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Bundesverband der Wertpapierfirmen e.V.
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Mr. Markus Ferber, MEP
European Parliament
Committee on Economic
and Monetary Affairs

via e-mail: econ-secretariat@europarl.europa.eu

your reference

your message of

city_date
Frankfurt/Main, 13.01.2012

Review of the Markets in Financial Instruments Directive – Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Dear Mr. Ferber,

the *Bundesverband der Wertpapierfirmen e.V. (bwf)* is a trade association representing the common professional interests of securities trading firms and market specialists at the securities exchanges throughout Germany on a national and European[1] level.

Please find enclosed our response to your questionnaire on the review of the *Markets in Financial Instruments Directive* (MiFID Recast) and the proposed *Regulation on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories* (MiFIR).

We respectfully ask you to take our considerations into account in the course of the further parliamentary discussion and legislative procedure.

Yours faithfully,

Michael H. Sterzenbach
Secretary General

[1] The *Bundesverband der Wertpapierfirmen e.V.* is registered in the list of interest representatives with the European Commission under Registration No. 1880407752-10

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Bundesverband der Wertpapierfirmen

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	**Bundesverband der Wertpapierfirmen e.V. (bwf)** *Federal Association of Securities Trading Firms* *Internet: www.bwf-verband.de*

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?	The bwf strongly advocates a "same business, same rules" approach for all investment firms in order to create and preserve a level playing field among market participants. However, a fair competitive environment requires a set of rules which are proportionate and appropriate. In this context, we do not consider it to be helpful or necessary to extend the scope of MiFID to companies and/or activities whose core business and

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		characteristics are not financial *per se*. Even though those activities can be large in scale in absolute terms, they should remain exempt from **MiFID** whereby exemptions should be granted to activities of corporate end users as well as suppliers as long as their financial activities are connected to their non-financial core business. These assumptions hold true in particular for energy companies, including generators, electricity/gas suppliers as well as network operators, whose main business is the production or supply of energy and who trade on energy markets on their own account in order to manage commercial risk and to allow for the efficient distribution of energy related products. In our view, there are several reasons for keeping energy companies outside the scope of **MiFID** for the majority of their trading activities: a) There is no theoretical or empirical evidence that energy companies give rise to systemic risk for financial markets. Energy companies have a significantly different risk profile than financial institutions. b) Applying **MiFID** to energy firms would create a regulatory overlap with existing and upcoming regulations for energy companies, mainly **Regulation (EU) 1227/2011** on wholesale energy market integrity and transparency (**REMIT**). In order to provide legal certainty, predictability and clarity, confusion of different legal regimes should be avoided. If deemed necessary, further regulation of the energy market should be stipulated by adjustments within the REMIT framework

		and not by extending the scope of **MiFID**. Furthermore, various energy companies already have established subsidiaries, which acquired a **MiFID** license for the relevant parts of their business. These **MiFID** licensed entities offer investment services (in energy related products) to customers. In order to offer the consumers of these products sufficient protection, these separate legal entities are – and should stay - subject to the same **MiFID** rules that are also applicable to other financial institutions. This said, we would like to comment on selected proposed provisions of Article 2, individually, as follows: **Exemption for trading on own account (Article 2.(1)(d) MiFID Recast)** The structure of **Article 2.(1)(d) MiFID Recast** in itself is overly complex, if not contradictory, since the counter-exemptions of **Article 2. (1)(d)(i) MiFID Recast** for market makers as well as the counter-exemptions of **Article 2.(1)(d)(iii) MiFID Recast** for the execution of client orders *de facto* reiliminates the (limited) exemption for persons providing investment services by dealing on own account. To our understanding, the amendment of **Article 2.(1)(d)** *"This exemption does not apply to persons exempt under Article 2(1)(i) who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission*

