

## German comments on the upcoming issues of the trilogy

### A. Summary:

1. **Access rules** are a matter of competition policy and should not be part of financial regulation. Therefore, we continue to prefer a deletion of Art. 28-30 MiFIR. At least, potential threats for the stability and liquidity of financial market and possible contagion effects should be limited as far as possible. If the articles will not be deleted, this could best be achieved by restricting the application of Art. 28 and 29 MiFIR to transferable securities and money market instruments. Application of access rules to exchange traded derivative infrastructures and markets would require sufficiently high safeguards with an adequate transition period. Art. 30 MiFIR would be an invasion in intellectual property rights and could thus have a detrimental effect on the further development of benchmarks. However, if such a provision will be kept the Council text could be the basis for an acceptable solution from our point of view.
2. It should be avoided to apply MiFID rules to predominantly commercial entities that deal with financial instruments or engage in financial activities only to a limited extent and do not pose a threat for financial stability or investor protection. The **exemptions** in the Council version of Art. 2 MiFID are well drafted and provide a good balance between the need to cover all relevant market participants and avoid an unjustified burden for the real economy. Therefore, we strongly support the Council version of Art. 2 MiFID, including exemptions for certain joint ventures that comply with strict organisational requirements.
3. We favour a well specified regulatory regime for **high frequency trading (HFT)** with a specific HFT definition according to the Council version that is sufficiently flexible to respond to future developments. We support the EP proposal of a prohibition of sponsored and naked access and for the testing of algorithms. The final text should include the Council proposal for a flagging of orders caused by an algorithm and a requirement to impose a fee for the excessive usage of order systems.
4. We support the parallel approach foreseen in all versions of Art. 24 and 25 MiFID that allows the provision of **investment advice** on a commission and on a fee basis side by side. But it should be clarified that a certain advisor is only allowed to provide either fee-based or commission based advice. In the Council version of Art. 24 we welcome in particular paragraph 8 that allows Member States to impose requirements on investment firms in addition to those foreseen in the directive.
5. We are in favour of strong and meaningful requirements for **position limit and position management systems**. In our view the Council version that includes OTC positions provides a good basis for a compromise but should be further enhanced, especially by requiring the application of position limits on an aggregated basis to all entities of a group and the determination of specific position limits by ESMA. On the other hand the exemption for hedging of commercial activities should also be applied on a group basis like in EMIR. But we do not consider it necessary to have an exemption for hedging treasury financing activities in addition to the exemption for hedging risks related to commercial activities of non-financial entities.
6. We agree with the **OTF category for shares**. But the transparency requirements for trading on OTFs should be similar with those for other platforms. Instead of a

prohibition of OTC trading for shares as foreseen in the EP version we prefer the Council proposal of a **trading obligation** for shares on a regulated market, MTF, OTF or systematic internalizer.

7. We strongly support more **market transparency** and a strict limitation of applicable waivers from pre-trade and post-trade transparency for the equity markets. Waivers should only be foreseen if justified and needed in order to avoid negative impacts, as for example in the case of large in scale orders. We would therefore prefer a deletion of the reference price waiver and the waiver for negotiated transactions which privilege specific market participants and trading venues to the disadvantage of the market as a whole. At least, the conditions for the application of waivers should be narrowly specified.
8. We generally prefer the **definition of commodity derivatives** in the Commission proposal. The Council version would provide an incentive to shift trading from regulated markets and MTFs to OTFs whereas the EP version would exempt commodity derivatives currently within the scope MiFID I. However, especially concerning European electricity and gas markets possible negative consequences of the proposed expansion of the definition of commodity derivatives require further discussion.
9. We strongly oppose the proposed **extension of MiFID to insurance undertakings, insurance intermediaries and specific insurance contracts**. This proposal would lead to contradictory rules and create confusion regarding the question which national authority is competent for the supervision. We favour to tackle these issues in the revision of IMD.
10. We strongly oppose the proposal of the parliament in Art. 9 (3) (1b) and Art. 48 (3) (b) concerning the **gender balance in management bodies**. However due to the to a large extend similar scope of MiFID and CRD IV we could accept an alignment of the corporate governance provisions of both directives. But we would like to stress the fact, that this is completely without prejudice to Germany's position regarding the draft directive on improving the gender balance among non-executive directors of companies listed on stock exchanges (...) being currently discussed in Council bodies.
11. Regarding the **organisational requirements for MTFs and OTFs** we support the Council proposal which contains a clear prohibition of dealing on own account and matched principal trading for MTFs in article 19 paragraph (6) and differentiates between trading on own account and matched principal trading at an OTF in article 20 MiFID.
12. Regarding the different proposals **on sanctions and supervisory powers** we prefer the Council text, which is a more balanced approach taking into account proper sanctions as well as the rights of (potential) offenders. However there are some aspects which need further discussions (e.g. the publication of sanctions).

