EACB position on the consultation by the Commission Services on the review of the Markets in Financial Instruments Directive (MiFID)

02 February 2011

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels
Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eurocoopbanks.coop • e-mail : secretariat@eurocoopbanks.coop

General remarks

The European Association of Co-operative Banks (EACB) would like to thank the European Commission for the opportunity to share its views on the important consultation on the review of the Markets in Financial Instruments Directive (MiFID). For the co-operative banking sector in Europe the implementation of the MiFID in general has been a very expensive undertaking. From our perspective the regime has proven to work well in the recent years. The rules and obligations currently in place ensure an appropriate level of investor protection and flexibility for clients and investment firms regarding the different types of clients, different services and different financial instruments. We have no knowledge about major problems in this respect in the day-to-day business of our member institutions and have to express some reluctance to the rather fundamental adjustments proposed to the MiFID framework.

Nevertheless, we have reviewed the Commission's proposals and have positively evaluated – for instance – a possible obligation for Member States to communicate to the Commission any addition or modification in national provisions concerning investment firms in order to avoid discretionary "gold plating". This is crucial to ensure a level playing field across the EU markets.

We are less positive, however, on the adjustments proposed with regard to investor protection. Indeed, many changes proposed by the Commission, would have a burdensome impact on the daily business especially for small and medium sized co-operative banks. We would urge the Commission – for example – to avoid major changes in the product-scope and in the categorisations of products to complex/non-complex products. We would also ask the Commission to refrain from possibly abolishing the "execution only"-regime or banning inducements. In addition investment advice or the reception/execution of orders should not be turned into a continuous obligation to confirm the suitability of the investment by additional requirements to provide post-trade advice or information. Otherwise the boundary with the portfolio management would get blurred. The same applies to a possible introduction of written minutes in case of an investment advice or even telephone recordings in case of the reception of orders and/or an investment advice.

All these measures would fundamentally change the way investment products and investment services are provided to customers in Europe. The added value of such proposals is in no way in an appropriate proportion to the actual costs the suggestions would lead to for our members and the industry as a whole.

The detailed comments on the set of questions of the Commission concerning the MiFID-review can be found below. We trust that your services will give them due consideration.

DEVELOPMENTS IN MARKET STRUCTURES

Defining admission to trading

(1) What is your opinion on the suggested definition of admission to trading? Please explain the reasons for your views.

In principle we welcome the proposal of the Commission to define “admission to trading” as the decision by the operator of a regulated market, MTF or organized trading facility to allow a financial instrument to be traded on its system as long as it is possible to identify whether a financial instrument admitted to trading. We agree that one success of MiFID is a more competitive trading landscape in Europe. Upcoming amendments to the set of rules should further support market liquidity and efficiency.

Organised trading facilities

General requirements for all organised trading facilities

(2) What is your opinion on the introduction of, and suggested requirements for, a broad category of organised trading facility to apply to all organised trading functionalities outside the current range of trading venues recognised by MiFID? Please explain the reasons for your views.

From our perspective an introduction of a broad category of organized trading facilities that are originally out of the MiFID-scope into a single Organised Trading Facility (OTF) will increase transparency and reduce systemic risks in the financial markets over time. Care must be taken to ensure that the specific requirements that would apply to OTFs are tailored towards their specific activities.

(3) What is your opinion on the proposed definition of an organized trading facility? What should be included and excluded?

From our perspective the definition of an organized trading facility given by the Commission is too broad. It is of key importance to clarify the exact scope of application of an OTF. A deliberately general definition could lead to different interpretations in each single European jurisdiction and therefore create an unlevel playing field and possibly also regulatory arbitrage. We call for a more precise definition and a clear-cut distinction between OTFs and MTFs. The definition of OTFs should not include voice execution or a hybrid voice/electronic execution. Also proprietary trading platforms and money market instruments should be clearly excluded.

(4) What is your opinion about creating a separate investment service for operating an organised trading facility? Do you consider that such an operator could passport the facility?

In order to ensure the equal treatment of similar services we are in favour of creating a separate investment service for operating an organised trading facility. As outlined in our answer to question 3 it is of crucial importance to clearly define an OTF. We would like to point out that the outlined proposal with the respective required administration would be very burdensome to put into practice, especially for small and medium sized operators.

(5) What is your opinion about converting all alternative organized trading facilities to MTFs after reaching a specific threshold? How should this threshold be calculated, e.g. assessing the volume of trading per facility/venue compared with the global volume of trading per asset class/financial instrument? Should the activity outside regulated markets and MTFs be capped globally? Please explain the reasons for your views.

The concept of OTFs and MTFs are fundamentally distinct and should therefore be regulated in a different way. Forcing MTF-rules on an OTF beyond a certain size would mean to break a successful business model. We also object to the proposed way of calculating respective thresholds by assessing the volume of trading per venue compared with the global volume, because this global volume is out of the influence of an OTF. Trading venues should be regulated with respect of their functioning and not according to volumes.

Crossing systems

(6) What is your opinion on the introduction of, and suggested requirements for, a new sub-regime for crossing networks? Please explain the reasons for your views.

We do not have any objections against the surveillance of crossing networks. It might enhance the fair treatment of customers and investors.

(7) What is your opinion on the suggested clarification that if a crossing system is executing its own proprietary share orders against client orders in the system then it would prima facie be treated as being a systematic internaliser and that if more than one firm is able to enter orders into a system it would be prima facie be treated as a MTF? Please explain the reasons for your views.

We fear that the quality of certain form of broker services would suffer if they had to fall under the rules proposed for MTFs. It is of vital importance for brokers to choose clients, because they can establish an environment of trust where clients know that their orders will only be matched with other clients that the broker accepted. An obligation for multilateral access would effectively break this business model with a negative impact for clients that seek a certain character of order execution. In consequence we would agree with the SI side of the proposal, but would question the “prima facie” regarding the treatment as MTF.

Trading of standardised OTC derivatives on exchanges or electronic trading platforms where appropriate

(8) What is your opinion of the introduction of a requirement that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities satisfying the conditions above? Please explain the reasons for your views.

Before making such a far-reaching decision to require most of OTC-traded derivatives to be traded exclusively on regulated markets, the European Commission should acknowledge that the needs of investors are a fundamental driver behind the derivative markets. The OTC markets provide investors with tailored solutions that meet their business needs. The proposed measure would certainly lead to a significant increase in fixed costs and in the end to more concentration in the market. Especially for small and

medium-sized co-operative banks this would be an issue since they have only a low business volume in derivative contracts. As a result these institutions will – because of unduly additional costs in the derivatives-trading – refrain from entering into derivative contracts. Thus, whey will no longer hedge their own position, available as hedge counterparties for their clients. Co-operative banks often use derivatives in the form of interest rate swaps ("IRS") in order to hedge their interest rate risk arising in the context of granting loans to clients with fixed interest payments. Therefore, such interest rate swaps enable the bank to offer and extend custom-made loans mainly targeted at SMEs.

The rules on the establishment of central CCP clearing for certain derivatives, better risk management and an enhancement of transparency in the field of derivatives currently in development in the context of the European Markets Infrastructure Regulation (EMIR) are sufficient. We do not see a need for further rules forcing all derivatives on organised trading venues.

(9) Are the above conditions for an organised trading facility appropriate? Please explain the reasons for your views.

We object to the preclusion of bilateral trading systems. This would lead to a fundamental change in the method of execution applied today. Certain products are liquid enough for trading on a bilateral basis, but not liquid enough to be traded on an exchange.

(10) Which criteria could determine whether a derivative is sufficiently liquid to be required to be traded on such systems? Please explain the reasons for your views.

From our perspective there is no one-size-fits-all approach to quantify the necessary level of liquidity in any meaningful way ex ante. The frequency of trades and the average size of transactions are obviously necessary criteria. But it is not sufficient to look at these figures only, because it really depends on the characteristics of the product. In addition, we would like to stress that the liquidity for a given contract can change over time. For instance, it is important to maintain alternative methods of negotiating or executing trades to cater for the possibility of significant drops in liquidity. In those circumstances, market participants will wish to be able to negotiate with the available sources of liquidity on a bilateral basis. Constraints on their ability to do so will exacerbate market issues by restricting alternative sources of liquidity.

(11) Which market features could additionally be taken into account in order to achieve benefits in terms of better transparency, competition, market oversight, and price formation? Please be specific whether this could consider for instance, a high rate of concentration of dealers in a specific financial instruments, a clear need from buy-side institutions for further transparency, or on demonstrable obstacles to effective oversight in a derivative trading OTC, etc.

Trade repositories are best suited to provide transparency for authorities and supervisors.

(12) Are there existing OTC derivatives that could be required to be traded on regulated markets, MTFs or organised trading facilities? If yes, please justify. Are there some OTC derivatives for which mandatory trading on a regulated market, MTF, or organised trading facility would be seriously damaging to investors or market participants? Please explain the reasons for your views.

Trading on an organised platform is only one of the execution models available to market participants. It is up to these participants to decide which of their transactions should be exchange traded or not. Nothing prevents trading venues to offer derivatives for trading. Quite a range of instruments were offered by exchanges over time. Where a well functioning exchange market has not developed, it is mainly because of the fact that not enough demand exists in the market for trading to reach a stable equilibrium. The Commission should therefore not introduce binding requirements for existing OTC derivatives to be traded on regulated markets.

Automated trading and related issues

(13) Is the definition of automated and high frequency trading provided above appropriate?

In general, we believe that implications of automated trading and high frequency trading should be thoroughly analysed before establishing new rules. Otherwise new rules are hardly fit for purpose and might drain liquidity of the markets. We believe the definition of automated trading needs further clarifications. It appears to be too broad and seems to cover a much wider range of operations then initially intended. A clarification would help to avoid possible misinterpretations and to ensure a higher degree of legal certainty.