		allowances, or derivatives thereof" shall exclude persons, e.g. commodity traders, which fall under the exemption of **Article 2(1)(i)** (because their business is an ancillary activity) from the exemption and (equally important) the counter-exemptions stipulated in **Article 2(1)(d)**. This seems to be appropriate, except for the restriction "*as members or participants of a regulated market or MTF"* which is not part of the requirements laid down *in **Article 2(1)(i)***. Since trades between commercial firms often take place outside a regulated market or MTF (and therefore trades are "OTC" from a formal point of view), such a restriction would not reflect the realities and needs of the business of commercial firm in an appropriate way. Even more, since "over the counter trades" of commercial companies do not result in a risk for the stability or the integrity of financial markets. Therefore, this restriction should be deleted. Furthermore, the system of exemption and counter-exemptions is somehow difficult to understand. Therefore, we suggest a clarification by changing the beginning of the sentence to *"The exemptions laid down in paragraph (d) do not apply to..."* **Exemption for ancillary activities (Article 2.(1)(i) MiFID Recast)** The proposal indicates that the EU Commission shall adopt delegated acts to specify the conditions that will determine whether the trading activity of a company is ancillary to its main business. This proposal recognises that, among others,

		companies involved in the physical production, supply and consumption of commodities (e.g. power and gas) need to trade derivatives to manage their commercial risks, and that such commercial trades should remain exempt from **MiFID** regulation. Since absolute volumes of trading activities can differ significantly, depending on the size of commercial activities on group level, we suggest that an "ancillary activity" should be defined clearly *on the level of the directive* in *relative* terms by comparing the trading volume with the overall level of economic activities on group level of the companies concerned. Appropriate Thresholds could be defined on Level II. For the purpose of clarification, we suggest that **Article 2(1)(i)** should be amended as follows: *"...provided that in all cases this is an ancillary activity relative to the size of their main business, when considered on a group basis..."* **Exemption for transmission system operators (Article 2(1)(n) MiFID Recast)** The exemption for transmission system operatorss is adequate. However, the same should apply to distribution system operators and *"storage and LNG System Operators"* according to **Directive 2009/73/EC**. The platform for storage capacities (store-x) is in progress and without a clear exemption its further development might be hindered.
	2) Is it appropriate to include emission allowances and	Although *emission allowances* do share some common features

	structured deposits and have they been included in an appropriate way?	with other classes of financial instruments, such as transferable securities (e.g. dematerialised bearer bonds held in a clearing system), they are distinguishable from such types of financial instruments in several ways. They do not confer financial claims against the public issuer of such allowances nor do they represent titles to capital or title to debentures or constitute forward contracts. Emission allowances are designed to serve climate change objectives and their primary purpose is not to serve as an investment product. Hence, we consider it inappropriate to classify emission allowances as financial instruments. Nevertheless, we understand that the current lack of a common legal framework for emission allowances trading on a European basis is raising concerns, even more since suspicious and potentially criminal activities have recently been observed in this market. However, on a material basis, there is a close relationship between energy and emission allowances markets. Since **MiFID** could already be perceived as excessively complex in many ways, subjects that clearly lie outside its original scope, such as emission allowances, should be regulated separately. Therefore, we are of the opinion that any regulation of emission allowances trading is, once again, best dealt with within the REMIT framework.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and	We support the approach to regulate *third country access*. The

	what precedents should inform the approach and why?	propose rules seem to be appropriate and sufficient.
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?	We agree in general with the new requirements on *corporate governance*. Especially since a number of them reflect common market standards for sound management that are already in place. Furthermore, we strongly welcome the attempt to keep the requirements sufficiently flexible and proportionate with respect to the different nature, scale and complexity of investment firms and their activities. This applies in particular to the limitations of cumulative *execution of directorships*, **Article 9(1)(a),** and the requirement to establish a *nomination committee*, **Article (9)(2.)**. However, with respect to the proposed requirement to put in place a policy promoting the *diversity of the management body*, **Article (9)(3)**, we think that a clarification is needed that certain attributes like gender, age or geographical origin only become relevant when professional skills and experience of candidates are comparably similar. It also should be taken into account that it can be significantly more difficult for smaller and mid size companies to compete for qualified management personnel. Therefore the requirements with respect to a desirable diversity within the management body should take into account not only the size of the management body itself but also the size of the company.
Organisation of markets and	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	We strongly advocate a "same business, same rules" approach which poses the same set of requirements to trading venues which are in direct competition with each other. We therefore

