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.

UBS Response to the Questionnaire

UBS would like to thank the European Parliament for the opportunity to comment on the questionnaire on MiFID and MiFIR II. Please find below our response to the specific questions set out in the Paper. We respond, inter alia, in the capacity as one of largest global institutional asset managers and wealth managers in the world.

UBS is a global firm providing financial services to private, corporate and institutional clients. Our focus is on wealth management and the Swiss banking business alongside global expertise in investment banking and asset management. UBS employs more than 65,000 people and is headquartered in Zurich and Basel. It operates in over 50 countries and from all major financial centres.

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?	Directive Article 3 provides for an optional exemption. Member States may choose not to apply the Directive to persons for which they are the home Member State and which provide only investment advice and are both authorized and subject to ongoing supervision and subject to at least analogous conduct of business requirements to those in MiFID 2. We welcome a harmonization of exemptions across the EU and believe the exemption proposed in Article 3 to be appropriate. Directive Article 2 exempts persons who (i) deal on own account as an exclusive activity, (ii) as an ancillary part of another non-financial corporate activity, or (iii) as part of a non-financial commodity-trading activity. We believe the exemption to be appropriate as the activities are less central to MiFID in that they are proprietary and commercial in nature.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	**Emission allowances** UBS does not trade emission allowances on own account, provide investment services specializing in emission allowances, nor do we operate a trading venue offering contracts in emission allowances.

		We therefore have no comments to offer. **Structured deposits** We do not support an extension of the MiFID requirements to structured deposits: The proposed extension does not in our view take into consideration that MiFID regulated products and structured deposits are substantially different. It is important to recognize that deposits – whether structured or not – benefit from certain levels of deposit protection. The proposed extension will impose a significant adjustment burden on firms that sell investment products and structured deposits and is in our opinion a disproportionate measure. We would instead advocate clients are notified of applicable deposit protection schemes.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	The Commission proposal lists safekeeping and administration of financial instruments including custody and related services such as cash and collateral management in Annex I as a MIFID investment service. In our view, the proposed amendment is not justified for two reasons: First, credit institutions that provide other investment services such as custodians are already required to be authorized under MiFID.

		As such the proposed reclassification of safekeeping and administration of financial instruments services as investment services will not lead to a stricter authorisation and supervision regime. Second, the provision of custody services differ significantly from the trading and distribution of financial instruments targeted by MiFID and are only to a very limited extent associated with the investment decisions of clients. We advocate that the protection of custody clients and the obligations of intermediaries and custodians towards clients is instead addressed in the future Securities Law Directive, which focuses on the holding and disposition of securities which forms the basis for the custody business. The proposed amendment to Annex 1 should, therefore, be deleted.
	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 provision of services by non-EU firms in the EEA is a highly important issue which in our view has not been subject to sufficient consultation. In particular, there was no reference to the retail aspect in the Commission consultation paper on the MiFID review. As a general matter, we believe that it is very important that EU investors have access to international markets. This is in

		the interest of an integrated, global financial market, which is only possible if the liberal, free trade approach is maintained allowing non-EU investment firms to compete along-side EU firms. Otherwise investor choice is reduced and competition hampered to the detriment of EU investors. We note that there has been no impact analysis: i.e. how many 3rd country jurisdictions would meet the equivalence standards and how long would this process take. Given the seriousness of the implications of these proposals for the EU, we consider it imperative that the potential implications of them are thoroughly investigated and understood before being considered for implementation. **a) Appropriateness of market access harmonization** While we support the concept of a harmonisation of the third country market access, we believe it is important that it is structured in a way that is non-detrimental to customer choice and competition in the EU and allows individual financial firms to gain market access based on their own ability to comply with certain EU client facing requirements without having to rely on the third country regulatory regime being deemed equivalent to MiFID/MiFIR requirements.

		We are very concerned that the approach chosen in the Commission's proposal will lead to practically impenetrable market access barriers for third country service providers to the detriment of EU clients and counterparties as it would prevent them from having access to the international financial market, and to a full range of choice of EU and non-EU originated products and services. **b) What principles should be followed?** It is our view that access to the EU should not be made conditional on a positive equivalence assessment of a third country's financial services law with MiFID/MiFIR. Third country firms have a limited impact on the development of their home country's financial services law. We are concerned that such a request would, de facto, prevent non-EU firms, which are willing and able to render MiFID/MiFIR compliant services, to access the EU financial market, therefore negatively impacting consumer choice and reducing competition without this being justified from an investor protection point of view. Investment firms from third countries that comply with MiFID/MiFIR client facing obligations should be able to provide