## **B. In Detail:**

# I. MiFID

## 1. Scope of application

### Article 1 paragraph (3) MiFID Draft – “Structured deposits”; application to credit institutions

We have a clear preference for the Council version, which does not cover traditional savings accounts where the interest rates are determined by an internal calculation by the credit institution. As the Council has proposed, the extension of the MiFID rules should be restricted to deposits which are structured and are similar to financial instruments from an investor perspective.

Additionally we do not think that it is appropriate to apply the entire MiFID in relation to credit institutions (“This Directive shall apply..”) as this creates contradictions with CRD/CRR. The extension should be limited to specific rules as COM and Council have proposed.

### Article 1 paragraph (3a) MiFID Draft – “Inclusion of insurance undertakings”

The Parliament text declares certain MiFID rules (particularly the code of conduct in article 23 et seq MiFID), to be applicable to insurance undertakings and insurance intermediaries when selling or advising clients in relation to insurance based investments. We strongly oppose the proposed extension of MiFID to insurance undertakings, insurance intermediaries and specific insurance contracts. This proposal would lead to contradictory rules and create confusion regarding the question which national authority is competent for the supervision. We favour to tackle these issues in the revision of IMD.

## 2. Exemptions

Regarding the exemptions in Art. 2 MiFID we strongly support the Council text, which is a carefully drafted to find a balance between the need to cover relevant market participants and avoid the application of MiFID rules to predominantly non-financial entities that only engage in certain financial instruments or in financial activities to a limited extend.

Furthermore, the Council-text ensures that only those algorithmic traders that apply specific high frequency trading techniques are covered by the authorisation requirements. Among others, in the EP-text, it is questionable whether an independent regulatory area remains for 2 paragraph 1 letter (d) point (ii) or follows the same regulatory purpose as point (iia), which already covers algorithmic trading. A further counter exception in article 2 paragraph (1) letter (d) point (iib) MiFID Draft for persons with “significant market presence” seems questionable in light of the principle of legal certainty because it is unclear when such presence will occur.

### Article 2 paragraph (1) letter (i) – “Ancillary activity exemption”

In the case of the ancillary activity exemption, to answer the question of whether an investment service can qualify as an ancillary service, according to Parliament, it is possible not only to take the activities of the consolidated group companies into account, but also the affiliated companies which are not consolidated (see **point (iii)**). Expansion is problematic because of circumvention issues. Furthermore, drawing the boundaries and determining when a company belongs to a group is likely to be difficult and unclear in practical terms (principle of legal certainty).

We support the exemptions in the council-text for persons providing investment services exclusively in commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of special electricity undertakings or operators in (o) and (p). We also support the exemption for transmission system operators in (n) whose text should however be aligned with the requirements in (o) and (p).

### **3. Definitions**

Concerning the definitions we support the Council text. Especially the following proposals of the Parliament raise concerns:

- Article 4 (2) number 6 MiFID EP-Draft: The Deletion of "at prices defined by him" is problematic as it widens the scope inappropriately.
- Article 4 (3) EP-MiFID: The Parliament version empowers the European Commission to amend some definitions in order to react to technical developments or abusive practices. The European Commission and Council only provide for delegated acts regarding technical elements of the definitions. We do not support an amendment of definitions by way of delegated acts. Any major change in the definitions has to be discussed in the legislative process of an amendment of the directive itself.