tradingome	changes are needed and why?	understand and support the Commission's attempt to ensure that all forms of organised trading on different venues are appropriately regulated and any form of regulatory arbitrage will be avoided. A task, which becomes even more challenging in light of faster than ever changes in trading technology and market structure. However, it is far from self evident that this task could be achieved most efficiently by the introduction of an additional type of trading venue as proposed with the *organised trading venue* category. The introduction would inevitably further increase the complexity of the legal framework and make the differentiation between the various types of venues more complex. One advantage of the existing framework for trading venues lies in its simplicity: Aside from *regulated markets*, there is one concept for organised trading in a multilateral structure (*"multilateral trading facilities"*) or on a bilateral, markt maker oriented structure (*"systematic internalisers"*). Generally speaking, those two concepts cover the two possible basic designs of organised trading. Therefore, we would like to suggest that it should be examined whether the avoidance of any regulatory loopholes in the field of organised trading cannot be more consistently achieved by a clarification and if necessary elaboration of the existing definitions of MTFs and SIs, as well as the assurance of a more stringent enforcement of existing

		standards. Furthermore, from a semantic point of view the term “organised” appears to be much too broad. Not only in that it could be viewed as a superordinated concept to MTFs and SIs alike, it could be furthermore perceived as almost arbitrary or meaningless in anticipation of the actual level of regulation in the financial markets, where basically every form of trading legally requires an “organised” framework of some kind. We are also concerned that the introduction of a new type of trading venue in its currently very vague definition could, unintentionally, cover certain forms of trading on behalf of clients which clearly do not define a “trading venue” in the sense originally introduced by **MiFID**. – The technical definition and scope of the “organised trading facilities” therefore should be clarified, in case that the concept shall be uphold.
	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?	To our understanding, *OTC trading* within the **MiFID /MiFIR 2** framework is defined de facto as a residual category for trading which does not take place on one of the execution venues, defined by **MiFID/MiFIR 2**. According to the Commission proposal, execution venues are either RMs, MTFs or OTFs. Therefore, trading which takes place on one of the newly introduced category of OTFs would not be considered to be “OTC”. In contrary, a systemic internaliser (SI) is not considered to be an

		execution venue under **MiFID recast/MiFIR** (see **paragraph 3.4.1 of the Explanatory Memorandum**). However, such a characterisation is clearly contradictory to **Article 44(1) of Directive 2006/73/EC** (**MiFID** implementing directive) which describes SIs as execution venues among RMs, MTFs and market makers or liquidity providers even though, they might trade "OTC"! Therefore, a clarification/adjustment is needed in order to resolve the described contradiction and to avoid the legal uncertainty arising from it. Furthermore, the description given in paragraph **3.4.1 of the Explanatory Memorandum** that *"Any trading on own account by investment firms with clients, including other investment firms, is thus considered over-the counter (OTC)"* needs some clarification in so far as trading on own account (no matter whether it takes place on a venue or OTC) does not necessarily take place between an investment firm and one of its clients: "proprietary trading" can also be undertaken with market counterparts which are not "clients" of the investment firms. Another important point which we think is not given due attention under the current **MiFID** framework as well as within the **MiFID/MiFIR 2** proposal is that different trading methods used to conclude a *transaction* on behalf of a client (executing a buy or a sell order) can result in several legal contracts. The reasons can be e.g. a commission chain, the involvement of a central counterparty, the use of a settlement-/clearing-agent or

