers/delayed publication, or the possible exemption from pre-trade transparency rules would be necessary for the pre-trade transparency proposals to work in the context of non-equity markets. The provisions regarding disclosure of quotes by SIs in fixed income and derivatives markets are of particular concern in this context and, we suggest, need revision to work with the grain of market practice and investor needs. It may also be necessary to consider a tailoring of the MTF regime to better suit the bond and derivatives markets.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	See our answers to Q.20.
	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)?	*Die IMA unterstützt die Bestimmungen des Artikels 61 etc für Anbieter von Datendiensten, sowie den Bedarf an harmonisierten Standards.* *Ebenfalls unterstützen wir kommerzielle Lösungen für CTPs. Allerdings befürchten wir, dass nicht ausreichend kommerzielle Treiber für umfangreiche CTPs gefunden werden könnten. Die Kommission sollte daher bereit sein, einen einzelnen zentralen CTP zur Verfügung zu stellen.* The IMA is supportive of the need for harmonised standards and of the provisions in MiFID Articles 61 etc. for data service providers. We also support commercial solutions for CTPs in principle but fear that there will be no sufficient commercial driver for comprehensive CTPs to emerge and believe that the Commission should be equipped to mandate a single

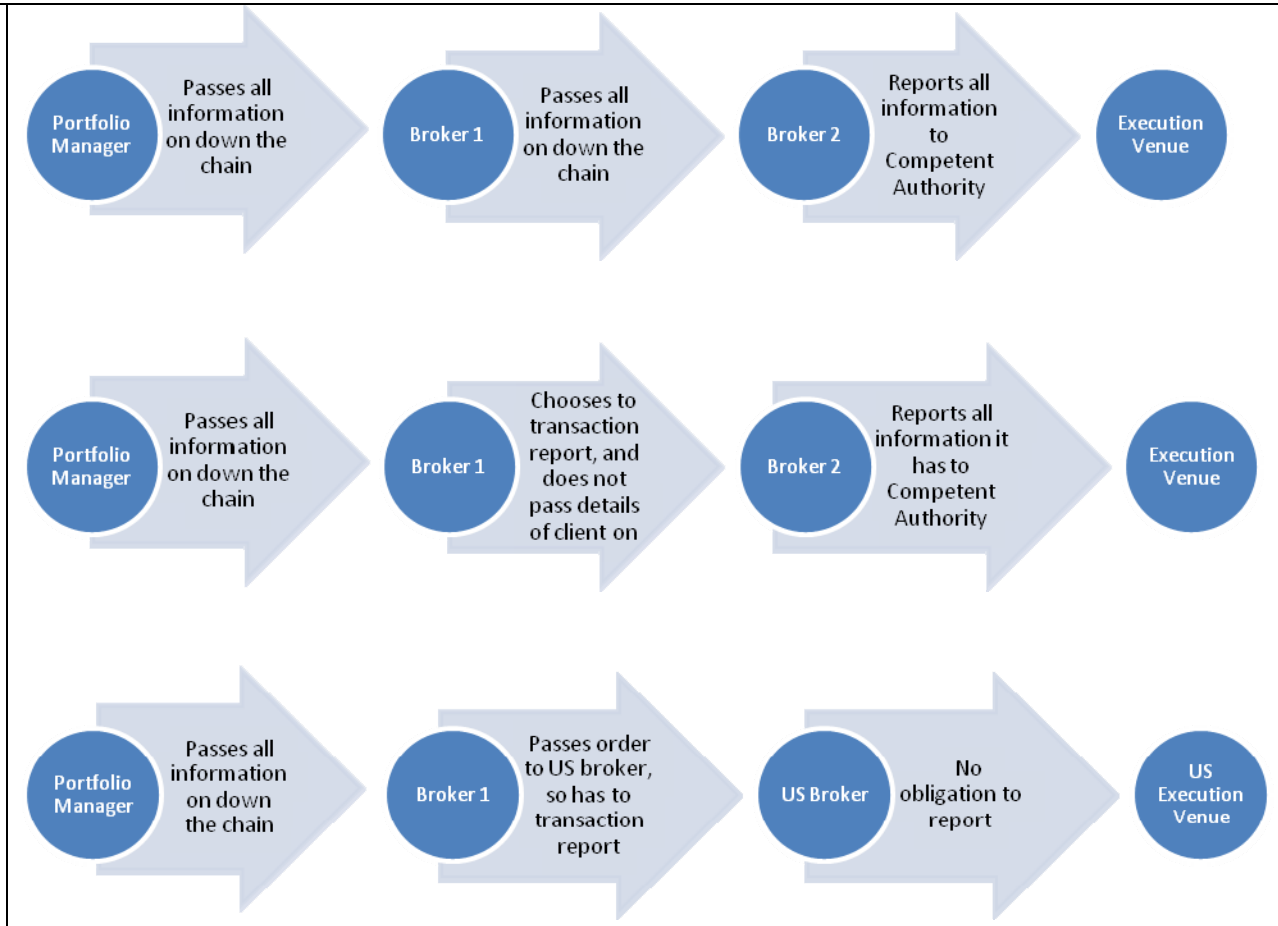
		authoritative tape in case that proves necessary. Giving power to the Commission to introduce a central tape (pre- and post-trade) will not demand that it has to do either but this issue cannot await a MiFID 3 to be sorted out.
	25) What changes if any are needed to the post-trade transparency requirements 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?	*Unsere Mitglieder unterstützen das Prinzip verstärkter Transparenz, jedoch muss zwischen dem Nachteil erhöhter Handelskosten und den Vorteilen verstärkter Transparenz abgewogen werden. Maßgeblich ist, dass der KMU - Handel geschützt wird.* *Die Anforderung, dass Details aller Transkationen so schnell wie möglich in Echtzeit den zuständigen Behörden gemeldet werden sollten, ist eine Verbesserung der momentanen Situation, die eine Meldung innerhalb von drei Minuten verlangt.* The current proposal says little about what criteria for delayed reporting will be permitted and quite what level of freedom national regulators will have. Our firms are generally supportive of more transparency but not where the cost to trading outweighs the benefits of transparency. This cost, which of course is borne by investors, can be particularly acute where large blocs are being traded in smaller to medium sized companies where, because the shares are illiquid, the consequent impact on the share price would be significant. SME trading must be protected; the ability to trade in a secondary market impacts the cost and ability for the SMEs themselves to raise capital. Regarding trade reporting, the requirement that details of all transactions should be made public as close as possible to real time should be an improvement on the current regime which refers to three minutes, but needs enforcement. Venues and investment firms should be monitored for timely reports.