Only the entity matching buy- and sell-orders can execute an order, but the rules are not solely aimed at operators of trading venues. We would therefore prefer to speak of “orders” rather than “executing the trade”. Because of rapid technical innovation some form of automated processes is part of almost all transactions in financial instruments today. This would in fact result in basically all forms of trading, e.g. smart order routing, falling under this definition of automated trading. As stated earlier we concur that all trading should be regulated in an appropriate manner, but we do not believe that all of this should be done under the umbrella of automated trading. This could change the benefits of investing in better technology and thus be detrimental to clients and the market as a whole.

(14) What is your opinion of the suggestion that all high frequency traders over a specified minimum quantitative threshold would be required to be authorised?

A possible authorisation of high frequency traders as a must should be based first of all on a clear definition of high frequency trading and secondly depend on a threshold to focus the supervision on the important traders.

(15) What is your opinion of the suggestions to require specific risk controls to be put in place by firms engaged in automated trading or by firms who allow their systems to be used by other traders?

We agree in principle, but the requirements should not be too prescriptive. The firms should be able to demonstrate to the supervisors continuously and at all times that they have established the necessary safeguards, as many already do today. These safeguards should be kept up to date.

(16) What is your opinion of the suggestion for risk controls (such as circuit breakers) to be put in place by trading venues?

We agree with the suggested requirements for trading venues to have in place appropriate risk controls.

(17) What is your opinion about co-location facilities needing to be offered on a non-discriminatory basis?

We agree that all investors should have equal access to the co-location facilities.

(18) Is it necessary that minimum tick sizes are prescribed? Please explain why.

We support the harmonisation of minimum tick sizes. Such an establishment would limit the fragmentation of orders and conversely increase liquidity to the benefit of the market participants.

(19) What is your opinion of the suggestion that high frequency traders might be required to provide liquidity on an ongoing basis where they actively trade in a financial instrument under similar conditions as apply to market makers? Under what conditions should this be required?

Not establishing significant long or short positions overnight (or over a certain time span) is part of the strategy of HFT. Requiring firms active in HFT to become some kind of market maker would effectively break the business model and would result in a drain of liquidity. We do not see any reason for such a radical interference in the markets. Circuit breakers seem better suited to overcome short periods of stress.

(20) What is your opinion about requiring orders to rest on the order book for a minimum period of time? How should the minimum period be prescribed? What is your opinion of the alternative, namely of introducing requirements to limit the ratio of orders to transactions executed by any given participant? What would be the impact on market efficiency of such a requirement?

Such a rule – applicable to all participants – would reduce the efficiency of the market and create new possibilities of arbitrage between MTFs due to an introduced cancellation delay. The ratio of orders executed by a participant is very dependent on its business. Introducing a ratio would create a strong constraint for the participant who would not be able to continue with his/her usual business.

Systematic internalisers

(21) What is your opinion about clarifying the criteria for determining when a firm is a SI? If you are in favour of quantitative thresholds, how could these be articulated? Please explain the reasons for your views.

We agree with the assessment of the Commission that one of the reasons for the failure of a SI-development at European level can be attributed to the lack of specificity of its regulation and the consequent uncertainty in characterising the activity of systematic internalisation. A review should aim at harmonising the rules and requirements for SI-operations in order to avoid possible differences arising from the regulatory discretion of

Member States in this respect. We believe that bilateral forms of trading will continue to play a role in the future. The regime for SIs could benefit from some refinements in order to give a better regulatory guidance. The aim of a revised SI-regime, however, cannot only be to increase the number of registered SIs.

We believe that any definition of quantitative thresholds should take in account the type of intermediary involved and their operations. In other words, any threshold has to consider the fact that there are small intermediaries which, with their limited amount of operations, could fall within the threshold identified and be forced to become an SI, with all the costs this would lead to. Furthermore, these thresholds should be defined taking into account the type of financial instrument as well. Given the above it would be important to have a qualitative definition of SI's activities

(22) What is your opinion about requiring SIs to publish two sided quotes and about establishing a minimum quote size? Please explain the reasons for your views.

Since the Commission noted a low diffusion of SI-activities in Europe, we believe that the obligation to publish two sided quotes could discourage SI-activities in general and lead to negative ramifications for the market. As SIs take on risks by quoting two sided they could refrain from doing so altogether.

Further alignment and reinforcement of organisational and market surveillance requirements for MTFs and regulated markets as well as organised trading facilities

(23) What is your opinion of the suggestions to further align organisational requirements for regulated markets and MTFs? Please explain the reasons for your views.

We agree that the same activities should be subject to the same rules. But apart from differences in the way financial instruments are admitted to trading and that regulated markets are public-law institutions, we do not see any differences in the requirements.

(24) What is your opinion of the suggestion to require regulated markets, MTFs and organised trading facilities trading the same financial instruments to cooperate in an immediate manner on market surveillance, including informing one another on trade disruptions, suspensions and conduct involving market abuse?

We agree. Closer connection and cooperation between trading venues would generally be helpful to further enhance market oversight. But one condition would be the use of common identifiers for such financial instruments. These additional requirements should not hinder trading venues from autonomous decisions they need to take.

SME markets

(25) What is your opinion of the suggestion to introduce a new definition of SME market and a tailored regime for SME markets under the framework of regulated markets and MTFs? What would be the potential benefits of creating such a regime?

(26) Do you consider that the criteria suggested for differentiating the SME markets (i.e. thresholds, market capitalisation) are adequate and sufficient?

We agree with the proposal that the envisaged provisions should facilitate the access of SMEs to the markets by making it less complicated and expensive than it is now.

We believe, however, that the minimum legal requirements for MTFs should not be softened. This would be in contradiction to the fundamental idea that the same business should fall under the same rules.

PRE- AND POST-TRADE TRANSPARENCY

Equity markets

Pre-trade transparency

(27) What is your opinion of the suggested changes to the framework directive to ensure that waivers are applied more consistently?

We endorse the approach adopted by the Commission to maintain the set-up of the current regime on pre-trade transparency for regulated markets and MTFs. The application of this overriding system has not led to particular problems in relation to market transparency and the price discovery process. We would like to highlight that the threshold review process should take into account a preliminary analysis of the market conditions, especially with respect to liquidity. In addition a recalibration should take into account the impact on dark pools.

(28) What is your opinion about providing that actionable indications of interest would be treated as orders and required to be pre-trade transparent? Please explain the reasons for your views.

We agree. Where IOIs are released only to a subset of market participants but not to others, this could lead to an unfair information asymmetry, which in our view is opposed to the principle of equality of opportunities for all market participants.

(29) What is your opinion about the treatment of order stubs? Should they not benefit from the large in scale waiver? Please explain the reasons for your views.

With respect to part/s of an order which is/are not executed we are of the opinion that it would be necessary to continue to ensure the exemption to the pre-trade transparency also for them, even if that part of the order does not fall within the threshold of the LIS waiver. This view is based on the assumption that it could be excessively expensive for a broker to “split up” the order into two parts and treat what is not executed as an order itself.

When a large order is submitted to a trading venue and meets the criteria of the waiver, we believe the stubs of that order should retain the protection of the waiver throughout the orders lifetime. Denying the rest of the order the protection of the waiver and making it public would go against the original intention of the waiver. This could have a negative impact not only on the rest of the order but by backward induction also on the positions taken.

(30) What is your opinion about prohibiting embedding of fees in prices in the price reference waiver? What is your opinion about subjecting the use of the waiver to a minimum order size? If so, please explain why and how the size should be calculated.

We do not believe that the waiver should be amended to include minimum thresholds for orders submitted to reference price systems. A threshold would prevent clients who are sending small orders of the benefits of venues or crossing engines using this waiver. Then these clients would no longer benefit from the low execution costs such venues or

crossing engines allow. It would go against the MiFID objective to enhance competition in order to lower the execution costs.

(31) What is your opinion about keeping the large in scale waiver thresholds in their current format? Please explain the reasons for your views.

The use of the LIS waiver has so far proven itself as an effective tool to ensure market transparency and should therefore be maintained. A recalibration of the thresholds might be appropriate since they were introduced under very different market circumstances as the current ones. A key aspect is thereby a sufficient level of flexibility in contrast to the very rigid format currently in place.

Post trade transparency

(32) What is your opinion about the suggestions for reducing delays in the publication of trade data? Please explain the reasons for your views.

The EACB considers the current post-trade transparency regime as adequately valid. The quality of post-trade transparency could be further improved by standardizing the information and ensuring its availability especially with respect to OTC transactions.

We strongly disagree with any changes in the current regime concerning the timeliness of post-trade transparency information. In fact any eventual shortening of delaying publication time does not increase the efficiency of public information – in normal conditions brokers publish their information in real time – but it would make it more difficult to reach the standard performance.

It should also be taken into consideration that in case of certain transactions – like OTC transactions by phone – it is more difficult to publish information in real time because such transactions cannot be fully automated and require a certain degree of manual activity.

The current 3-minute maximum delay should be maintained because it would not force smaller intermediaries into disproportionate investments in relation to their operations.

Equity-like instruments

(33) What is your opinion about extending transparency requirements to depositary receipts, exchange traded funds and certificates issued by companies? Are there any further products (e.g. UCITS) which could be considered? Please explain the reasons for your views.

We would support the extension of transparency obligations to the depositary receipts, exchange traded funds and certificates. However, any change in scope needs to be well communicated to the banks, be consistently defined and interpreted by all Member States, and be implemented on a timescale which gives market participants sufficient time for the respective IT system changes. It might be also necessary to thoroughly analyze pre-existing national legislation for the mentioned products in order to avoid any duplications or contradictions. We are against extending the transparency requirements to UCITS, as there is only one price per day fixed by the asset management company.