		the transfer of financial instruments which were bought or sold on behalf of a client in the course of self dealing of an investment firm. In the latter case, an investment firm executes a client order by dealing with market counterparts (either on an execution venue or OTC) on its on books before the financial instruments are transferred between the investment firm and its client. Under the current framework, the "second leg" of the transaction, the transfer of financial instruments between the investment firm and its client, are considered to be a separate "OTC" transaction, even when the transfer results from a client order which was executed on a RM or MTF. We think that the current practice is highly confusing and can result in misleading interpretations e.g. within the framework of *transaction reporting* under **MiFID**. We therefore suggest, that <u>the different legal steps/contracts that are needed in order to facilitate the execution of a client order should be regarded as a single transaction</u>, which should be characterized as "OTC" only if an execution venue was not involved in facilitating the trade. Furthermore, a clarification should be given, that purchase and sale of a financial instrument constituting a transaction should be reported only once. Finally, we are concerned that the intended broadening of the scope of *"systemic internalisation"* may result in an (unintended) narrowing of the legal basis of well established and accepted trading practices which do not constitute systemic internalisation. In fact any business relationship on an ongoing

		basis can be described to some extent as *“organised”* or *“systematic”* and therefore cannot be actually characterized as *“ad hoc”* or *“irregular”* – the attributes currently used for differentiation. One example in this context is the *“sales trading”* for institutional clients undertaken by dedicated business units within an investment firm. While conducted on an ongoing basis and governed by various conduct of business requirements, such activities do not constitute “systemic internalisation”. In order to make clear that **MiFID /MiFIR 2** does not intend to change the regulatory framework for such business models, **MiFIR recital 18** should be revised by changing the phrase: *“It is not the intention of this Regulation to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size”* to *“It is not the intention of this Regulation to require the application of pre-trade transparency rules and other obligations of systemic internalisers to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular or are carried out with wholesale counterparties and are part of a business relationship which is*

		itself characterised by dealings above standard market size". The proposed adjustment would not change the current interpretation or regulatory practice (in a semantic interpretation, the current wording "and" should be read "as well as") but would help to avoid any possible ambiguity in the future.
	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?	Since trading activities in general become more and more automated and supported by technology, utmost care should be given to a clear and unambiguous definition of algorithmic or high frequency trading. Therefore, we welcome that **Article 4(30) MiFID Recast** clarifies that *order routing* and *trade confirmation systems* do not fall within the definition of *algorithmic trading*. For the sake of clarity, we would suggest that *systems employed for the purpose of price determination* on organized venues (by the market operator himself or by a firm entitled by him) should also be expressly exempt from the definition of algorithmic trading. We agree in principle with the proposed specific requirements for *algorithmic trading*, *direct electronic access* and *co-location services*. However, we are not supportive of the idea that investment firms shall provide competent authorities periodically with a detailed description of its algorithmic trading strategies and the proposed obligation for liquidity provision "regardless of prevailing market conditions", as called for in **Article 17(2) MiFID Recast**.

		While the general purpose of a regulatory monitoring of employed algorithmic trading strategies remains unclear, the proposed annual reporting period would be inappropriate for a technology which is under continuous development and for trading algorithms which are redesigned and adjusted in much shorter time periods. We understand that the proposed obligation to provide liquidity on an ongoing basis shall address concerns that the liquidity by HFT "market makers" may be less reliable in situations of high volatility compared to the liquidity provided by "traditional" market makers/specialists. However, even committed market makers or specialists on exchanges may find it sometimes necessary to reduce the amount of their (voluntary) provision of liquidity to the market in order to limit their exposure to market risk and to protect their economic and regulatory capital. Furthermore, **MiFID** currently does not (and should not) define any requirement for market makers to provide liquidity. Existing commitments of market makers/specialists on regulated markets are subject to contractual arrangements between the market operator and the market making/specialist firm. Such arrangements did prove valuable and sufficient even under the most severe market conditions during the recent crisis. Therefore, there is no need for regulatory intervention. Consequently, it would be inconsistent to impose regulatory requirements for ongoing liquidity provisions on