		The IMA supports the requirement that trade information should be available separately and on a reasonable commercial basis. "Reasonable commercial basis" needs to be thought through as this was the term used in MiFID I. If all printing has to go through an APA, can managers continue to rely on their brokers to transaction report? Rules will also need to address the issue of double counting.
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?	*Es ist maßgeblich dass Europäischen Aufsichts- und Regulierungsbehörden verstehen wie existierende Level 2 Gesetzgebung in Zukunft angewendet werden wird.* It is very important to understand how the existing Level 2 legislation will be amended and apply in future.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	*Wie im Anhang beschrieben, haben wir Bedenken im Bezug auf die Klarheit der Mitteilungsverordnungs Bestimmungen, die in den Artiklen 21-23 MiFIR beschrieben sind.* We have concerns about the clarity of the requirements on transaction reporting as set out in MIFIR Articles 21-23. Detailed comments on these are set out in the annex on detailed comments on specific articles, below.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	• MAD II must reflect how the OTF and OTC proposals evolve • EMIR and market structure and derivative trading • AIFMD: it must be ensured that managers authorised under AIFMD and MiFID 2 can use third country firms on a consistent basis. • CRD: see our response to Q5 on the corporate governance overlap PRIPs: see our response to Q1 and Q2
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Dodd Frank: third country issues and derivative market issues.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	It seems generally appropriate

	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	*Es erscheint uns fast unmöglich, diese Frage zu beantworten, da es bisher nicht klar ist, wieviel der existierenden Level 2 Regulation bestehen bleiben und wieviel geändert werden wird. Falls jedoch die existierende Level 2 Regulation widerufen wird, würden wir in mehreren Dingen Klarheit benötigen – z.B. zu Entlohnungen, Berichterstattung und Maßnahmen zur besten Ausführung. Wie in unserer bisherigen Antwort dargestellt, benötigen wir zu einigen Level 1 Themen mehr Klarheit, z.B. zum Thema Transparenz.* This is almost impossible to answer as it is not clear how much of the existing Level 2 will remain or be amended. But if the existing Level 2 directive is to be repealed then there are several areas where we would need clarity – inducements, reporting and the Level 2 best execution measures, for example. We have also pointed out in our responses above, areas where more detail is required at Level 1, e.g. transparency

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 21 :	Given that they are obliged to act on behalf of their customers, and in accordance with the regulations, firms should not be required

	to ‘promote the integrity of the market’, but to ‘contribute to the integrity of the market’.
Article 23(1) :	It should be made clear that the requirement for ‘investment firms which execute transactions’ to report to their competent authority refers, primarily, to those that execute a transaction in financial instruments against the market (i.e. against a Regulated Market, an MTF or an OTF).
Article 23(3) :	As the objective of the transaction reporting regime is primarily to combat market abuse then the identity of the ‘client’ referred to should be that entity which exercised discretion in initiating the order. In the case of portfolio management this would normally be the portfolio management firm itself, as opposed to its underlying client. This is clear from Recital 28, but it would be helpful if this could be confirmed within the body of the Regulation.
Article 23(4) :	As stated in Recital 29 ‘double reporting of the same information should be avoided’. Article 23(4) requires that the information to be reported shall be transmitted with the order along the execution chain, until the investment firm which executes the transaction reports all details of the transaction to the competent authority. This should be the default position. Article 23(4) allows firms to opt out of transmitting all the information to the next link in the execution chain if they transaction report all the relevant information themselves to the Competent Authority. It should be clear that if a firm passes all the relevant reportable information on to the next link in the execution chain then no obligation to report arises for that firm. The next link in the chain is obliged to either pass the information along or report it themselves. I would note that the Commission have stated, in response to a question on this point, that ‘the investment firm would have a choice about whether it chooses to pass client information down the order trail. If it does so, only one transaction report would be necessary. If it does not, subsequent intermediary steps would be required to report as well’. It is important that the obligation to either pass on the information, or report, is clear, so that the competent authorities receive all the relevant information about each transaction once and, ideally, only once. This will avoid unnecessary expense, duplication, confusion and missing information. Firms should not have the right to refuse to accept information which is passed to them. It should also be made clear, ideally in the text of the Article, that if an order, which is reportable, is passed to an entity outside the EEA to whom these requirements do not apply then the responsibility to ensure that a transaction report is made falls on the last link in the execution chain to which the Regulation does apply. Examples of execution chain, with different scenarios:


Portfolio Manager
Passes all information on down the chain
Broker 1
Passes all information on down the chain
Broker 2
Reports all information to Competent Authority
Execution Venue
Portfolio Manager
Passes all information on down the chain
Broker 1
Chooses to transaction report, and does not pass details of client on
Broker 2
Reports all information it has to Competent Authority
Execution Venue
Portfolio Manager
Passes all information on down the chain
Broker 1
Passes order to US broker, so has to transaction report
US Broker
No obligation to report
US Execution Venue