		their services on the basis of a cross-border license without the need to set up a branch. Compliance with such client facing obligations should be assessed by the national competent authority, in consultation with ESMA. The protection of clients could further be secured (1) through ESMA-defined cooperation arrangements between the competent authority of the relevant Member State and the third country supervisory authorities; (2) by requiring membership of the third country firm in adequate investor-compensation schemes; and (3) by comparable capitalization of the third country firm to firms which are subject to the Capital Requirement Directive. We would further advocate that such a cross-border license model permits the passporting into other Member States. The protection of clients would be ensured through the full compliance with the provisions of MiFID/MiFIR. Furthermore, a safe harbour should be considered for intra-group deals that are the result of internal group risk management policies. In addition, we would welcome clarification of the provision in recital 74 of MiFID II, specifically in regards to the terms "own

		exclusive initiative" and "promotion of investment services". To ensure consistency across Member States we believe that (1) third country firms should be permitted to continue providing the types of services that they have provided to their EU domiciled clients before entry into force of MiFID/MiFIR, that (2) clients may request upon their own initiative continuous and ongoing provision of services and that (3) accessibility of a firm's website by itself should not be regarded as "promotion of investment services" in the EU. Finally, bilateral agreements between individual EU Member States and third countries conferring a facilitated access to the financial market of that particular EU Member State as well as existing branches of third country service providers in any given EU Member State should be grandfathered. As a minimum a long transitional period of at least 10 years should be provided for. **What precedents should inform the approach and why?** UBS does not believe that there is a valid precedent contained in any other EU legislative act which can be translated easily into such a vast, all-encompassing field of application as MiFID/MiFIR. We would like to emphasize our view that it is not the same whether a third country legislation is assessed against equivalence

		(be that strict or in effect) with regard to self-contained subjects such as AIFMD and UCITS. MiFID/MiFIR is the key element of financial regulation in the EU and very broad. Unlike in the context of AIFMD/UCITS, it may be impossible to point to any specific legal act(s) in a particular third country which could, even in the widest sense, be considered the counterpart to MiFID/MiFIR. We are concerned that it could take years of legislative work and political consensus finding to achieve a position where a particular third country could be confident that its investment services law will be considered equivalent by ESMA/the Commission to MiFID/MiFIR. National third country parliaments may need to go back and forth with ESMA to ensure that the country can receive equivalence approval, which may also conflict with the national legislative process. UBS believes that such an outcome is neither necessary nor desirable to safeguard the interests of EU customers. Having been discussed intensely for a number of years already, UBS believes furthermore that it should be acknowledged that progress on mutual recognition frameworks has proven elusive.
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	The Commission proposes to strengthen corporate governance provisions with regard to the profile, role, responsibilities of both executive and non-executive directors and balance in the

	proportionate and effective, and why?	composition of management bodies. In particular, the proposals seek to ensure members of the management body possess the sufficient knowledge and skills and comprehend the risks associated with the activity of the firm in order to ensure the firm is managed in a sound and prudent way in the interests of investors and market integrity. We support the Commission's effort to strengthen corporate governance in the financial sector. The financial crisis has revealed shortcomings in corporate governance which need to be addressed. Our comments on the specific governance proposals for investment firms and trading venues are as follows. **Non-executive directors – professional experience:** we would like to emphasize our view that a board benefits from a diversity of management and commercial experience. As such, we are not supportive of the proposed requirements for non-executive directors to have professional experience in the financial field. We would also draw attention to the fact that current requirements and obligations imposed on non-executive directors, together with the ensuing liability, make it increasingly difficult for international firms to find suitable directors. We therefore believe that the

		choice should not be further limited by additional regulatory requirements. **Non-executive directors – maximum amount of directorships:** While we support the principle that the number of directorships non-executive directors may take on should be limited, we believe that the proposal should provide for more flexibility to cater for individual situations. An individual with a 100% employment contract accepting executive directorships is likely to be more constrained in capacity than a full-time non-executive director. Specifically it is important for boards to have the discretion to disapply the policy with cause. We would assume that the board would inform shareholders of such a disapplication of policy. **Nomination committee:** In our view the requirement for a nomination committee consisting entirely of non-executive members is overly onerous for firms that are part of a wider group and where the group nomination committee is comprised entirely of non-executive directors. **ESMA technical standards:** Where ESMA develops technical

		standards according to article 9 of the proposal, there is a concern that these unified standards do not adequately address the peculiarities of local markets. This is of particular concern with respect to the unified definition of skills, experience or diversity. What may be necessary as reasonable skills in a pure wholesale and investment banking environment may be too onerous for a small local savings bank in a retail market.
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?	According to the Commission, the OTF category is intended to capture organised venues which allow multiple third-party buyers and sellers to interact, but which are not caught by the definitions of regulated market, multilateral trading facility or systematic internaliser. At the same time, it states that as an OTF constitutes a genuine trading platform the platform operator should be neutral. As such the operator of an OTF would not be allowed to execute in the OTF any transaction between multiple third-party buying and selling interests including client orders brought together in the system against its own proprietary capital. This also excludes the OTF operator from acting as a systematic internaliser in the OTF it operates. Our specific concerns with the definition and differentiation from other trading venues are outlined below.