		algorithmic/high frequency traders. In addition, (de facto) market making activities where the proposed obligation to *"post firm quotes at competitive prices"* would be applicable are only a subset of algorithmic trading. In general, any obligation with respect to the provision of liquidity can only be meaningful where (algorithmic) trading employs a firm's own capital. Contrariwise, where algorithmic trading is used in order to execute client orders (e.g. by a "VWAP"-algorithm which tries to execute the order at a volume weighted average price), the amount of additional liquidity will be defined (and limited) by the size of the order.
	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 support the proposed requirements in principle. In order to ensure a level playing field among trading venues, the requirements of **Article 51 MiFID Recast** on *system resilience*, *circuit* breakers and electronic trading should be applied to <u>all</u> trading venues.
	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?	**Article 22 MiFIR** calls for a *record keeping period* of five years which is in line with requirements under the current regime. However, **Article 16(7)** stipulates an additional obligation for the storage of *telephone conversations* and *electronic communication* for a period of three years. From our experience, access to *telephone recordings* for regulatory, compliance or other legal purposes is required in mainly in order to clear up misapprehensions immediately or within a short time span after the conversation was recorded. In

		order to avoid unnecessary administrative costs and to find the right balance between fulfilling regulatory interests and data protection demands, we would suggest to limit record keeping requirements for taped phone conversations to a period no longer than one year.
	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?	We consider it to be desirable that as many derivatives as possible *could* be traded on regulated markets as the trading venue with the highest regulatory standards. As an alternative to OTC trading, it would contribute to the stability and reliability of the overall market structure, especially in times of crisis and market failures/inefficiencies in the OTC segment. However are less convinced that *mandatory* trading on organised venues is the most favourable solution. Instead, we would favour regulatory incentives for on regulated markets e.g. by the introduction of differentiated capital adequacy requirements. Furthermore, we have to keep in mind that *central clearing* and *tradability* in an exchange like environment are two different things. With respect to the degree of necessary standardisation the requirements are simply different. - A derivatives contract may be eligible for central clearing without having reached the level of standardisation (fungibility) required to be traded on organised venues. Therefore, the practical implementation of the *"Trading obligation procedure"* as defined in **Article 26 MiFIR** will be mission critical. It is therefore important that the public

		consultation which ESMA shall conduct according to **Article 26.2 MiFIR** takes place at an early stage and is given due attention and sufficient time. Furthermore, it should be considered to establish a market participant's panel, which could act as a consultative body especially during the implementation phase of the new provision.
	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?	Our expectations that the introduction of an *MTF SME growth market regime* could significantly improve the accessibility to capital markets for small and midsized enterprises are limited. These expectations are due to our opinion that the current general political sentiment for capital markets in most member states could be perceived as characterized rather by "resentment" than by acknowledging its significant and indispensible contribution to economic prosperity and growth for the society as a whole.
	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?	*Access to market infrastructure* should be offered on a non-discriminatory basis in general. The provisions proposed in **Title VI MiFIR Recast** are comprehensive and seem to be appropriate. However, we expect the impact of regulation on future changes in market infrastructure to be relatively small compared to potential effects triggered by further conceivable industry consolidation.
	14) What is your view of the powers to impose position limits,	We are very sceptical that the proposed introduction of *position*

	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?	*limits* would have any positive effect from a regulatory point of view. On the contrary, position limits are very likely to result in *reduced market liquidity* and *consequently impaired price discovery*, which in turn can contribute to *greater volatility*. Accordingly, this will reduce hedging opportunities and thereby may create potential cost increases for producers and end-users alike. Position limits hinder effective risk management as companies would be allowed to manage their commodity price risks only up to a certain level. These limits e.g. would hamper energy producers in forward selling their electricity production to a sufficient extent, or being able to buy the emissions certificates required to produce electricity. Furthermore, there is no conclusive empirical study which proves that position limits either contain upward price movements in commodity derivatives or their associated underlying, or more broadly that they deter manipulative practices. In fact, position limits would not provide any meaningful information to regulators whether commodity prices are driven by market fundamentals or undue manipulative behaviour. Beside this, it remains completely unclear, on which objective, non discriminatory criteria such limits should be based. Therefore, we think that rather than introducing position limits some less restrictive general rules on *position management* combined with effective *"circuit breakers"* in case of extraordinary price movements and appropriate *position*