### **4. Corporate Governance**

We strongly oppose the proposal of the parliament in Art. 9 (3) (1b) and Art. 48 (3) (b) MiFID EP-draft concerning the gender balance in management bodies. In parallel to its position during the CRD IV negotiations Germany continues to be of the opinion that there is no valid legal basis in the Treaties for the adoption of such provisions and that, in any event, it does not comply with the principle of subsidiarity.

However due to the to a large extend similar scope of MiFID and CRD IV, we could accept an alignment of the corporate governance provisions of both directives. But we would like to stress the fact that this is completely without prejudice to Germany's position regarding the draft directive on improving the gender balance among non-executive directors of companies listed on stock exchanges (...) being currently discussed in Council bodies.

### **5. Product governance**

#### Article 16 paragraph (3) and article 24 paragraph (1a) MiFID EP-draft

In general, we support the introduction of product governance rules. Nevertheless, we think that such rules have to be clearly set up and further specified. As currently drafted the rules apply exclusively to investment firms, but not to other issuers like entities specialized in issuing securities. This poses a challenge in terms of an equal level playing field. As the regulatory guidelines for product approval are tied to the nature of the investment firm, they could probably easily be circumvented by spinning off an issuing company that is not required to have an authorisation.

We further doubt that product governance rules are really necessary for all kinds of financial instruments. Especially simple products that are non-derivative and non-structured (e.g. corporate and sovereign bonds and transferable securities) would not benefit from a product governance process from an investor protection point of view.

Although we do support in general the idea to require a "product approval process" as well as a "target market analysis", we do not agree with introducing so-called "post sales obligations" which would require investment firms to take appropriate action if the financial instrument develops in contradiction to the expectations of the investment firm. Such a monitoring seems challenging taking into account the length of investments and the number of investment products. It also would be problematic to require investment firms to disclose the "fair value" of a financial instruments as there are different methods to calculate that value.

## **6. Electronic recording of client correspondence ("taping")**

### Article 16 paragraph (7) MiFID

We strictly oppose the mandatory recording of telephone conversations, in particular regarding business with retail clients. These provisions lead to high costs and are not appropriately taking into account the personal rights of the clients. Therefore they should be deleted.

If the recording requirements are kept minutes should be allowed as an alternative as in the EP amendments, which take into consideration the principle of proportionality, especially for small investment firms/credit institutions which provide investment services in an ancillary manner, only, might be acceptable as a compromise.

In any case, the consent of the parties whose telephone conversation is to be recorded must be mandatory. The current draft only provides an obligation to notify clients, which is not appropriate taking into account the personal rights of the clients.

We further would propose a clarification regarding the starting point of the retention periods, which should be the point, when the recording is made.

## **7. HFT**

Regarding the HFT proposal we support the Council approach. Especially we do not agree with the specific definition of HFT in the EP proposal (Article 4 paragraph (2) nos. (30a) and (30b) MiFID Draft). According to the EP text latency would be a determining factor in a transaction. This approach leads to legal uncertainty. On number (30b) of the EP version we question the practicability of the approach because the criteria are too inflexible to take into account changing conditions and are susceptible to circumvention.

However the EP proposal contains some aspects which should be part of the final text.

### Article 17 paragraph (4) MiFID EP-Draft – "Prohibition on sponsored and naked access"

We welcome the proposed prohibition on sponsored and naked market access as this could limit the risks of HFT and potential market abuse.

### Article 51 paragraph (3) MiFID EP-Draft – "Testing of algorithms"

We very much welcome the requirement for sufficient testing of algorithms in a realistic environment, as cases of market disruptions caused by HFT firms could have been prevented or mitigated in this way.

#### Article 51b MiFID Draft – “Synchronisation of business clocks”

Synchronising business clocks is considered very sensible in order to minimise errors and potential abuse through different timestamps.

On other parts of the EP proposal we are rather skeptical:

#### Article 17 paragraph (3) MiFID EP-draft – “Quoting obligation”

The obligation in this article to post quotes “at all times” is too far-reaching, as even traditional market making agreements provide for a presence of only 80-90% and could cause liquidity providers to withdraw.