		Prohibition of trading against own capital: The Commission proposes that client orders in an OTF cannot be executed against the proprietary capital of the investment firm operating the OTF. We are not supportive of the proposed ban because it is detrimental to our interest as buy side investors. We would like to raise the European Parliament's attention to the fact that the prohibition will damage dealer-led liquidity. Allowing institutional investors to interact with proprietary capital of the platform operator makes it easier for them to buy and sell financial instruments, and, in the case of derivatives, to hedge risks. The less liquid an instrument is, the more investors rely on the provision of liquidity by the operator of the OTF. Particularly in stressed market conditions, which are increasingly common, buy side investors seek the certainty of execution that comes from being able to deal directly with a market maker. Hence where proprietary trading has the purpose of servicing clients of the OTF, i.e. involves principal orders, trading against own capital should hence be explicitly allowed. This is particularly important as Broker Crossing Systems ("BCS") will fall under the OTF category. Principal orders should, however, be clearly distinguished from

		proprietary or market making flow. We would furthermore emphasize that operators of OTFs are subject to duties to act in the best interests of our clients and deliver best execution. As such there should be no need for any additional "protections" and indeed this cuts off a potential source of liquidity to the detriment of a firm's ability to deliver on those duties to secure best ex and act in the client's best interests. Instead of the proposed ban, potential conflicts of interest between the OTF operator and investors are in our view best addressed through appropriate management and disclosure under MiFID's conflict of interest rules. **Prohibition of interoperability between OTFs and of OTF platform operators acting as systematic internalisers in the OTF:** For large buy-side investors, there is a benefit to interface with a single offering allowing us to view and transact against available liquidity across multiple sources in a single location for the benefit of clients and investors. For a bespoke OTC transaction, we might find the greatest liquidity by executing through a dealers' SI. For clearing eligible transactions we might

		seek to execute across multiple venues. The emergence of multi-dealer platforms in today's OTC markets demonstrates this preference to have a "one stop shop" for accessing multiple liquidity providers. Judging from the experience of the equities markets, broadening MiFID across the OTC markets may lead to fragmentation of liquidity across many multi-dealer platforms ("MDP"). Therefore by extension platform providers should not be prevented from aggregating liquidity from multiple MDPs in favour of buy side investors. The alternative would be for institutional investors to join a multitude of MDPs, which costs money, consumes resources, and cannot be done quickly if market liquidity suddenly shifts (in which case institutional investor may simply not be able to hedge their risk). In summary we would be concerned that the proposed segregation will increase the complexity of execution and does not sufficiently cater for the needs of the buy side clients. Segregation should not come at the expense of liquidity, choice and quality of execution for the professional investment community.

		OTF as a residual trading venue: To promote competition between the trading venues we believe that it is important to recognize OTFs as equally valid methods of trading to RMs and MTFs. We are therefore in disagreement with the Commission proposal that the use of OTFs is to be dependent upon the provision of a detailed explanation as to why the system does not correspond to and cannot operate as either as regulated market, MTFs or a systematic internaliser. Broker crossing systems have evolved and exist for the purpose of more efficiently securing the best result for clients. They are not venues or ends in themselves, but a means to an end. In that respect they are completely different in approach and subject to different standards (best execution). Neither RMs nor MTFs have any discretion over orders and by definition, have no obligation to deliver best execution for the client. **Extension of the Systematic Internaliser regime of equities to non-equities:** The Commission proposes to extend the Systematic Internaliser ("SI") regime by applying requirements of equity SIs to non-equity SIs. We are particularly concerned that the pre trade transparency requirements with the obligation to provide firm quotes will harm the liquidity of the EU bond markets. The

		less standardized a product is, the more liquidity depends upon effective market making which can be damaged by transparency that is not well calibrated. We would therefore advocate that pre-trade requirements for non-equity SIs are limited to instruments for which there is a liquid market, as it is proposed for equity SI. We would stress the importance that for illiquid markets (eg trades occurring only a few times a day), there should not be an obligation to quote on request.
	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?	Pure OTC trading is best defined along the lines of bilateral trading between two parties, often (but not necessarily) with non-standard structures. In regards to the channeling OTC trades onto organized venues, we would like to draw the Parliament's attention to an often mis-used statistic that 40% of Pan European trading is OTC trading. As demonstrated in a recent AFME report, it is important to note that the majority of this flow are so called reporting events instead of real liquidity. Reporting events can be moved onto an order book and often represent movements of shares from the account of a client's executing broker to that of the prime broker. These are often called Give Ups or Give Ins.