		reporting should be implemented in order to facilitate market integrity and investor protection. However, a requirement for position reporting by market participants (including a breakdown of positions held by their clients) to the operator of the individual trading platform on a real time basis would be clearly disproportionate and impractical.
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?	
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	We are critical with respect to the general approach of further restricting the categories of financial instruments, which retail investors can trade on an *execution only* basis. Under the proposed provisions of **Article 25 MiFID Recast**, even a callable or convertable bond would be considered to be *"complex"* and therefore would not be execution only eligible. In our view, this would be clearly an undue restriction of investor's choice. Even more, since the problem of "complex products" whose risk characteristics are difficult to understand for a retail investor seems to be much more apparent in the field of investment advice than in the execution only business.
	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?	Periodic *reporting on the quality of execution* as called for in **Article 27(2) MiFID Recast**, is already common market practice among trading venues. Therefore, it will, to a high degree, depend upon the specifications and criteria in the form of regulatory technical standards to be developed by ESMA

		whether this provision will be beneficial for market participants, investors and regulators. We strongly recommend that ESMA should be required to hold a consultation with stakeholders prior to drafting these regulatory technical standards. We are rather critical with respect to the proposed requirement for investment firms to make public, on an annual basis, the *top five execution venues* for each class of financial instruments as stipulated in **Article 27(5) MiFID Recast**. It is not only unrealistic to assume that investors would choose an investment firm by reading annexes of different best execution policies on an annual basis but also questionable how this information could be deemed as a meaningful basis of judgement. The sophisticated investor for whom such a list could be informative, will usually instruct the investment firm anyway where he wants his order to be executed. Therefore, in our opinion, this proposed requirement, which would impose a significant additional administrative burden on investment firms cannot be justified from a cost/benefit point of view and should be deleted.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	The proposed new requirements for investment firm in **Article 30 (1) MiFID Recast** to *"act honestly, fairly and professionally and to communicate in a way which is fair, clear and not misleading"* in their relationship with eligible counterparties find our full support. However, to a high extent such high level provisions are rather a matter of course or already dealt with on the level of national civil and commercial law (e.g. in the form of prohibiting fraud or deception). We further understand that the restriction proposed in **Article**

		30(2) MiFID Recast for governments and their corresponding offices which – divergent from the original concept – shall be recognised as eligible counterparties only if they represent public authorities "at national level", follow a discussion on potential false advise for investments undertaken by municipals and other lower political bodies. While we do not object to this proposed change in the categorisation of eligible counterparties as such, we would like to mention that such a provision would not be entirely coherent within a broader regulatory framework. In particular, we think it is somehow hard to understand that municipal bodies can set up and operate local saving banks as "fully fledged" credit institutions (and investment firms alike) but shall be treated as retail investors for their own investment decisions. Whether the proposed general exclusion of regional and municipal political bodies from the status of an eligible counterpart is appropriate and necessary also remains questionable because the current regime already offers a comprehensive and flexible "opt-out" possibility for investors who do not want to be treated as eligible counterparts or professionals on a general or even on a transaction by transaction level. However, if lower political bodies shall be exempt from the eligible counterpart category in the future, than we propose to eliminate the general possibility for eligible counterparties to "opt-out" since the way this option was handled by certain market participants in the past, also raised our concerns in terms of fairness and a "level playing field". For example, it is a

		common practice for buy side firms, like investments funds, to "opt out" in order to obtain retail protection and/or to be entitled to best execution with respect to investment services provided by a broker. The new "retail client" however will continue to demand a service level tailored for professional clients or eligible counterparts. In theory, the broker could reject such a request for reclassification. In practice however, he will agree in most cases, at least as long as he does not want to risk losing an important client. In other words, the current "opt out" regime at this point creates a serious "free riding" problem, which can put certain smaller and mid size firms in a legally disadvantageous position without any convincing regulatory justification.
	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?	**Article 31 & 32** of the **MiFID Recast** proposal stipulates far-reaching *powers of intervention* for national competent authorities and ESMA. Direct market intervention, either in form of *product intervention* or by prohibiting *certain financial activities or practices*, shall be justified under certain conditions in order to address - A (significant) threat to investor protection, - A (serious threat to) the orderly functioning and integrity of financial markets or - The stability of the whole or part of the financial system. In our view utmost care should be taken in defining the