(34) Can the transparency requirements be articulated along the same system of thresholds used for equities? If not, how could specific thresholds be defined? Can you provide criteria for the definition of these thresholds for each of the categories of instruments mentioned above?

We would agree to the transparency requirements for shares being a starting point for new rules for equity-like instruments, but the rules should be calibrated to the specific characteristics of these instruments. Due to considerable differences the respective rules cannot be set in the same way as for equities. The transparency requirements need therefore to be calibrated carefully taking into account the differences in the nature of the respective instruments and should in the end be implemented gradually in order to facilitate operators to adapt and to adjust their systems.

Trade transparency regime for shares traded only on MTFs or organised trading facilities

(35) What is your opinion about reinforcing and harmonising the trade transparency requirements for shares traded only on MTFs or organized trading facilities? Please explain the reasons for your views.

In principle we do agree that everything admitted to trading on a regulated market should be made transparent on all trading venues, but since admission to trading is one of the few differences between regulated markets and a MTF, extending these requirements could lead to a confusion about minimum requirements for financial instruments that are made transparent.

(36) What is your opinion about introducing a calibrated approach for SME markets? What should be the specific conditions attached to SME markets?

We do not see a benefit in different legal requirements for the SME markets. And from our experience the rules for MTFs do not hinder the establishment of successful markets for SMEs.

Non equity markets

Pre- and post-trade transparency

(37) What is your opinion on the suggested modification to the MiFID framework directive in terms of scope of instruments and content of overarching transparency requirements? Please explain the reasons for your views.

We welcome that the proposal takes into account the differences between classes of financial instruments and all types of products in the fixed income market. As for corporate bonds we consider it as crucial to distinguish between different categories, namely between bonds issued by banks or financial institutions and corporate bonds as well as between bonds traded on regulated markets and not traded bonds. Such a differentiation is justified because of the different characteristics of these categories of instruments. It is important to emphasize that bank bonds are issued by entities subject to strict regulation and supervision.

The Commission should be aware that for less liquid instruments (some credit bonds in particular), these obligations could undermine liquidity. Pre-trade transparency could lead to a reduction in the number of quotes, price requests and pricing information, and lead to an increased risk for market makers.

From our perspective the extension of the transparency requirements to non-equity instruments will be very complicated and costly for the industry especially with respect to the technical implementation. We doubt that there has been a sufficient scrutiny on the acceptance of pre- and post-trade data by investors. We call for an in-depth impact assessment before making such far-reaching changes. Since we did not experience any market failures in this respect we do not consider the proposed regulatory requirements as appropriate.

(38) What is your opinion about the precise pre-trade information that regulated markets, MTFs and organised trading facilities as per section 2.2.3 above would have to publish on non-equity instruments traded on their system? Please be specific in terms of asset-class and nature of the trading system (e.g. order or quote driven).

We are of the opinion that pre- and post-trade transparency already exists for corporate and sovereign bond markets. Pre-trade transparency is realised via dealer pricing runs (provided by organisations such as Bloomberg, Markit, ThomsonReuters, CMA/QuoteVision/DataVision, etc.), electronic execution platforms (provided by organisations such as Bloomberg, TradeWeb, BondVision, MarketAxess and TLX) and aggregate/composite pricing services (provided by organisations such as Markit, CMA and Bloomberg).

(39) What is your opinion about applying requirements to investment firms executing trades OTC to ensure that their quotes are accessible to a large number of investors, reflect a price which is not too far from market value for comparable or identical instrument traded on organised venues, and are binding below a certain transaction size? Please indicate what transaction size would be appropriate for the various asset classes.

OTC should be excluded from the scope of this pre-trade transparency requirement as there is no “inherent information asymmetries” in the rates market.

We noted that in the consultation paper nothing is said about how investment firms will be able to realise pre-trade transparency given the high amount of orders, quotes and other information to report. Indeed real time is very ambitious. Daily reporting would be more feasible. In addition, the paper does not clearly explain the objectives of a pre-trade transparency in real-time, what market failure it seeks to address and how it will mitigate harmful impacts on market users.

In addition, it is unclear on how a “comparable instrument” should be defined. If products were similar investors would not resort to OTC markets. The particularity of OTC is that it does not promote the one-size-fits-all approach and can meet a client's specific need via bespoke products.

Furthermore, pre-trade transparency on derivatives could give misleading information to market participants as execution prices can be linked to the quality of the counterparty. Pre trade information available for rates or credit products can differ slightly from one trading venue to the other: market makers can price a product differently based on the

type of activity prevailing on the venue (reflecting differences in risks and hedging costs) or the difference in membership fees (ex Tradeweb / BondVision).

(40) In view of calibrating the exact post-trade transparency obligations for each asset class and type, what is your opinion of the suggested parameters, namely that the regime be transaction-based, and predicated on a set of thresholds by transaction size? Please explain the reasons for your views.

A post-trade transparency regime that is transaction-based could harm liquidity and limit the ability of market participants to hedge their risks. Forcing the use of public post-trade transparency can make some contracts less attractive, undermining liquidity and the risk management needs of counterparties. Hence, we would favour post-trade transparency on an aggregate basis with delays to be defined on an asset class level.

If the Commission keeps its position on post-trade transparency, we suggest that it should be calibrated to the liquidity of the markets subject to the requirement with appropriate time delays and size-related thresholds, and should take into account the possible risks of harming that liquidity.

Last but not least, we would like to emphasize that there are already a number of providers of post-trade data, such as Xtrakter, www.bondmarketprices.com and SIX Telekurs. Thus, there is no asymmetry of information between retail investors and wholesale ones. If trade information already available is not being utilised, it is difficult to see how imposing a mandatory post-trade transparency framework would serve to improve the situation.

(41) What is your opinion about factoring in another measure besides transaction size to account for liquidity? What is your opinion about whether a specific additional factor (e.g. issuance size, frequency of trading) could be considered for determining when the regime or a threshold applies? Please justify.

With respect to bonds we consider the size of the issuance to be a better proxy than the frequency of trading.

Over the counter trading

(42) Could further identification and flagging of OTC trades be useful? Please explain the reasons.

From our perspective there is no need for additional regulatory measures concerning OTC trades going beyond the proposals outlined in the EMIR regulation on derivatives, central counterparties and trade repositories. Specific flagging and further rules on the identification of OTC trades will not add any benefit. Regular market surveys contribute to a clear picture with respect to market levels and granularity.

DATA CONSOLIDATION

Improving the quality of raw data and ensuring it is provided in a consistent format

(43) What is your opinion of the suggestions regarding reporting to be through approved publication arrangements (APAs)? Please explain the reasons for your views.

The regulators must ensure that post-transparency quality is faultless. APA status is one of the possible ways to meet this purpose. However it must be provided that it does not affect the cost structure of intermediaries. We would like to emphasize that the introduction of reporting through APAs could be harmful for small and medium sized banks which should already use proprietary channels (e.g. the internet). Such additional burdens would be disproportionate with respect to the volume of activity and the their respective contributions to the price formation process.

(44) What is your opinion of the criteria identified for an APA to be approved by competent authorities? Please explain the reasons for your views.

We agree on the criteria identified for an APA to be approved by competent authorities. In the light of the links of the topic with the trade repository data consolidation foreseen in the European Market Infrastructure Regulation (EMIR) we would like to emphasize that a duplication of requirements through double regulation needs to be avoided.

(45) What is your opinion of the suggestions for improving the quality and format of post trade reports? Please explain the reasons for your views.

We agree that more clarity about content and format of reports would facilitate consolidation and comparison of data. It is of crucial importance to properly consult the market before making decisions on the matter.

(46) What is your opinion about applying these suggestions to non-equity markets? Please explain the reasons for your views.

We support the consolidation of transparency information in the equity markets, but object data consolidation with respect to non-equities.

Reducing the cost of post trade data for investors

(47) What is your opinion of the suggestions for reducing the cost of trade data? Please explain the reasons for your views.

We agree that the cost for European data is too high and should be reduced. We support the proposals to make pre- and post-trade information data available separately and to provide more than 15 minutes old post-trade data free of charge.

(48) In your view, how far data would need to be disaggregated? Please explain the reasons for your views.

We would support a high level of granularity and believe that for example information of different financial instruments or different markets should be unbundled. This includes unbundling of pre and post trade data.

(49) In your view, what would constitute a "reasonable" cost for the selling or dissemination of data? Please provide the rationale / criteria for such a cost.

We do not see a need to further legally specify what “reasonable” means. Providers of trade data should be able to demonstrate to supervisors that their prices are reasonable at all times. Supervisors are also well suited to take into account national or market specifics.

(50) What is your opinion about applying any of these suggestions to non-equity markets? Please explain the reasons for your views.

Equity markets should receive the first and exclusive attention.

A European Consolidated tape

(51) What is your opinion of the suggestion for the introduction of a European Consolidated Tape for post-trade transparency? Please explain the reasons for your views, including the advantages and disadvantages you see in introducing a consolidated tape.

On the one hand, the introduction of a consolidated tape will create transparency and would allow to improve best execution. There are, nevertheless, several risks linked to the introduction of a generalized European Consolidated Tape. It would lead to significant additional burdens for intermediaries and in the end to higher costs for single transactions. Also data protection issues would arise in case of market participants being possibly able to see the trades and positions of one of their competitors. The provider of the data will be in a unique commercial position. A tough governance structure for the provider as a natural monopolist – enabling the users of such a consolidated tape to voice possible concerns – will be of paramount importance.