		Exclusion of these reporting events leaves around 15% of the market as OTC "Real Liquidity". Of this around 5% is broker to broker flow. An example of this would be where one broker receives an order for a market where they do not hold a direct membership, but access it through a local broker. In order to execute the client order, the broker would pass the order OTC to their local broker to trade in the market. It is difficult to imagine how this flow would move onto order books. Lastly around 5% of the market is through Broker Crossing Systems ("BCS"). This flow would be captured by the new OTF category. The main users of BCS are institutional investors with large orders. If institutional investors could only execute their orders on lit markets, their execution costs would increase due to the potential of increased information leakage and as a result market impact and cost. Through a BCS, institutional investors are able to reduce their market impact for a proportion of their flow and benefit from executing against like minded investors. As a large global asset manager and investor we would furthermore stress our view that OTC and organized markets

		should be seen as complementary and not mutually exclusive markets.
	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?	In regards to algorithmic trading, we would like to draw the Parliament's attention to the fact that algorithmic strategies are used differently by a broad range of users. On the one end there are firms which design their own automated algorithms and undertake a significant amount of trading activity through these algorithms, on the other end there are users of others firms algorithmic trading facility products such as portfolio managers which do so to complement their traditional trading. Firms using algorithmic trading in this second way do not design their own algorithmic trading and usually do not employ them in a fully automated way. Reflecting the different use of the strategies, there is a key difference between *automated market making strategies* (which provide liquidity on a proprietary basis) and *client execution algorithms* which are not liquidity provision algorithms but rather designed by Investment Banks to execute a client's order in line with market conditions and the client's objectives in order to gain the client the best possible result. It is important that the latter client execution algorithms are not be mis-labelled as market

		making and should not be subject to the same obligations. Example: An investment bank receives a client order where the client e.g. an institutional investment manager wishes to execute their large order very slowly in order to minimise market impact. If there was an obligation to continuously post this order on the lit market, their order would create signaling in the market and impact the performance. It is worth noting that almost all orders will be exposed to some form of algorithm at some point in today's market, either by being executed directly through an algorithm, or through passing through Smart Order Routers. Smart Order Routers are necessary in today's fragmented market place to access liquidity across the market. We are particularly concerned with Article 17. We would stress our view that not all of the requirements in Article 17 are appropriate for this second group of users. Overall we believe that the article includes excessively onerous requirements. The strict requirement to ensure they algorithmic strategies do not contribute to a disorderly market is too broad and too vague. It is a standard difficult about continuous quotes at competitive prices at all times, regardless of prevailing market conditions if not

		impossible to reach with many factors out of reach of the individual firms' hands. The requirement to continuously quote at competitive prices at all times, regardless of prevailing market conditions cannot, for example, be met by fund managers using electronic systems to manage their orders and initiate transactions on behalf of their clients. We therefore advocate the following changes of the Commission proposal. The definition of "all" algorithmic trading in Art. 4 (30) of MiFID should be amended to ensure that institutional investors using electronic systems to merely manage their orders are not caught. We specifically propose to delete the wording of "limited" human intervention. The provision to continuously quote should not be imposed on all algorithmic trading, but only to proprietary liquidity provision strategies. The market making obligation should furthermore not be required on an ongoing basis "at all times" as such a requirement is likely to be counterproductive leading to a decline in trading volume coupled with an increase in spreads with a detrimental impact on liquidity.