		conditions, which would justify such interventions and it should be made clear, that direct market intervention remains a temporary instrument and a measure of last resort. Despite the conditionalities layed down in **Article 31 & 32** we think that this is not made sufficiently clear. Furthermore, the potential areas of execution of interventional powers are quite different in nature, severity and the dimension of risk arising from them. In other words: potential concerns, which may stem from an investor protection perspective by a certain product offering is something entirely different from a threat to the stability of the financial system. This circumstance alone raises serious concerns whether a single set of rules could be applied to the different areas in an appropriate and proportionate way. (E.g. the notification period of one month before a measure takes effect, as stipulated in **Article 32(3)** is certainly appropriate when dealing with investor protection issues but could be much too long in the case of an emergency intervention addressing serious threats to financial stability in a crisis situation.) We would also like to point out that even the high level characterisations of circumstances, which would justify an intervention on level of the directive are not completely harmonised between **Article 31** (defining powers of ESMA) and **Article 32** (defining powers for competent authorities). In fact, while **Article 32** presumes at least "significant concerns" or a "serious thread" in order to justify regulatory measures, such important limitations of interventional powers are missing in **Article 31**. Furthermore, a reference to the fundamental

		proportionality principle as stipulated in **Article 32(2)(c)** is missing completely in **Article 31** and should be necessarily amended. Another concern is related to the area of potential *product intervention*: With respect to the possible prohibition of a specific product, the proposed provision remains silent on the obvious question how existing investors in the product/instrument concerned would be effected and how their legitimate economic interests would be dealt with. Last but not least, the proposed provisions on regulatory interventional powers illustrate the general problem of assessing the appropriateness of a legislative measure whose practical (and potentially far reaching) impact will be strongly dependent on the definition of "criteria and factors" governing its application which shall be determined at a later stage by "delegated acts". In our view, this is a dissatisfying and questionable procedure from a general policy perspective.
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	While we agree with the proposed provisions in general and are supportive with respect to the intention of broadening the *scope for pre-trade transparency to equity like instruments*, we remain critical to a mandatory publication of *"actionable indications of interests"*. The publication of indications of interest via widely accessible communication networks is already common market practice where such an "advertisement" is deemed helpful by investors expressing their trading interests. On the other hand, in cases

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		where an investor does not wish to "unveil" his or her trading interest to a broader audience, the impact of any mandatory publication of indications of interests under a pre-trade regime would be clearly prohibitive. In other words market transparency would, most likely, not be increased but rather reduced. Furthermore, even though a considerable amount of indications of interest based transactions may be executed according to the trading interest initially indicated, the differentiation between "actionable" and "non-actionable" could be difficult in practice since indications of interest almost always require further negotiation of execution and post execution arrangements. For the reasons given above and since we cannot identify any kind of market failure arising from current practices we are not supportive of the idea to make (actionable) indications of interests subject to any form of mandatory pre-trade transparency under **MiFID**.
	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?	We support extending the *pre-trade transparency regime to debt and debt like instruments* in general, as long as careful consideration is given to different market structures for different types of instruments. Since markets for different instruments differ significantly in terms of liquidity, number of players, trading technology employed etc., a "one-size-fits-all" approach for pre- and post-trade transparency may not be appropriate and feasible. Therefore the potential impact of a pre-trade transparency regime for bonds and debt like instruments cannot be assessed in