A partial consolidation system based on the volume of exchanges covering only standardized and traceable information on listed and liquid equities could be an appropriate solution. The trading volumes generated by small brokers would have little relevance with respect to the price discovery process. On the basis of this system only trading venues and brokers which contribute significantly to the trading of shares would be required to publish their information – in standard formats which permit the information to be traced – in order to enable an easy consolidation via authorized channels.

(52) If a post-trade consolidated tape was to be introduced which option (A, B or C) do you consider most appropriate regarding how a consolidated tape should be operated and who should operate it? Please explain the reasons for your view

We support option A, a non-profit making entity in order to ensure minimal costs for the industry with a limited potential for conflicts of interest with a tough governance structure in which the users of the facility would be well represented.

(53) If you prefer option A please outline which entity you believe would be best placed to operate the consolidated tape (e.g. public authority, new entity or an industry body).

Please see our reply to question 52.

(54) On Options A and B, what would be the conditions to make sure that such an entity would be commercially viable? In order to make operating a European consolidated tape commercially viable and thus attaining the regulatory goal of improving quality and supply of post-trade data, should market participants be obliged to acquire data from the European single entity as it is the case with the US regime?

Please see our reply to question 52.

(55) On Option B, which of the two sub-options discussed for revenue distribution for the data appears more appropriate and would ensure that the single entity described would be commercially viable?

Please see our reply to question 52.

(56) Are there any additional factors that need to be taken into account in deciding who should operate the consolidated tape (e.g. latency, expertise, independence, experience, competition)?

Latency is one of the main criteria. Processing, consolidation and dissemination of data should be as close to instantaneous as possible. Expertise is also very important to deliver the expected service to the market participants. Independence is in our view not of major importance.

(57) Which timeframe do you envisage as appropriate for establishing a consolidated tape under each of the three options described?

The creation of a Consolidated Tape and APAs would require the adoption of a standard format for post-trade transparency that allows the comparability of information. In this light only a gradual approach seems feasible that standardizes as a first step the information before creating the Consolidated Tape.

(58) Do you have any views on a consolidated tape for pre-trade transparency data?

We agree with the evaluation in the consultation paper that the current European market structure does not lend itself easily to the establishment of a consolidated tape for pre trade transparency data. Furthermore, a lot of financial instruments would not benefit from a consolidated tape for pre trade data. Before exploring this question further, ESMA should analyse the progress and achieved benefits of the consolidated tape for post trade data.

(59) What is your opinion about the introduction of a consolidated tape for non-equity trades? Please explain the reasons for your views.

Because of the fundamental differences between equity and non-equity markets the timing of the publication of post-trade information differs considerably. We therefore firmly object the introduction of a consolidated tape for non-equity trades.

MEASURES SPECIFIC TO COMMODITY DERIVATIVE MARKETS

Specific requirements for commodity derivative exchanges

(60) What is your opinion about requiring organised trading venues which admit commodity derivatives to trading to make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity? Please explain the reasons for your views.

Requiring organised commodity derivatives trading venues to make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity will improve the transparency of the commodity market.

(61) What is your opinion about the categorisation of traders by type of regulated entity? Could the different categories of traders be defined in another way (e.g. by trading activity based on the definition of hedge accounting under international accounting standards, other)? Please explain the reasons for your views.

To categorise traders by type of regulated entities would permit to get an accurate view of the commodity derivative markets. However, it would be very difficult, not to say impossible, to differentiate the hedging activity using the accounting definition.

(62) What is your opinion about extending the disclosure of harmonized position information by type of regulated entity to all OTC commodity derivatives? Please explain the reasons for your views.

Extending the disclosure of harmonised position information by type of regulated entity to all OTC commodity derivatives will be a complex and costly process to put in place, creating serious entry barriers, entrenching dominant players into their existing positions.

(63) What is your opinion about requiring organised commodity derivative trading venues to design contracts in a way that ensures convergence between futures and spot prices? What is your opinion about other possible requirements for such venues, including introducing limits to how much prices can vary in given timeframe? Please explain the reasons for your views.

MiFID exemptions for commodity firms

(64) What is your opinion on the three suggested modifications to the exemptions? Please explain the reasons for your views.

We certainly favour to close regulatory arbitrage between fully regulated entities and less regulated entities that offer similar products.

Definition of other derivative financial instrument

(65) What is your opinion about removing the criterion of whether the contract is cleared by a CCP or subject to margining from the definition of other derivative financial instrument in the framework directive and implementing regulation? Please explain the reasons for your views.

Emission allowances

(66) What is your opinion on whether to classify emission allowances as financial instruments? Please explain the reasons for your views.

TRANSACTION REPORTING

Scope

(67) What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

Broadening the scope of financial instruments which are subject to transaction reporting will cause difficulties and further costs. From our perspective the main issue in the Commission proposal is related to IT impacts of the contemplated extension of the transaction reporting perimeter (i.e. an impact of the volume of declared transactions on the IT systems' performance).

In addition, a list of instruments admitted to trading on a regulated market, a MTF or an organised trading facility should be provided by the Commission to investment firms since those are not in a position to set up such a list. This would also ensure consistency in reported transactions to the competent authorities.

(68) What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments the value of which correlates with the value of financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

We disagree with this proposal. The verb "correlate" is not specific enough to allow for a proper identification of reportable products. This vagueness will not only generate uncertainty on firms which shall comply with MIFID transaction reporting requirements and with the MAD, but it will also give rise to heterogeneous interpretations by Member States hampering a full harmonization of the content of transaction reports throughout Europe.

Furthermore, the other problem we see is related to the type of financial instruments that would be covered by the extension of the reporting requirement. The lack of standardization of complex/structured products will make their reporting more difficult. The type of data/information to be reported would have to be precisely defined by the Commission in order to allow for a consistency between reporting requirements of all competent authorities within the EU.

Also a possible extension of transaction reporting requirements to all derivatives being so far traded OTC will have major impacts on the transaction reporting regime. The quality of transaction data and – in the end – the extent of regulatory supervision being actually possible depend on two factors: 1) There are information on whether the instruments is actually subject to transaction reporting obligations; 2) A clear identification of the instruments is possible.

We welcome the acknowledgement of the Commission that double reporting of trades under MiFID and the recently proposed reporting requirements for OTC derivatives to trade repositories should be avoided. We would like to emphasize that a possible time lag between the implementation of the respective rules in EMIR and MiFID should not lead to drawbacks for entities subject to the revised transaction reporting regime. It would be important that the revised MiFID transaction reporting obligations are not in place before the EMIR trade repository regime is implemented. Would institutions subject to the MiFID transaction reporting regime have to implement it already beforehand, they would – de

facto – not have the possibility to choose. This would lead to considerable economic burdens without any added value for competent authorities. It should therefore be clearly stated that the transaction reporting obligations for OTC derivatives will have to be followed after the establishment of the trade repositories only.

(69) What is your opinion on the extension of the transaction reporting regime to transactions in depositary receipts that are related to financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

We do not object the extension of the transaction reporting regime to transaction in depositary receipts that are related to financial instruments. Also here it is of crucial importance that the instruments can be recognized as being subject to reporting obligations. They should therefore be included in the list of instruments that are subject to the transaction reporting regime.

(70) What is your opinion on the extension of the transaction reporting regime to transactions in all commodity derivatives? Please explain the reasons for your views.

Also the extension of the transaction reporting regime to transactions in all commodity derivatives leads to a considerable enlargement instruments subject to the reporting requirements. They should be marked with well established IDs like the ISIN or the AII. Those ensure the necessary level of flexibility. Also commodity derivatives need to be included in the list of instruments subject to the MiFID transaction reporting regime.

(71) Do you consider that the extension of transaction reporting to all correlated instruments and to all commodity derivatives captures all relevant OTC trading? Please explain the reasons for your views.

Please see our answer to question 70.

(72) What is your opinion of an obligation for regulated markets, MTFs and other alternative trading venues to report the transactions of nonauthorised members or participants under MiFID? Please explain the reasons for your views.

We agree with this proposal as it will allow resolving one of the discrepancy issues between the scope of Market Abuse provisions and the scope of MIFID.

(73) What is your opinion on the introduction of an obligation to store order data? Please explain the reasons for your views.

We are against the introduction of an obligation to store order data. The storage of order data should be kept separately from the transaction reporting which comprises only actually executed transactions. Order data storage – on the contrary – includes all orders, also not executed ones. Already today there is a general storage obligation in place (Art. 7 in Commission Regulation (EC) No 1287/2006). This obligation should remain unchanged. Investment firms should not be obliged to provide those data automatically to competent authority. The data have to be provided to the authorities upon request. In addition investment firms have to indicate any presumed cases of market abuse. This system has proven itself and should not be changed.

(74) What is your opinion on requiring greater harmonisation of the storage of order data? Please explain the reasons for your views.

There is no need for further harmonization. The respective rules are already harmonized (Art. 51 in Commission Directive 2006/73/EC).

Content of reporting

(75) What is your opinion on the suggested specification of what constitutes a transaction for reporting purposes? Please explain the reasons for your views.

The proposed definition is not clear enough. It does not clarify the notion of where a transaction is executed which is important to identify the regulator an entity has to report to (host or home regulator?). This specific points needs to be clarified as it gives rise to different interpretations throughout Europe. Investment firms may be obliged to duplicate their reporting efforts. The suggested definition of what constitutes a transaction for reporting purposes does not specify sufficiently what exactly a report has to contain. This needs to be avoided. It is of crucial importance that a report on a transaction includes all relevant aspects of a contract, especially the price. It has to be ensured that only actually executed transactions are subject to reporting obligations.