		We support the introduction of well-designed, flexible and dynamic markets safeguards as the ones proposed by the European Commission (e.g. circuit breakers) and that firms who provide direct electronic access to clients have in place robust risk controls and filters to detect errors or attempts to misuse their facilities.
	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?	We believe they are appropriate to address the risk 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 believe that a common regulatory framework should distinguish calls among professional traders of an investment firm on the one hand and telephone conversations relating to investment advice and portfolio management (thus mainly with retail) on the other hand. The former could help detect any abusive practices. In the latter case, it would be disproportionate to introduce a taping requirement for the following reasons. The relationship between client and advisor / investment manager is usually a long standing one based on mutual trust and confidence and conversations will encompass many matters including highly private information such as the financial and wealth background of the client, his needs, risk profile and planning requirements. The

		clients could consider such recording to be intrusive and this would be detrimental to the business relationship. Clients might also be inclined to no longer provide certain private information that is necessary for the firm to understand and assess the client's needs and risk profile. Furthermore, discussions with clients are usually not structured in a way which would allow singling out the order from the wider description of the client's situation and investment motivations, meaning that a telephone recording requirement could raise important confidentiality concerns. We would also argue that telephone recording is not required for clarifying client orders given by telephone as this could be handled by sending written confirmations subsequent to the call, as is already the case in many Member States. We are not aware of precedents where the lack of telephone recordings prevented a corresponding market abuse investigation, since firms will always be able to provide evidence that a certain order has been made by the client. Finally, we believe that telephonic recording would not be compatible with data protection rules and employees' rights of privacy in many member states.
	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?	While we support the G20 commitment that standardised and sufficiently liquid derivatives are to be traded on regulated

		markets, MTFs or OTFs, there are circumstances where it is not always appropriate to do so. Specific care must be taken when including FX transactions within the scope of these regulations. The vast majority of FX transactions are simply exchanges of currency, and many are simply a bi-product of another non-FX transaction. For example an EU pension fund may choose to purchase USD denominated securities, for settlement in 4 days time. If FX swaps and forwards are forced to be traded on organised venues, not only will the client have to buy the securities on one venue, if they do not want to bear currency risk they will also have to buy a EURUSD FX forward on another (most likely separate) venue. This introduces significant extra complication and cost into a ubiquitous activity.
	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?	We have no comments to offer.
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	We strongly support the proposed removal of barriers and discriminatory practices and believe that the proposed provisions specifying non discriminatory access to CCPs by trading venues, non discriminatory access to trading venues by CCPs and non

		discriminatory access to benchmarks are of huge importance to ensure competition in exchange traded derivatives. There is currently very little competition in Exchange Traded Derivatives. The breaking down of the silos that exist in trading, clearing and benchmarks will hugely benefit end investors through increased competitive pressure and reduced costs. In regards to non discriminatory access to clearing, it is important to note that while presently both Turquoise Derivatives and LIFFE FTSE Futures contracts clear through LCH, the clearing pools are kept artificially separate i.e. users of Turquoise Derivatives cannot benefit from cross margining with their LIFFE positions. Although it can be claimed that access is non discriminatory (as both have same access), the result is the restriction of competition. Separating interest pools within CCPs should not be permitted. In regards to the pricing of Index benchmarks, it is worth noting that the owners of the intellectual property also tend to be owners of the trading venue and sometimes own the clearing too. As the owners of the full value chain, if the benchmark owner were to price the benchmark artificially highly, it would simply equate to a

		transfer payment within the same group. However external parties would be forced to pay the artificially high price and would have to pay the full amount instead.
	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?	As an overall comment we would stress our view that position limits should only be applied within a position management regime as a last option to address market dislocation, and should be carefully calibrated. The EC's position limits proposal is too complex to work effectively in practice. First, as proposed, there are too many interlocking and overlapping powers and responsibilities, even with the proposed ESMA co-ordination role. This would likely lead to conflicting and uncoordinated actions, in both normal and exceptional market conditions. Second, ESMA's proposed emergency powers may not be workable in practice; it is unlikely that ESMA will have sufficient real time data to effectively impose and monitor any restrictions in a crisis. The proposal would be greatly enhanced if a simple and bottom up approach was adopted. First, the exchange should be responsible for setting any requirements. Exchanges are in the best position to understand their markets and individual contract terms and to meet the objectives of supporting liquidity, preventing

		market abuse and supporting orderly pricing and settlement. Second, member state competent authorities should only be responsible for assessing the effectiveness of the exchanges application of position limits or alternative arrangement against the objectives set out above. Third, only in exceptional and emergency circumstances, should member state competent authorities be able to impose restrictions directly on all classes of derivatives. Fourth, the EC and ESMA's role should be restricted to drafting broad EU harmonising requirements, which leaves exchanges with sufficient flexibility to apply restrictions, in a manner which takes into consideration the specific features of that particular commodities market and individual contract terms. Furthermore, ESMA's emergency role should be restricted to only co-ordinating member states responses to exceptional market circumstances.
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?	While they are in general adequate, in certain aspects the requirements go beyond the required level to protect the interest of investors and are likely to have unintended consequences. We believe that the proposal to include a requirement for intermediaries providing investment advice to explain the basis on