		a meaningful manner without knowledge of the content of the yet to be defined waiver regime stipulated by **Article 8 MiFIR**.
	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?	See answer to question 21. Calibrations should be made on an informed basis after due prior consultation with the industry, debt issuers and other stakeholders.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	We agree with the approach that competent authorities should be allowed to issue *waivers from pre-trade transparency* requirements, which are based on a particular *market model* and/or *order characteristics*. However, care should be taken and a clarification is deemed necessary so that the future assessment of pre-trade transparency requirements will not conflict with the existing flexibility provided by the current definition of legitimate market models as defined in **Annex II** of **regulation EC No 1287/2006**. As with other parts of the proposal, its practical impact will be strongly influenced by the specifications and definitions defined by future “delegated acts”.
	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)?	We appreciate that the Commission has identified the high cost of trade data as major issue in the process of reviewing **MiFID**. However, it is worth while mentioning that we are discussing potential measures to cure a problem which **MiFID** itself, to a certain degree, has created by promoting market fragmentation and thereby multiplying the sources of trade data on the one side

		and producing an increasing and price inelastic demand for such data on the other. In such a framework, it is not surprising that the request to provide trade data at a *"reasonable commercial basis"* turned out not to be very efficient and satisfactory. As long as the described economic/regulatory framework remains principally unchanged, we are rather sceptical that the proposed structural changes would change this situation substantially. This holds true in particular for market participants, which are dependent on real-time access to a wide universe of trade data. While we support attempts to *increase data quality* to bring forward *standardisation of data formats* as well as increased "structural transparency" as a result of the obligation to use *approved publication arrangements*, we remain sceptical with respect to the expected benefits from the introduction of *consolidated tapes* for financial instruments on the basis of competing commercial services.
	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?	As mentioned above, we do not expect that the *costs for trade data* will be reduced as a result of the proposed structural change in the post trade transparency regime. Idealistically, we are of the opinion that trade data should be regarded as a *"Public good"* which should be made available at cost level. However, this seems to be rather unrealistic under current market conditions and the **MiFID Recast** clearly favors and sets the framework for a commercial solution (without

		appropriately addressing the problem of inelastic demand). We also accept that data vendors as private for profit companies have a need to demonstrate to their shareholders the ability to generate profitable returns. Therefore, we rather expect that prices for market data will remain high or even increase as a result of the new consolidated tape regime and the regulatory approval required for publication arrangements.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	In our view, the strong emphasis which the **MiFID/MiFIR 2** proposal is laying on commodities and commodity derivatives call for an institutionalized participation of related European political bodies and Agencies, in particular the *Agency for the Cooperation of Energy Regulators* (ACER).
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	The regulatory linkage with **EMIR** and **MAD** is already given appropriate attention within the **MiFID/MiFIR 2** proposal. Beside this the crucial links with **REMIT** (a non-financial, but also market integrity focused piece of EU legislation for the wholesale energy market) should be given due consideration, in order to avoid double regulation. The recently introduced **REMIT** is already improving transparency and efficiency of energy wholesale markets, and therefore certain **MiFID** requirements will be unnecessary and burdensome duplications for those energy companies which will

		not be able to make use of the ancillary activity exemption. Furthermore, the definition of *physical forwards* as financial instruments in **Annex I, Section C.6 MiFID** (see reply to question 6) creates overlap with **REMIT**, which is already regulating physical transactions for power and gas. Since physical forwards are mainly an instrument to coordinate supply and demand between suppliers and end users and not a typical investment product, we think it would not be appropriate to include these contracts in the definition of financial instruments.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Our view that physical forwards should not be defined as financial instruments is further supported by the corresponding classification within the **US Dodd-Frank Act** which does not classify physical transactions in commodities as financial instruments. Consequently, European companies could suffer from a in competitive disadvantages if the proposed inclusion in **Annex I, Section C.6 MiFID** would be uphold.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	In our opinion, the numerous proposed *Level 2 measures* and the empowerment of the Commission to adopt *"delegated acts"* create a risk of potentially jeopardizing the balance of power among the European political institutions. Furthermore, with the high number of proposed Level II measures, it becomes hardly impossible to fully assess the potential impact of the proposed changes and new regulations

		under **MiFID/MiFIR 2** at the current stage since the scope of these measures very often goes far beyond specification of *"technical details"*. Therefore, we are strongly concerned that substantial parts of the new legal framework which will have a significant legal and economic impact on investment firms and investors alike could be defined without prior due consultation of stakeholders.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article ... :	
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