#### Article 51 paragraph (1b) MiFID EP-draft – “Minimum period of validity”

In our view requiring a minimum period of 500 milliseconds for which orders are to be valid is no sensible regulatory approach. Such an approach would expose the orders including orders of liquidity providers to new risks (e.g. to orders being “fished dry” by other market participants). Furthermore, it would increase overall transaction costs and spreads while leaving unchanged the fact that the speed of orders transmitted to the market would remain an important factor. Furthermore, the readiness to enter open orders in the order book, thus promoting a fair price formation process, could decline.

#### Article 51 paragraph (2a) MiFID EP-draft – “Cross-market coordination for halting trading”

We do not support the cross-market coordination which has been proposed in terms of technical halting of trading, as it would mean additional administrative effort without discernible added value.

We also do not agree with the envisaged disclosure of the thresholds for circuit breakers, as this could speed up a fast market even further and facilitate manipulations.

#### Article 51a paragraph (2) MiFID EP-draft – “Determining the tick size”

We do not agree to the inclusion of liquidity as a criterion in tick sizes. This would have the disadvantage of increased complexity for the tick size regime. We therefore prefer simpler requirements as foreseen in the Council-text that are in line with the current, tried and tested approach of the FESE.

#### Excessive use of orders

Finally we are of the view that an excessive usage of order systems due to a disproportional amount of orders or changes of orders could seriously endanger the reliability of markets. We would therefore welcome an extension of Art. 51 (3) MiFID to include a requirement to impose a fee concerning the excessive usage of the order systems due to algorithmic trading.

## Article 91b MiFID EP-draft – “Advisory committee”

We are generally not opposed to the creation of an advisory committee of national experts on high-frequency trading. However we do not think that it is necessary and appropriate to require the setting up of such a group and its mandate in the MiIFD, because this would hamper the necessary flexibility at ESMA level. A rather skeptical view is also taken regarding the compilation of a list of abusive practices, which could be too inflexible regarding upcoming developments on financial markets.

With regard to the Council text we especially support the following aspects:

### Flagging of HFT-orders and excessive use of orders

We welcome the obligation proposed by the Council to flag orders generated by algorithmic trading (Art. 51 paragraph (6) MiFID). Flagging would improve the opportunities of competent authorities to identify any problems caused by algorithms.

Furthermore, we are of the view that an excessive usage of order systems due to a disproportional amount of orders or changes of orders could seriously endanger the reliability of markets. We would therefore welcome an extension of Art. 51 (3) MiFID to include a requirement to impose a fee concerning the excessive usage of the order systems due to algorithmic trading.

## **8. Organisational requirements for MTFs and OTFs**

Regarding the organizational requirements for MTFs and OTFs we support the Council proposal in general.

The Council version of MiFID contains a clear prohibition of dealing on own account and matched principal trading for MTFs in article 19 paragraph (6) (to be welcomed) and differentiates between trading on own account and matched principal trading at an OTF in article 20 MiFID. The Parliament text only contains the prohibition on dealing on own account in article 20 paragraph (1) MiFID (OTF), without differentiating between dealing on own account and matched principal trading. It is unclear whether matched principal trading is permitted according to Parliament (and if so, in which cases) or whether it falls under the prohibition of dealing on own account. We would welcome a clear specification that dealing on own account and matched principal trading are not allowed.

## **9. Managing conflicts of interest and code of conduct (Art. 24, 25 MiFID)**

Regarding these rules we prefer the Council text which contains enough flexibility to deal with all relevant questions. In general, we doubt that such a detailed proposal like the EP text in this regard is needed to establish the appropriate requirements in level 1. To the contrary, too much detail at Level 1 would limit the possibility to address specific circumstances and changing conditions adequately. In this regard there should be enough flexibility at level 2.

### Provision of investment advice

In general we favor a parallel approach that allows the provision of investment advice on a commission and on a fee basis. But it should be clarified that a certain advisor (natural person) is only allowed to provide either fee-based or commission based advice. Provision of commission and fee-based advice should be allowed in one investment firm simultaneously but in separate business divisions.