In general we consider it as essential to start an in-depth review and a comparison between the existing transaction modalities in Europe. The results could be used as a basis for the elaboration of an appropriate definition of what constitutes a transaction.

(76) How do you consider that the use of client identifiers may best be further harmonised? Please explain the reasons for your views.

We would like to point out that supervisors already have the power to require the transmission of data from all subjects (agents and/or customers) involved in a transaction or a chain of transactions. A mandatory obligation to report client identifier automatically to the competent authority would lead to significant costs and is by no means in a reasonable proportion to the actual benefit for the supervisors. In addition we would like to emphasise that there are still a lot of questions not solved with respect to the intended transmission of a client ID (e.g. security issues; receiver is not responsible for the correctness of this data; unclear procedure in case a client ID is not transmitted). All these issues must be solved in an appropriate manner before further harmonising the use of client IDs.

(77) What is your opinion on the introduction of an obligation to transmit required details of orders when not subject to a reporting obligation? Please explain the reasons for your views.

Please see our answer to question 73.

(78) What is your opinion on the introduction of a separate trader ID? Please explain the reasons for your views.

We disagree with this proposal for the following reasons:

- Legal considerations concerning data protection relative to physical persons (i.e. data privacy laws) should be carefully considered among the different Member States;

- Secondly, identifying properly the trader of a particular transaction may not be so easy due to operational reasons: in some cases, a trading strategy may be elaborated by a trading team and the related orders might only be executed by one trader. Providing the trader ID to the regulators in the transaction reporting might be therefore misleading.

The identity of traders should not be automatically reported and should only be granted at the request of the regulators if justified by an assumption over market abuses.

(79) What is your opinion on introducing implementing acts on a common European transaction reporting format and content? Please explain the reasons for your views.

With respect to the Commission proposal concerning the introduction of implementing acts on a common European transaction reporting format and content we would like to highlight several issues that are linked to such a implementation. In the light of the very diverse spectrum of transactions and products across the European territories it is of paramount importance that the transaction and product specificities are duly taken into account. There is the question whether it is really possible to find a common content for all these different transactions and products without leading to a less quality of supervision of and fight against insider dealing and market abuse. We also see the risk that the number of inquiries of the supervisory authority towards the investment firms will increase significantly.

The same applies for special circumstances linked to the provision of those transactions and products to clients and the respective reporting obligations to national competent authorities. Our member institutions are very often small and medium sized banks that are active only or mainly in their specific domestic regional market. Obliging such institutions to report to ESMA instead of their national authority would not be appropriate. It should continue to be possible to report nationally because the national authorities have enough resources and competences to scrutinize the respective reports. From our point of view it will not be possible for ESMA to properly manage the huge amounts of incoming data such an introduction would lead to and especially to take adequately into account the still existing differences in the business in the 27 Member States.

Reporting channels

(80) What is your opinion on the possibility of transaction reporting directly to a reporting mechanism at EU level? Please explain the reasons for your views.

Please see our answer to question 79.

(81) What is your opinion on clarifying that third parties reporting on behalf of investment firms need to be approved by the supervisor as an Approved Reporting Mechanism? Please explain the reasons for your views.

We agree with this proposal as it will bring consistency in the regulatory requirements and sanctions framework between regulated firms subject to the transaction reporting requirements and non regulated third parties which are reporting on behalf of investment firms but which are not subject to MIFID and to the same sanctions.

(82) What is your opinion on waiving the MiFID reporting obligation on an investment firm which has already reported an OTC contract to a trade repository or competent authority under EMIR? Please explain the reasons for your views.

Please see our answer to question 68.

(83) What is your opinion on requiring trade repositories under EMIR to be approved as an ARM under MiFID? Please explain the reasons for your views.

Please see our answer to question 81.

INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES

Scope of the Directive

Optional exemptions for some investment service providers

(84) What is your opinion about limiting the optional exemptions under Article 3 of MiFID? What is your opinion about obliging Member States to apply to the exempted entities requirements analogous to the MiFID conduct of business rules for the provision of investment advice and fit and proper criteria? Please explain the reasons for your views.

We welcome the development of a level playing field in which no market participant has the advantage of being less regulated than the rest of firms. However, the specificities of decentralized financial groups (such as cooperative banking groups, where both local/regional banks and central institutions are involved in regulatory compliance, depending on the nature of the legal provision), have to be taken into account.

Application of MiFID to structured deposits

(85) What is your opinion on extending MiFID to cover the sale of structured deposits by credit institutions? Do you consider that other categories of products could be covered? Please explain the reasons for your views.

The EACB has always advocated for a special treatment of deposits, as they enjoy a very different status due to (inter alia) the Deposits Guarantee Schemes within the EU and the very low degree of complaints as they are widely known and understood investment vehicles across European jurisdictions. Structured Deposits (at least those with a clear capital guarantee) may have an internal complexity, but their risk / reward profiles from the point of view of the investor are normally easy to understand as they offer some exposure to underlying investments which are easy to understand and whose performance is widely accessible (i.e. such as equity indexes) but with an explicit capital guarantee. Extending heavy informational requirements and even the suitability and appropriateness regimes to these products will not result in better client protection and could even endanger the development of deposits which form the backbone of the funding of retail-focused, low-risk, low-leveraged financial European institutions such as cooperative banking groups.

Direct sales by investment firms and credit institutions

(86) What is your opinion about applying MiFID rules to credit institutions and investment firms when, in the issuance phase, they sell financial instruments they issue, even when advice is not provided? What is your opinion on whether, to this end, the definition of the service of execution of orders would include direct sales of financial instruments by banks and investment firms? Please explain the reasons for your views.

From our point of view it is not possible to fundamentally distinguish from a consumer protection perspective if a sale takes place in the issuance phase or not.

Conduct of business obligations

"Execution only" services

(87) What is your opinion of the suggested modifications of certain categories of instruments (notably shares, money market instruments, bonds and securitised debt), in the context of so-called "execution only" services? Please explain the reasons for your views.

We see no need for any change in this respect. The current system of "execution only" services including the definition of "non-complex financial instruments" has proven itself. Furthermore, the envisaged modifications do not clarify the rules and can even become confusing. In particular, we do not favour any vague reference to concepts such as "*incorporate structures which make it difficult for the client to understand the risk involved*". Introducing such unclear defined criteria for non-complex products may mean that banks either may apply the appropriateness test for all products as distinctions between non-complex and complex products will be hard to make by banks (and their related IT-systems which facilitate the provision of execution only services in particular).

(88) What is your opinion about the exclusion of the provision of "execution-only" services when the ancillary service of granting credits or loans to the client (Annex I, section B (2) of MiFID) is also provided? Please explain the reasons for your views.

We believe that no such exclusion should be added, as the existence of a financing to the client does not change the nature of the investment, and in any case this leverage and its effects and risks are something which a client should freely decide based on his/her financial position and means. Moreover, investments firms are first interested in the timely and full recovering of such credit risks and hence not allowing for irresponsible risk-taking. Furthermore, the definition on whether the investment has been financed or helped to finance by some credit facility (which in fact could have been granted for different purposes) can be conflictive.

(89) Do you consider that all or some UCITS could be excluded from the list of non-complex financial instruments? In the case of a partial exclusion of certain UCITS, what criteria could be adopted to identify more complex UCITS within the overall population of UCITS? Please explain the reasons for your views.

We oppose the exclusion of UCITS from the list of non-complex financial instruments, as it is very difficult to find criteria that can justify such exclusion and due to the very nature of the vehicle (which tend to be very diversified pools of very different assets) this partial exclusion risks spreading to the whole asset-class, hindering its development to the detriment of European investors.

(90) Do you consider that, in the light of the intrinsic complexity of investment services, the "execution-only" regime should be abolished? Please explain the reasons for your views.

Absolutely not. Such an abolishment would be a disaster for the European market, for investors and for investment firms and would furthermore infringe the principle of proportionality, because:

- Investors should always be free to decide by their own, take their investments decisions and benefit from the developments and opportunities offered by markets, investment platforms and channels. Abolishing the "execution-only" regime attacks the elemental freedom and independence of citizens and firms. What is meant by 'retail clients should always expect a higher standard of service from intermediaries´? Why prejudge that clients are not capable of investing directly when the nature and risks of these instruments are widely known and understood?
- Investment firms would need to deny some clients their investments or delay or hinder them on the grounds of the need to comply with regulatory requisites that clients themselves do not need neither want to go through and this risks imposing new costs and even damages to clients. Some forms of investment, which have developed to benefit of customers thanks to technological improvements (i.e. internet on-line trading) would be heavily impacted.
- It is obvious that some products offer a high degree of transparency, client awareness and wide and easy access (such as shares). This fact has been acknowledged by MiFID when defining "non-complex" products that obviously can be traded on an "execution-only" basis. Abolishing the "execution-only" regime risks in fact concluding that every investment product is "complex" and that clients need to be always 'guided' and 'protected' beyond any reasonable need or fact.

Investment advice

(91) What is your opinion of the suggestion that intermediaries providing investment advice should: 1) inform the client, prior to the provision of the service, about the basis on which advice is provided; 2) in the case of advice based on a fair analysis of the market, consider a sufficiently large number of financial instruments from different providers? Please explain the reasons for your views.

In general from our perspective amending the MiFID rules related to the provision of investment advice does not seem appropriate. We see several crucial problems with the suggestions made by the Commission services in this respect. A limitation of products offered to a client does not mean that such an investment advice would be "unfair". It should continue to be up to the investment firm to decide which products should be part of its portfolio when advising prospective clients. The criteria that will determine the "sufficiently large number of financial instruments" as well as the number and choice of producers and products that will qualify for an "independent" advice remain completely unclear. We fear that also small and medium sized institutions would be obliged to screen the whole product market - which would lead to a considerable increase of costs – in order to be able to offer a "sufficient large number" of financial products. This is not acceptable. A large amount of products offered does not automatically increase the quality of advice.