		which they provide advice should be limited to retail clients. Any obligation to inform clients of any relevant modifications in the situation of financial instruments pertaining to them should furthermore be dependant on the type of the mandate agreed with the client. Advisory mandates should provide a higher level of service compared to mere account arrangements. We would like to stress that personal circumstances, investment objectives and other factors such as risk appetite / aversion are subject to frequent change and require that where the client asks for such a service, the appropriate level of service is specifically agreed upon. We do not support the prohibition on inducements. The proposed abolishment or strict limitations of inducements would call for a conceptual change in distribution channels and payment of services, which is likely to not only result in higher costs, but also a much narrower choice of products for investors, which are both contrary to the aims of MiFID. It would also mean that EEA firms would be severely disadvantaged in relation to non EEA firms in a business that is global in nature. The current regime allows a client to take an informed decision prior to an investment and particularly to ensure that potential

		conflicts are properly disclosed. Clients have the right to require more specific information both under MiFID as well as underlying principles of contract law. We would stress our view that transparency is one of the accepted means to mitigate potential conflicts on which the Commission should focus instead.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	We welcome the fact that Art 25 aims at ensuring that the investor gets full transparency on the product and suitability aspects. We believe, however, that the proposal on which products are complex and non-complex is too restrictive and does not serve the purpose of suitability as it induces the investor to confuse complexity and risk. Complexity does not equal risk. For example, techniques such as derivatives used in structured funds might be complex to explain but result in investor protection, not an increase in risk. In the current MiFID version, complexity is assumed for financial instruments that "embed a derivative (…) which makes it difficult for the client to understand". It is hard to understand why a derivative is more difficult to understand than a cash instrument as any derivative can be fully replicated with cash and the proper asset by continuously adjusting funds across the two. Furthermore,

		whether or not an investment strategy is understood by clients or not should not be the yardstick of regulation as understanding is inherently subjective in nature as is dependant on the individual knowledge of the investor. One investor might easily understand the concept of exotic options whereas another investor might struggle with the implications of a downgrade of government debt on his portfolio returns. It is our view that an understanding in general and of investment strategies in particular must rely on both ends of the communication, i.e. on the provider of information as well as on the user of information. For investors to judge the possible implications of any investment strategy they need to have a minimum (finance) background as well as information about the content of the strategy and its risks. Instead of the suggested complexity based approach, we advocate requiring compliance with pre-defined minimum transparency requirements for all the different financial instruments sold in the market place (with appropriate waivers in place for professional investors). A document like the KIID could be required for all financial instruments. Its investment objective section should

		contain a list of assets invested into, strategies and methods applied as well as, in the risk section, a list of all the types of risks encountered when investing into a particular financial instrument. Should the Commission consider to keep the complexity based approach we would stress the importance to amend the proposed 'difficult for the client to understand' criterion in a manner that it is no longer tied to subjective criteria dependant on the individual knowledge of the investor as this would leave room for interpretation. A financial product should not be considered complex by the only observation that it contains a derivative. In regards to Paragraph 3 (iii) UCITS with a high level of capital protection or capital guarantee should be considered as non-complex. It is important that access to products that reduce risk for retail investors are not restricted. Investors should, however, be made aware of potential counterparty credit risks.
	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?	Overall we do believe that the revised best execution requirements are workable. The reporting requirements, however, are likely to come at a cost to the investor. Any perceived benefits should hence be critically reviewed and be balanced with associated costs.

		Furthermore, it is our view that the obligation to make public for each class of financial instruments the top five execution venues where client orders were executed, should only apply to investment firms which execute transactions on many execution venues. The right to select only one particular execution venue for a certain asset class should be explicitly confirmed.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	In general yes. We are not aware of any evidence of the current regime having failed and would not advocate any unnecessary alterations. Changes with a view to improving investor protection are better served if they are directed at the particular activity in question rather than through a change to the categorisation populations and criteria. We have three specific comments to offer. First, we believe that a more sophisticated proposal is required in regards to the treatment of local authorities and municipalities. We would stress the fact that there is a wide spectrum of different types of local authorities and municipalities some of which are large with a high knowledge and experience in the areas where they operate, while others are small with a limited degree of investment knowledge. We note the proposal that individual

		Member States can recommend their own "opt-up" criteria for these municipalities. We are concerned that in practice such a process is likely to prove cumbersome and impractical with the result that large, sophisticated municipalities will end up remaining "retail" and thus be severely limited in their choice of service providers and will have to pay more to be serviced. We would advocate that in addition to any opt-up process, the competent authority of each Member State draw up their own ESMA endorsed list of local authorities and municipalities to be treated as professional clients per se. We would also advocate a grandfathering procedure for existing client categorisations in respect of existing transactions. It would be highly problematic to seek to change a client's categorisation, particularly from professional to retail, mid-transaction. Second, the opt-up criteria remain unduly and unnecessarily restrictive. In particular, the criteria relating to frequency of transactions is inappropriate for many types of products and services that would not entail that level or frequency of trading. The criteria should be sensitive to the range of products and services covered by MiFID/MiFIR.