#### Article 24 paragraph (1c) MiFID EP-draft – Monetary and non-monetary benefits

The Parliament version contains detailed guidelines about the admissibility of monetary and non-monetary benefits in connection with investment services which are too detailed for a Level 1 text from our point of view.

In connection with the L2 guidelines under MiFID 1, the Parliament text requires that the monetary and non-monetary benefits be “designed to enhance the quality”. This specific criterion has not proved practicable in supervisory practice under MiFID I and should therefore be deleted.

#### Article 24 paragraph (3) MiFID EP-draft – General client information

Unlike the European Commission and the Council version, the Parliament version no longer includes the obligation to provide information on whether the investment advice will be given on an independent basis (or not). From our point of view, such a statement should be required to inform the client about the kind of service in good time before investment advice is provided.

We are critical regarding the Level 1 requirement under article 24 paragraph (3) subparagraph 2 MiFID EP-draft. Cost transparency is fundamentally to be welcomed; however it is a matter of technical details in which way such transparency can be achieved to inform clients in the most appropriate way taking into account the different forms of financial instruments and investment services. This should therefore be regulated at L2.

#### Article 24 paragraph (3a) MiFID EP-draft – Independent portfolio management

We support the stricter approach of the Commission and the Council which only allow portfolio management on a fee basis. This avoids conflicts of interest when providing portfolio management on a commission basis.

#### Article 24 paragraph (8) MiFID (Council text)

We particularly support this provision of the Council text which allows Member States to impose requirements on investment firms additional to those provisions set out in Article 24, because it allows member states to react on particular national developments, strategies or behaviours in the most appropriate way.

#### Article 25 paragraph (-1) MiFID EP-draft Requirements for employee qualifications

Parliament has inserted Art. 25 paragraph (-1) MiFID EP-draft; it is fundamentally not objectionable, albeit “located” in the wrong place. Article 25 MiFID Draft deals with guidelines on the adequacy or suitability assessment; the new article 25 paragraph (-1) MiFID EP-draft, in contrast, is about organisational obligations for an investment firm. It should therefore be moved to the organisational requirements (Art. 23) to which it belongs.

#### Article 25 paragraph (3) point (a) (ii) MiFID Draft – Execution only

The Parliament version waters down the strict exclusion of those financial instruments that embed a derivative from execution-only transactions. Instruments which embed a derivative are thus to be permitted under the EP version if the derivative does not increase risk to the investor. This vague amendment is likely to lead to legal uncertainties and problems of demarcation.

#### Article 27 MiFID Draft – Best execution

The Parliament version prohibits investment services companies from receiving any remuneration, discount or non-monetary benefit for routing orders to a particular trading venue (article 27 paragraph (1a) MiFID Draft). While we support such a prohibition in general a detailed regulation at level 2 seems more appropriate from our point of view.

### **10. Article 32 and article 53 MiFID Draft – “Suspensions from trading”**

We welcome the Parliament version in this regard to a large extent. We especially welcome, that the EP-Text does not include a suspension follow-up obligation for derivatives as foreseen in Art. 32 paragraph (2) Council version. An obligation of this nature would be extremely difficult to monitor in practice.

The restriction on the reason for suspension included in the Parliament version – “non-disclosure of information about the issuer or financial instruments” – is suitable for minimising suspensions; however the circumstances should be limited to cases of non-disclosure of insider information [Articles 6+12 of MAR], to avoid that every reported breach becomes a possible reason for suspension.

We expressly welcome the wording of the Parliament version which imposes an obligation on the operators of trading platforms to notify their supervisory authorities of whether the suspension was followed up, and if not why not. This will reduce administrative workload for competent authorities.

Regarding the EP Proposal to expand the suspension follow-up obligation to include “other trading arrangements” (see article 32 paragraph 1 subsection 2 of MiFID EP-draft) it is unclear what this concerns and how these trading arrangements can be monitored at all. We therefore prefer clearly the Council text. Finally the wordings of Art. 32 and 53 MiFID Draft should be aligned especially paragraph 3 of Article 32 in comparison to Art. 53 para. 3 MiFID).