(92) What is your opinion about obliging intermediaries to provide advice to specify in writing to the client the underlying reasons for the advice provided, including the explanation on how the advice meets the client's profile? Please explain the reasons for your views.

We reject the introduction of an obligation for intermediaries that provide advice to specify in writing to the client the underlying reasons for the advice provided. This would unnecessarily tighten the consultation process, lead to minute like recordings of conversations with client and therewith create a lot more documentation of which the

added value is not certain. The documentation processes specified in the current MiFID regime are sufficient to provide for a high level of consumer protection and should not be amended. In case of misleading advice there are sufficient civil law rules in place in each European jurisdiction which ensure that intermediaries can be sued at a civil court in case of problems. We consider the current set of rules in this respect as appropriate.

(93) What is your opinion about obliging intermediaries to inform the clients about any relevant modifications in the situation of the financial instruments pertaining to them? Please explain the reasons for your views.

We strongly disagree with this proposal. Especially small and medium sized intermediaries would have to shoulder disproportionate fixed costs and would therefore be very burdensome. It is not justified because it would dismantle the barriers between the portfolio management and investment advice in which the client is responsible to scrutinize – for instance – further market trends. Changes in this respect would not be in the interest of a client and will certainly lead to an overflow of all kinds of information related to a specific financial instrument. The relevancy of those documents may be very difficult to assess by a client upon receipt and may trigger all types of requests for further advice. It remains unclear what "relevant modifications" actually means. The use of unclear legal terms should be avoided.

We wonder how these information requirements should be seen in relation to the consultation document of the European Commission regarding a Securities Law Directive (SLD) in which also requirements regarding the passing of information which the issuers make available through an information channel accessible to intermediaries with respect to securities are proposed. We agree with the Commission's view regarding the SLD as far as she doesn't stipulate an original obligation for investment firms to inform their clients but only an obligation to pass information they get from the issuers. In any case, a duplication of obligations should be avoided.

(94) What is your opinion about introducing an obligation for intermediaries providing advice to keep the situation of clients and financial instruments under review in order to confirm the continued suitability of the investments? Do you consider this obligation be limited to longer term investments? Do you consider this could be applied to all situations where advice has been provided or could the intermediary maintain the possibility not to offer this additional service? Please explain the reasons for your views.

We strongly disagree with the Commission proposal to keep permanently under review the situation of clients and financial instruments. This "longer term assistance" would lead to heavy burdens for investment firms and also for the clients themselves. This obligation would not be practicable. We must take into account that such a new investment service would need the will of the client to conduct such assessment with a particular investment firm. Investment firm cannot and should not be required to actually conduct such periodically new assessments as this is something that does not depend only on the will or decisions of the intermediary.

Informing clients on complex products

(95) What is your opinion about obliging intermediaries to provide clients, prior to the transaction, with a risk/gain and valuation profile of the instrument in different market conditions? Please explain the reasons for your views.

This is already under scrutiny in the PRIPS consultation and should be restricted to PRIPS products only. Please see our response to the PRIPS consultation.

(96) What is your opinion about obliging intermediaries also to provide clients with independent quarterly valuations of such complex products? In that case, what criteria should be adopted to ensure the independence and the integrity of the valuations?

We are opposed to the introduction of an additional periodic reporting because of the heavy additional burdens especially for small and medium sized institutions which are in no reasonable proportion to the actual benefits of the suggested amendments.

Especially in case of buy and hold products for which no real market exists, these kind of quarterly valuations have very limited value. For special instruments (like certain options) the valuation methods are not developed enough to be accepted by all market participants.

(97) What is your opinion about obliging intermediaries also to provide clients with quarterly reporting on the evolution of the underlying assets of structured finance products? Please explain the reasons for your views.

Financial intermediaries should not be obliged to provide clients with reporting on the evolution of the underlying assets of structured finance products because the evolution of such assets do not necessarily translate into an easy and direct assessment of the evolution of the structured finance products as this normally requires the analysis of the conditions under which the product was structured and hence sold to the client.

(98) What is your opinion about introducing an obligation to inform clients about any material modification in the situation of the financial instruments held by firms on their behalf? Please explain the reasons for your views

As outlined in our answers above we are against introducing an obligation to inform clients about material modifications in the situation of the financial instruments held by firm on their behalf.

(99) What is your opinion about applying the information and reporting requirements concerning complex products and material modifications in the situation of financial instruments also to the relationship with eligible counterparties? Please explain the reasons for your views.

Eligible counterparties are by definition informed financial market participants who gather their information from very different sources and who very often undertake own analyses. A special information requirement towards eligible counterparties seems to be a pure formalism.

(100) What is your opinion of, in the case of products adopting ethical or socially oriented investment criteria, obliging investment firms to inform clients thereof?

There is no need for further obligations for investment firms and issuers in this respect. Issuers can on a voluntary basis decide to answer questions concerning the adoption of ethical or socially oriented investments.

Inducements

(101) What is your opinion of the removal of the possibility to provide a summary disclosure concerning inducements? Please explain the reasons for your views.

We consider the removal of the possibility to provide a summary disclosure concerning inducements as problematic. So far the summary disclosure – combined with the possibility to receive further information upon request – worked very well in practice. Only a few clients actually requested further detailed information which was also evidenced in a recent study conducted by the Committee of European Securities Regulators (CESR).1 An information-overkill for the clients should be avoided. The summary disclosure enables the client to get a quick overview regarding possible conflicts of interests and to properly compare between different providers. The possibility to provide summary disclosure concerning inducements should continue to be open for investment firms.

(102) Do you consider that additional ex-post disclosure of inducements could be required when ex-ante disclosure has been limited to information methods of calculating inducements? Please explain the reasons for your views.

From our practical experience clients in general do not make use of the possibility of ex-post disclosures concerning inducements. The respective information is relevant for the client before she/he makes an investment decision. With the current disclosure regime it is ensured that the client receives all relevant information concerning inducements beforehand. Ex-post information in this respect has no added value for the client. The implementation of such a regime would lead to significant additional burdens for involved investment firms which are by no means justified from a cost-benefit-perspective.

(103) What is your opinion about banning inducements in the case of portfolio management and in the case of advice provided on an independent basis due to the specific nature of these services? Alternatively, what is your opinion about banning them in the case of all investment services? Please explain the reasons for your views.

We are against a banning of inducements in the case of portfolio management and in the case of advice provided on an independent basis. The same applies to a banning of inducements in general. The current regime prohibits conflicts of interests that may damage the interests of the client (Art. 18, 3, b of MiFID level 1) and inducements that might impair compliance with an investment firm's duty to act in the best interests of the client (Art. 26, b, ii of MiFID level 2). Those rules apply always to all investment advices on a dependent or independent basis. There is no qualitative difference. The disclosure of all inducements prior to an investment decision is sufficient to avoid possible conflicts of

[1] Committee of European Securities Regulators (CESR), 2010, *Inducements: Report on good and poor practices*, p. 37, http://www.esma.europa.eu/popup2.php?id=6561

interests. A complete ban of inducements would completely change the remuneration structures for investment services throughout Europe. It would also require a complete reversal of consumer behaviour. Most clients are not willing to pay an explicit remuneration.

Provision of services to non-retail clients and classification of clients

(104) What is your opinion about retaining the current client classification regime in its general approach involving three categories of clients (eligible counterparties, professional and retail clients)? Please explain the reasons for your views.

We very much welcome the acknowledgment of the Commission that the rules on client classification currently in place provide an adequate and satisfactory degree of flexibility and could thus remain unchanged. We fully share this assessment. The current regime has proven to work well in the recent rules. It ensures an appropriate level of investor protection and flexibility for clients and investment firms regarding their different types of clients, different services and different financial instruments. The implementation of this regime was a very costly burden for co-operative banks in Europe. Since we have no information about any drawbacks in this respect, we are of the opinion that major changes should be avoided.

(105) What are your suggestions for modification in the following areas:

a) Introduce, for eligible counterparties, the high level principle to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading when informing the client;

We do not see any reason for further specifying the duties of eligible counterparties with respect of having to act honestly, fairly and professionally. These principles are already today binding obligations for eligible counterparties.

b) Introduce some limitations in the eligible counterparty's regime. Limitations may refer to entities covered (such as non-financial undertakings and/or certain financial institutions) or financial instruments traded (such as asset backed securities and nonstandard OTC derivatives); and/or

The standards for eligible counterparties should not be changed. The current statutory requirements are already today very strict. We therefore disagree with the proposed introduction of limitations in the eligible counterparty's regime.

The exclusion of transactions in "complex products" has to be firmly rejected. As far as the terminology is concerned, the expression used is completely unclear and leaves too much room for interpretation. This should be avoided as it would lead to uncertainty and differences when categorizing clients. The current system should not be weakened by using unclear legal terms. A practical consequence of such a limitation would be that an eligible counterparty status could not even be granted to banks that work on a daily basis with highly complex products or that issue such products themselves.

c) Clarify the list of eligible counterparties and professional clients per se in order to exclude local public authorities/municipalities? Please explain the reasons for your views.

We would welcome a Europe-wide clarification of the categorization of local public authorities and municipalities. There are major differences in this respect between each single Member State. Public authorities or municipalities should not be excluded from being able to be classified as an eligible counterparty or a professional client. It has to be acknowledged that many local public authorities participate to the economic life like companies and act accordingly in the financial markets. Especially big local public authorities will not accept to be treated as retail clients that might only reach "professional client"-status in case of an upgrade. Should the Commission consider to classify all local public authority – independent from their size – as retail clients, the criteria for an upgrading to a professional client need to be revised. The current rules are not applicable to local public authorities.