		Third, it is our view that it should be left to the client's discretion to waive certain investor protection rules (in particular those designed for the protection of private clients). We have made the experience that private clients that do not qualify for the professional client status approach us with the aim to reduce investor protection efforts, in particular documentation (e.g. German investment advice minutes and product information sheet which are mandatory for all private clients pursuant to German national investor protection law). So far such waiver can be agreed with the client on a contractual basis while the bank's regulatory obligation remains unaffected.
	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?	Product intervention powers should in our view be considered as a measure of last resort exercisable only on proof of damage. Powers should furthermore rest with national competent authorities as they are able to tailor the intervention more closely to the requirements of the local market. Only in very limited instances of an EU-wide problem should ESMA powers apply. The proposed criteria justifying an ESMA intervention should be narrowed down.
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	We support extending the transparency regime to depositary receipts and exchange traded funds if admitted to trading on a regulated market (i.e. if admission occurs upon a request or

	needed and why?	approval by the issuer of such instrument). The requirements, however, should not be extended to UCITS funds or other non-exchange traded funds as the majority of funds have a single price point per day. As such a single disclosure per day would therefore be more appropriate. Further clarification would also be required as to what is understood by "certificates issued by companies". We also consider that the proposed extension of scope be consistently defined and interpreted by all member states and that the implementation timetable be structured in such a way to allow time for adapting the relevant systems. Furthermore we would welcome clarification that pre trade transparency waivers apply to orders based on their type *or* size to allow for the reference price waiver to be maintained by ESMA.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	The Commission proposes that in relation to non-equity instruments, quotes below a certain size will have to be firm or executable for all clients. We are concerned and do not agree with this requirement. If indicative quotes were made binding, market makers would be unable to adjust prices to market circumstances,

		hence would be more reluctant to quote prices in times of market stress, which would ultimately damage best execution and impact liquidity. The requirement to provide firm quotes should be strictly correlated with liquidity the definition of which should be more narrowly defined than a product's admission to a regulated markets or the fact it has a prospectus. The continuous quoting obligation should be carefully calibrated at Level 2 in a way that preserves the buy side industry the choice with which trading platform to interact with. The Commission also suggests that all firm quotes must be reported to clients in an objective non-discriminatory way. We would like to stress the fact that such a measure is likely to be harmful to buy side investors. Significant information would leak to the market, with dealers' and institutional investors' positions potentially exposed. The resulting exposure risk or public knowledge of an initial order hitting the order book may cause market participants to use this information to exploit the expected price movement at the expense of the initial order. In quoting the price for the specific instrument, the dealer is taking a position and putting its own capital at risk. If the dealer had to

		reveal its positions, it would be at higher risk compared to other market participants that could benefit from the information they have on his position to gain a profit. Therefore, it is critical that the thresholds are appropriately set so as not to damage the effectiveness of wholesale markets and its negative repercussions for buy side clients.
	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?	We refer to our comments in Q21.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	We are supportive of the existing pre trade transparency framework for Cash Equities, namely the Large in Scale and Reference Price waivers. We would like to emphasize that the ability to trade in the "dark" on venues using pre trade waivers is a complement to the ability to trade on Lit venues, rather than a substitute. With regards to Fixed Income markets, we welcome the introduction of waivers based on methods of trading and products' liquidity. Overall we would stress the importance that the legislative

		text provides for sufficient flexibility allowing criteria for granting waivers to be reassessed and recalibrated on a regular basis to account for changes in the market.
	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)?	**Authorised Publication Authorities (APAs)** The introduction of Authorised Publication Authorities (APAs) will contribute to greater standadisation of data and greater quality of data. A shortcoming of current OTC reporting data is that there is not the required level of granularity allowed by current flags to make meaningful interpretations of the data. To overcome this, additional flags should be introduced to allow reporting events like Give Ups / Give Ins to be distinguished from OTC trades representing real liquidity. UBS would support the suggestions from CESR in their technical advice to the European Commission on Post Trade Transparency Standards (CESR/10-882) from October 2010. **Consolidated Tape Provider** The proposals for the Consolidated Tape Provider state that there should be multiple providers of the consolidated tape, each conforming to a set standard. UBS would argue in favour of a