### **11. Article 41 et seq MiFID Draft – “Third-country regimes”**

As a general rule, we do not see the need to modify the current arrangements in accordance with MiFID 2004/39/EC giving Member States the authority to decide if and under which regulatory requirements a third country firm may provide investment services to retail and professional clients within their territories. However from our point of view the council proposal is an acceptable compromise for us, but should also foresee that Third country firms provide investment services directly to retail clients in a Member State if they have established a branch in that member state.

The European Commission proposal and the Parliament version propose for too far reaching provisions to regulate the activities of third-country firms which want to perform investment services in a member state from a third country or via a branch in a member state (including equivalence assessment, possibility of cross-border invest-

ment services from a branch in one member state to another member state). These provisions are too restrictive, among others because they make the provision of investment services by Third country firms in the EU depended on a comprehensive equivalence assessment. This would be a very burdensome and lengthy process especially if it has to be done for all Third countries with firms operating in the EU. Decisions of national regulators would be more flexible and better able to assess the circumstances in individual cases.

## **12.Data reporting (APA, CTP, ARM)**

On data reporting we support the Council text. However we could accept some of the amendments of the EP. Especially the additional guidance by ESMA on conflicts of interest between operators and users of an APA/CTP/ARM (Article 65 paragraph (2) MiFID EP-draft) seems sensible. The same applies to the proposed clarification for avoiding conflicts of interest (Article 66 paragraph (2) MiFID EP-draft)

### "Single entity"

However, we oppose the single entity approach in the context of the consolidated tape (Article 67a MiFID EP-draft). Instead commercial CCPs should be given the chance to be established under the MiFID regime. Moreover, it remains entirely unclear how this single entity, which would be established using delegated acts by the European Commission, should be set up, e.g. under private law or as a public utility.

Further a list of the parameters of transactions to be made public by an APA (Article 66 paragraph (1a) MiFID EP-draft) seems unnecessary in the Level 1 text, as paragraph (5) empowers ESMA to specify such technical details at Level 2.

## **13.Commodity derivatives**

### Article 59 MiFID Draft – "Position limits"

Regarding this aspect of the MiFID we generally support the Council compromise, which address the risks of a market in commodity derivatives, including agricultural products in the most appropriate way (e.g. by including the OTC market). However we are of the view that some additional requirements should be set to avoid loopholes in the proposed regulatory system.

From our point of view the exemption for treasury financing activities in the council text is not needed. Only commercial activities of non-financial or by other non-financial entities within the group to which the non-financial counterparty belongs (see Art. 10 paragraph (3) EMIR) should be exempted. Otherwise the text might open circumvention possibilities.

We further support the proposal of the Parliament that the position limits should be determined by ESMA by way of technical standards for every market and product, to foster harmonization and avoid an unlevel playing field.

In addition we are of the view, that positions of entities within a group should be aggregated to avoid circumvention by using other entities in a group. The criteria of such an aggregation should be determined at Level 2.

### Article 60 MiFID Draft – "Position reporting"

The key difference between the Council text and the Parliament version in article 60 is that under article 60 paragraph (1a), the Parliament version also provides that in-

vestment firms are, upon request, to provide the competent authorities with a complete breakdown of their positions which are being traded OTC. ESMA must then also set the format for these reports by way of technical standards. Such reports on positions traded OTC would create more transparency, which is generally supported especially regarding agricultural commodity derivatives. However it seems open to which extend such reports are useful for competent authorities.

#### **14. Sanctions / Supervisory powers**

Regarding the different proposals on sanctions and supervisory powers we prefer the Council text, which is a more balanced approach taking into account proper sanctions as well as the rights of (potential) offenders.

##### Publication of sanctions

Article 74 of the European Parliament's proposal on MiFID includes a regulation on the obligation for publication relating to sanctions and administrative measures we consider being excessive. The wording of the obligation for publication as in article 75b of the Council's version is preferable. The regulation in the Council proposal sets out a more detailed system which will better satisfy the existing data protection requirements and in certain individual cases permits complete non-publication. Publication of personal data is very problematic from our point of view. Such publication encroaches considerably on the affected person's right to privacy and may also breach (German) constitutional principles. However, a differently structured publication obligation enables action to be determined on a case-by-case basis.