(106) Do you consider that the current presumption covering the professional clients' knowledge and experience, for the purpose of the appropriateness and suitability test, could be retained? Please explain the reasons for your views.

As outlined in our reply to question 104 we are of the opinion that the current presumption covering the professional clients' knowledge and experience should be retained since it took considerable amounts of time, money and resources to implement the respective rules in the last couple of years.

Liability of firms providing services

(107) What is your opinion on introducing a principle of civil liability applicable to investment firms? Please explain the reasons for your views.

Investment firms are already subject to civil liability. But we think that the MiFID as a supervisory law is not the right place to harmonize civil law. We especially object to an isolated harmonisation of civil liability. Also the material law and law of procedure (e.g. who has the burden of proof) would have to be taken into account in this context.

Moreover, civil liability does not arise from the mere infringing of any particular legislation (be it MiFID or any other). As a matter of fact, civil liability needs three elements to arise:

1. The existence of a legal or contractual infringement by one of the parties
2. The existence of a damage for another party
3. The existence of a cause-effect relationship between elements 1) and 2)

The assessment of these three elements, as well as the quantification of the compensations, depends obviously on national civil law and specifically on the jurisdictional decision of the courts.

We do not see the need, or even the feasibility or practical consequences of such a proposal which cannot change civil law nor challenge the principle of jurisdictional independence, where only the tribunals are responsible for deciding such liabilities, obviously taking into account all applicable legislation and the particular circumstances of every case. As a matter of fact, every case is totally different, as the same legal infringement can have different consequences under different circumstances, or with different clients, and/or the quantification of damages can be also completely different.

Finally it is a question of whether European institutions have a competence with respect to the harmonisation of civil law.

(108) What is your opinion of the following list of areas to be covered: information and reporting to clients, suitability and appropriateness test, best execution, client order handling? Please explain the reasons for your views.

Please see our answer to question 107.

Execution quality and best execution

(109) What is your opinion about requesting execution venues to publish data on execution quality concerning financial instruments they trade? What kind of information would be useful for firms executing client orders in order to facilitate compliance with best execution obligations? Please explain the reasons for your views.

We do not agree with the Commission proposal to introduce an obligation in the framework directive on trading venues to produce data on the execution quality. The existing information and measuring instruments are appropriate.

In any case it is important to note that price quality is not the only crucial factor for developing the best execution policy. The introduction of standard execution quality data which are solely based on price quality aspects might, in the medium and long term, lead to a situation where the use of such data comes to be standard market practice, putting those investment firms which, in a perfectly legitimate manner, take guidance from other factors, such as execution speed and execution likelihood, under pressure to justify themselves.

(110) What is your opinion of the requirements concerning the content of execution policies and usability of information given to clients should be strengthened? Please explain the reasons for your views.

We are against the proposed strengthening of the information requirements concerning the content of the execution policies. The execution policies, the respective rules and procedures are generally very complex and are not a priority for retail clients since they have only little interest in looking into the details of the respective policies. Such detailed information should only be provided to the client in case he requests it.

Dealing on own account and execution of client orders

(111) What is your opinion on modifying the exemption regime in order to clarify that firms dealing on own account with clients are fully subject to MiFID requirements? Please explain the reasons for your views.

In this respect we call for a clear distinction between proprietary trading as a service to clients and pure proprietary trading. In case of the dealing on own account being a complete substitute for the execution of an order this should be treated as an investment service and therefore be subject to MiFID. Where the average client would not expect a service but regards the firm as counterparty, the deal would not amount into a service and should therefore not be subject to MiFID.

(112) What is your opinion on treating matched principal trades both as execution of client orders and as dealing on own account? Do you agree that this should not affect the treatment of such trading under the Capital Adequacy Directive? How should such trading be treated for the purposes of the systematic internaliser regime? Please explain the reasons for your views.

The risk of such trading is comparable to the settlement risk in normal trading. There is no influence concerning the execution of client orders in case of SIs. If the SI is the counterparty, then it should be considered as being dealing on own account. We consider it as not appropriate to treat the back-to-back orders as dealing on own account. This would be in conflict with the provision of the Capital Adequacy Directive.

Authorisation and organisational requirements

Fit and proper criteria

(113) What is your opinion on possible MiFID modifications leading to the further strengthening of the fit and proper criteria, the role of directors and the role of supervisors? Please explain the reasons for your view.

We would like to emphasize that this topic is predominantly a topic for banking supervision. It is therefore of crucial importance to scrutinize whether there are already banking supervision rules in this respect on a European level. Should there still be legal gaps with respect of the obligated institutes that might be closed by a revision of the MiFID, it is of crucial importance to ensure a sound consistency between the respective regimes for banking supervision and securities supervision.

Compliance, risk management and internal audit functions

(114) What is your opinion on possible MiFID modifications leading to the reinforcing of the requirements attached to the compliance, the risk management and the internal audit function? Please explain the reasons for your view.

We welcome any strengthening of the compliance function including procedures for removal, direct reporting lines to the board of directors as well as organisational set-ups on the highest hierarchical level. Nevertheless, the dismissal of the compliance-, risk management- and internal audit-officer should not have to be approved by the board of directors. This should be the task of the management board only, because it is this entity that has the sole responsibility for the management of the business. It should be clarified that the board of directors has to be informed, but not be involved in the decision making process in this respect.

The client complaints management should be not handled by the compliance function, because every single investment firm has already found and implemented a structure enabling them to appropriately handle the complaint management. The compliance department should, however, have access to the complaint reports.

Organisational requirements for the launch of products, operations and services

(115) Do you consider that organisational requirements in the implementing directive could be further detailed in order to specifically cover and address the launch of new products, operations and services? Please explain the reasons for your views.

We consider the inclusion of a compliance function in procedures in case of new products as appropriate. But an obligation to include the compliance function with respect of any single product would be too far-reaching.

(116) Do you consider that this would imply modifying the general organisational requirements, the duties of the compliance function, the management of risks, the role of governing body members, the reporting to senior management and possibly to supervisors?

The MiFID introduction has required massive adaptations to organisation and processes and there seem to be no justifications for a further change of settings. The current organisational requirements are detailed enough.

Specific organisational requirements for the provision of the service of portfolio management

(117) Do you consider that specific organisational requirements could address the provision of the service of portfolio management? Please explain the reasons for your views.

There should not be more specific organisational requirements with respect to the provision of the service of portfolio management. The current requirements are sufficient for ensuring a high level degree of investor protection.

Conflicts of interest and sales process

(118) Do you consider that implementing measures are required for a more uniform application of the principles on conflicts of interest?

No, those would not be required. It should be up to ESMA to provide for a more uniform application of such principles.

Segregation of client assets

(119) What is your opinion of the prohibition of title transfer collateral arrangements involving retail clients' assets? Please explain the reasons for your views.

We are concerned about the thinking of the Commission that the concentration of client money in group entities may face the risk of contagion in case of an intra-group insolvency. This is not the case since the segregation of client assets is a fundamental principle.

(120) What is your opinion about Member States be granted the option to extend the prohibition above to the relationship between investment firms and their non retail clients? Please explain the reasons for your views.

Please see our reply to question 122.

(121) Do you consider that specific requirements could be introduced to protect retail clients in the case of securities financing transaction involving their financial instruments? Please explain the reasons for your views.

Please see our reply to question 122.

(122) Do you consider that information requirements concerning the use of client financial instruments could be extended to any category of clients?

We do not agree with a general prohibition to use a client's asset. We agree that the client must be informed in due time and give his consent in case her/his assets are used – for instance – as collateral.

(123) What is your opinion about the need to specify due diligence obligations in the choice of entities for the deposit of client funds?

In order to avoid national civil liabilities, investment firms apply very strict procedures with respect to the mentioned due-diligence-processes. Also sectoral rules like – for instance – the AIFM directive, deal with this topic. We therefore do not see the need for further specification of the due diligence obligations.

Underwriting and placing

(124) Do you consider that some aspects of the provision of underwriting and placing could be specified in the implementing legislation? Do you consider that the areas mentioned above (conflicts of interest, general organisational requirements, requirements concerning the allotment process) are the appropriate ones? Please explain the reasons for your views.

We are not against a further specification of the respective obligations. We would, however, appreciate if the very manifold spectrum of business models and placing channels in the different member states would be taken into account when specifying the respective MiFID-obligations. Well working models should not be jeopardized.

FURTHER CONVERGENCE OF THE REGULATORY FRAMEWORK AND OF SUPERVISORY PRACTICES

Options and discretions

Tied agents

(125) What is your opinion of Member States retaining the option not to allow the use of tied agents?

(126) What is your opinion in relation to the prohibition for tied agents to handle clients' assets?

(127) What is your opinion of the suggested clarifications and improvements of the requirements concerning the provision of services in other Member States through tied agents?

We welcome the suggested clarifications and improvements.

(128) Do you consider that the tied agents regime require any major regulatory modifications? Please explain the reasons for your views.

According to the MiFID level 1 directive (2004/39/EC, Article 4 (1) 25) a tied agent may have only one investment firm on whose behalf it acts. The robust interpretation seems to be currently that this article means "only one investment firm or credit institution". It would be very important to reach the state of play where a tied agent may have several investment firms and/or credit institutions within the same group on whose behalf it acts (group level consideration). This would not weaken investor protection. Referring to article 3 of Directive 2006/48/EC the group should be understood as a central body and its affiliated institutions as a whole.