		single provider, rather than multiple providers. Market data charges in Europe are many times those of comparable markets like the US. This is because there is very little competitive pressure on the provision of live prices for the Primary markets. The introduction of a single mandated consolidated tape, which would set the price of post trade data and shred revenues accordingly to contributing markets would place a cap on the cost of the consolidated tape, rather than simply be a cost representing the sum of the parts set by the exchanges. It can also be argued that we are currently in the situation where we have multiple providers of consolidated tapes. Two examples of these are Reuters and Bloomberg. However although data can be consolidated by these vendors, the issue remains that there is a consistent consolidated tape, but differing competing versions giving different results. The main benefit to a consolidated tape comes from the use as a single reference source to which all parties can refer and use consistent data. This can only be achieved through a single golden source.

	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?	We have no comments to offer.
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?	We hope that the work of the ESAs will over time lead to a more harmonized regime for financial markets in Europe. At the same time we are concerned of the additional powers granted to ESMA as they are further away from markets compared to the national competent authorities. We refer to our response in Q19. It is of upmost importance that ESAs ensure that they are staffed by individuals first with the appropriate knowledge, experience and skills, and only second based on nationality. Without a material increase in resources in particular for ESMA, we do not believe that it will be possible to deliver the numerous technical standards in time at the desired level of quality.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	We have no comments to offer.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing	We believe that the interaction of MiFID/MiFIR is considerable with a number of EU financial services legislation, such as EMIR

	MiFID/MiFIR 2?	MAD/MAR, TD or short selling. In this respect, we are concerned about the mushrooming of reporting obligations with respect to trade and positions data. While we recognize that MiFIR acknowledges that trade repositories under EMIR may be recognized by the competent authority as an ARM under MiFIR, this is by no means certain. If this is not automatically the case, the result is duplication of reporting at considerable cost to the economy. Furthermore, aggregation is no longer possible if duplication of reporting exists because duplications need to be weeded out. We believe that the EU would benefit from one single positions and trade reporting mechanism across all assets classes, markets and directives/regulations. This would allow regulators to aggregate data in a meaningful way. We believe this chance is being lost by every directive/regulation introducing its own data reporting mechanism.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	The EU proposals are considerably more restrictive than other jurisdiction's third country firm access rules (e.g., Eastern European, Asia, Switzerland, Middle East), where EU firms enjoy access without equivalence requirements. In particular, the EU does not have to adjust its rules to, for instance, Swiss securities regulations for its firms to gain access to the Swiss market, as is

		the case in the converse situation according to the new proposal. The same is true with respect to many other jurisdictions around the globe. This is likely to backlash against EU firms, reduce customer choice, reduce competition and harm economic growth. It also breaks with a number of national free trade traditions and EU priorities of encouraging competition, as many third country jurisdictions are unlikely to bend to the EU's will to implement MiFID/MiFIR for their internal, third country customers. Should the proposed restrictive proposal be aimed at imposing pressure upon other jurisdictions with restrictive access regimes (e.g., the US), it should be noted that the EU does not have a tradition of isolationism like these other jurisdictions and that the negative impact on the EU would likely be material, given the EU's traditionally open economy and close links with international trade and finance. For instance, companies from emerging market conducting roadshows would be barred from approaching EU pension funds.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	While we recognize that there may be a benefit of a unified sanctions regime, we believe that some of the proposals in the current draft are not proportionate. We would advocate for authorities to ensure that when cases are made against firms as

		well as individuals, facing both administrative and criminal proceedings for the same matters (double jeopardy), sanctions are published in a one-off way to minimize negative publicity impact and to allow financial markets to adequately estimate and understand the impact of sanctions on an issuer or firm. Furthermore, with respect to the obligation to publish sanctions, we do not believe that such an obligation is sensible. Authorities should have a full range of sanctions available to them so as to determine the most appropriate approach in the circumstances. A public "naming and shaming" may well be wholly disproportionate in many situations. However, if the Commission considers such a measure, there would have to be a clear understanding about its purpose. Any sort of naming and shaming should be limited to serious violations to ensure an appropriate disciplinary effect on the firm's behaviour.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	While we believe that the balance between Level 1 and Level 2 may be adequate, we have the impression that financial markets regulation in the EU (including the myriad of technical standards expected from ESMA) is increasingly going towards the US approach with very detailed and prescriptive rules rather than

		relying on broad principles. We fear that this may lead to an increase in box ticking in various compliance functions rather than a fundamental discussion of client concerns, appropriate corporate governance, etc. at the level of the board of directors.