Telephone and electronic recording

(129) Do you consider that a common regulatory framework for telephone and electronic recording, which should comply with EU data protection legal provisions, could be introduced at EU level? Please explain the reasons for your views.

The EACB would like to highlight that there should be a clear distinction between recordings of telephone conversations between professional traders and between retail clients and their branches. While we have no objections against recording obligations for telephone conversations between trade desk staff we are strictly against mandatory provisions on the recording of telephone conversations with retail clients at a European level.

Article 51 (4) of the MiFID level 2 directive (2006/73/EC) – that provides the Member States with a discretion to set their own national rules on the matter of recording telephone conversations and electronic communications involving client orders – should remain unchanged. Keeping in mind the special circumstances in each Member State, in particular the market structure, the decision on an introduction of mandatory obligations of telephone recordings should be left to each single Member State.

European co-operative banks are mainly small and medium sized and characterized by a decentralized structure. Especially for such type of banks a mandatory obligation at European level to record telephone conversations with clients would be a very costly burden. The purchase of recording facilities and the respective maintenance would imply very high costs for them. Imposing mandatory provisions at European level could lead to the effect that especially smaller and medium sized and/or decentralized banks will not be able to offer investment services or at least investment services via telephone anymore. This would lead to a significant reduction in the landscape of investment service providers, a development clearly against the interest of the end investor who would have less choice in the institutions he wants to entrust with his investments. Also it would create an unlevel playing field at the financial market at the expense of smaller and medium sized and/or decentralized banks and their retail clients. Not least for this reasons some Member States have explicitly refrained from providing a mandatory obligation to record telephone conversations with clients.

Furthermore we would like to point out that we are not aware of drawbacks relating to telephone conversations between investment firms and clients that would justify a mandatory provision at European level. We find the proposed measures not in proportion to the expected benefits which are still unclear.

In addition we would like to highlight, that clients in many European markets are extremely sceptical towards telephone recording. From our experience such an obligation would not be well received by the majority of clients. Also because it would be raising serious questions in relation to data protection EACB is opposing a mandatory obligation at European level.

(130) If it is introduced do you consider that it could cover at least the services of reception and transmission of orders, execution of orders and dealing on own account? Please explain the reasons for your views.

As already outlined in our answer to question 129, we call for a clear distinction between telephone conversation of professional traders and telephone conversations of retail clients and their branches. We have no objections of recordings between professionals with respect to services of reception, transmission or execution of orders and the dealing on own accounts. We firmly object recordings in the sphere of retail banking.

(131) Do you consider that the obligation could apply to all forms of telephone conversation and electronic communications? Please explain the reasons for your views.

Please see our reply to question 130.

(132) Do you consider that the relevant records could be kept at least for 3 years? Please explain the reasons for your views.

In this context we first of all would like to stress once again, that there is no need for a telephone and an electronic recording with respect of retail clients.

First of all, cases of miscommunication are extremely infrequent in relation to retail clients. Should this, nevertheless, happen, the investment firms have to demonstrate that the order was executed in the manner requested by the client. So the retail client is already protected sufficient in a case of miscommunication.

With respect of the investigation into market abuse, the competent authorities already get automatically records of each transaction. Furthermore the investment firms have to record the details of the order. Also with respect of the investigation into market abuse, the competent authorities already get sufficient information. Finally it should be taken into account that significant instances of market abuse could be arise via professional traders but not among orders placed via retail clients.

For further remarks, please see also our reply to question 130. In any case the amount of recorded material in this respect is huge. Therefore a retention period of three years is very burdensome. Disputes concerning miscommunication and investigation into market abuse usually begin after a much shorter time lag. We therefore suggest adjusting the retention period accordingly and consider a retention period of 12 months as sufficient.

Additional requirements on investment firms in exceptional cases

(133) What is your opinion on the abolition of Article 4 of the MiFID implementing directive and the introduction of an on-going obligation for Member States to communicate to the Commission any addition or modification in national provisions in the field covered by MiFID? Please explain the reasons for your views.

Article 4 of the MiFID Implementing Directive is aimed to safeguard that Members States that wish to retain and impose requirements in addition to MiFID can only do so in exceptional cases and in compliance with the conditions set forth therein. It should not be abolished. It is aimed to avoid any discretionary “gold plating” by Member States and it ensures an effective operation of the European Passport. From our perspective the practical implementation of the MiFID in this respect was not satisfactory. Many differences between single member states remained or even were stipulated after the MiFID came into force without paying attention to the requirements of Art. 4. Member States should therefore be obliged to report any addition or modification in national provision concerning investment firms to the Commission. The Commission needs to ensure that all Member States are compliant with these rules Art. 4 and non-compliance with these rules would lead to effective sanctions to ensure the intended level playing field within the EU.

Supervisory powers and sanctions

(134) Do you consider that appropriate administrative measures should have at least the effect of putting an end to a breach of the provisions of the national measures implementing MiFID and/or eliminating its effect? How the deterrent effect of administrative fines and periodic penalty payments can be enhanced? Please explain the reasons for your views.

(135) What is your opinion on the deterrent effects of effective, proportionate and dissuasive criminal sanctions for the most serious infringements? Please explain the reasons for your views.

(136) What are the benefits of the possible introduction of whistleblowing programs? Please explain the reasons for your views.

Already today there is the possibility to give hints to a compliance officer in an institution or to the authorities. We would not introduce a new official hotline, but rather strengthen the internal compliance departments as a first point of contact.

(137) Do you think that the competent authorities should be obliged to disclose to the public every measure or sanction that would be imposed for infringement of the provisions adopted in the implementation of MiFID? Please explain the reasons for your views.

We strongly object to an obligation for the supervision authority to disclose to the public every measure or sanction for infringement of MiFID provisions. Infringements may occur which may not be that material and may be remedied, with or without specific instruction of the competent authority, relatively easily by the party that caused the infringement. In such case, the interest of a disclosure to the public does not outweigh the interest of the respective bank or investment firm. Moreover, increase of publications caused by such an obligation may even be detrimental to the effect of disclosure powers as a tool. The more the public is used to such disclosures, the less effective such tool may be.

Access of third country firms to EU markets

(138) In your opinion, is it necessary to introduce a third country regime in MiFID based on the principle of exemptive relief for equivalent jurisdictions? What is your opinion on the suggested equivalence mechanism?

We would welcome such a third party regime on a European level and prefer it to pure bilateral arrangements between third countries and single member states.

(139) In your opinion, which conditions and parameters in terms of applicable regulation and enforcement in a third country should inform the assessment of equivalence? Please be specific.

The assessment of equivalence should focus on the functional equivalence regarding basic principles – like the protection of the market or the competitiveness – and not be carried out on the basis of a comparison of single measures.

(140) What is your opinion concerning the access to investment firms and market operators only for non-retail business?

It seems to be a reasonable first step.

REINFORCEMENT OF SUPERVISORY POWERS IN KEY AREAS

Ban on specific activities, products or practices

(142) What is your opinion on the possibility to ban products, practices or operations that raise significant investor protection concerns, generate market disorder or create serious systemic risk? Please explain the reasons for your views.

We understand that there might be emergency cases – like the major disturbances of the financial markets – that justify as *ultima ratio* also a ban of products or certain practices. The ban of short selling by national authorities as emergency measure – for instance – was widely accepted in practice. A ban of certain investment services, however, shall only be possible in clearly defined emergency cases as a pure last resort measure. It is not enough to speak just of "concerns" that might justify a ban. In this light the criteria highlighted by the Commission need further enhancements.

(143) For example, could trading in OTC derivatives which competent authorities determine should be cleared on systemic risk grounds, but which no CCP offers to clear, be banned pending a CCP offering clearing in the instrument? Please explain the reasons for your views.

No, because banning trading does not solve the problem of CCPs unwilling to clear the transaction. Of course, supervisory authorities should be the only entities able to ban instruments, but only by a specific and well justified decision. This power should not be delegated, not even indirectly as in the case of the proposal, to a private entity with interests other than upholding the integrity of the markets.

(144) Are there other specific products which could face greater regulatory scrutiny? Please explain the reasons for your views.

We believe financial products in the unregulated part of the financial markets arena should face the same scrutiny especially if aimed at retail clients.

Stronger oversight of positions in derivatives, including commodity derivatives

(145) If regulators are given harmonised and effective powers to intervene during the life of any derivative contract in the MiFID framework directive do you consider that they could be given the powers to adopt hard position limits for some or all types of derivative contracts whether they are traded on exchange or OTC? Please explain the reasons for your views.

We strongly oppose to a possible intervention during the lifetime of a derivative. This would prevent any netting agreements from realising. This would affect the market negatively in a fundamental way.

(146) What is your opinion of using position limits as an efficient tool for some or all types of derivative contracts in view of any or all of the following objectives: (i) to combat market manipulation; (ii) to reduce systemic risk; (iii) to prevent disorderly markets and developments detrimental to investors; (iv) to safeguard the stability and delivery and settlement arrangements of physical commodity markets. Please explain the reasons for your views.

(147) Are there some types of derivatives or market conditions which are more prone to market manipulation and/or disorderly markets? If yes, please justify and provide evidence to support your argument.

(148) How could the above position limits be applied by regulators: (a) To certain categories of market participants (e.g. some or all types of financial participants or investment vehicles)? (b) To some types of activities (e.g. hedging versus non-hedging)? (c) To the aggregate open interest/notional amount of a market?

Contact:

The EACB trusts that its comments will be taken into account. For further information or questions on this paper, please contact:

Ms Marieke VAN BERKEL, Head of Consumer Affairs, Payments and Financial Markets (vanberkel@eurocoopbanks.coop)
Mr Alessandro SCHWARZ, Senior Adviser Financial Markets (a.schwarz@eurocoopbanks.coop)