In addition we have serious doubts on publications made prior to decisions taking legal effect because they are much greater encroachments and also bear reputational and liability risks for the publishing authority. In this regard recital 98 should also be revised.

##### Level of sanctions

Article 75 paragraph (2) (e) to (g) of the European Parliament's proposal on MiFID includes provisions on the maximum amount of fines. We do not support turnover-based fines. We do not consider turnover a suitable criterion for assessment of a company's ability to pay, since it is too one-sided. Accordingly, we are in favour of a text containing a nominal fixed amount (as, e.g. in article 75a paragraph (3) e) of the current Council proposal) – at least as an alternative – as a maximum sanction, which should not be higher than 10 million Euro.

The parliamentary proposal including a (maximum) sanction amount in the form of 15% of turnover for legal persons and €10 million for natural persons is unnecessarily high. We would like to stick to the Council proposal with regard to the level of sanctions.

We do not support the provision on skimming profits in paragraph (2) g) EP-text, which determines a fine in the amount of 10 times the profit or benefit derived. Skimming off 10 times the profit is unnecessarily high and disproportionate. A provision were the profit can only be skimmed off once but the fine can be in excess of this is preferable from our point of view.

In addition the words "10 times of" have to be deleted in Article 75 a para (3) (3) (EP-text).

### Determination criteria

Article 76 paragraph (1) of the European Parliament's proposal on MiFID regulates the criteria applicable in determination of sanctions. According to the Council proposal, we think that the final text of MiFID should include a wording that clarifies as far as possible that the listed criteria are not to be understood as exhaustive. Otherwise this would conflict with basic principles of our national and constitutional law.

We also reject the parliamentary proposal to include an authorisation for ESMA to issue guidelines on the type and level of sanctions, in order that differing legal traditions in the member states can be addressed. Abstract provisions from ESMA on the level of fines may contradict the existing system of a necessary case-by-case assessment in fine determination under German administrative offence law. Moreover, the determination of sanctions in Germany is based overall on a system whereby independent courts may also be authorised to determine sanctions. One peculiar aspect in comparison with other countries may be that the principle of culpability plays an important role due to the close connection with criminal proceedings. It is unlikely that ESMA guidelines will sufficiently address such national peculiarities.

### Article 72 paragraph (1) letter (ha) MiFID EP-draft – “Investor compensation”

The parliamentary text provides that supervisory authorities can demand that compensation be paid to investors suffering damage or other reparations be met in the event of breach of MiFID or MiFIR.

We are very concerned on this proposal, not least with regard to constitutional aspects (separation of powers between executive and judiciary). The authorisation also contradicts the MiFID notion of collective investor protection, which involves supervisory authorities not taking action in individual civil proceedings for investors. The relationship to civil law liability claims and law of civil procedure issues is also unclear.

### Art. 72 paragraph 1 letter (hb) MiFID EP-draft – “Product prohibition in case of lacking product approval process”

According to the Parliament, the supervisory authority should be authorised to prohibit marketing of financial instruments, both in cases as under Art. 32 MiFIR and in the event of lacking product approval. In our view administrative or penal sanctions seem to be sufficient in case a product approval process has not been installed or has not been respected. We do not support a product prohibition in this regard, because this will substantially expand product intervention power under article 32 MiFIR and introduces an abstract strict liability offence.

### Article 91a MiFID EP-draft – “Data protection”

The Parliament version inserts a new article 91a MiFID, which orders that the responsible authorities in the member states comply with the EU Data Protection Directive (95/46/EC) in implementing MiFID and MiFIR. The wording of the European Parliament suggests “direct” application of the directive; this seems inappropriate since it is not an EU regulation. The national supervisory authorities are bound by the national implementations of the EU Data Protection Directive (and not the directive as such), provided they are relevant. If the EU Data Protection Directive is not applicable, it may need to be amended.

### Other aspects

We support the Council approach regarding the possibility to apply criminal as well as administrative sanctions to breaches of the MiFID/MiFIR rules.

## **15. Annex**

### Annex I section C (6) MiFID Definition of commodity derivatives

The proposed definitions of both the Council and the EP in Annex I Section C para. 6 in general cause concerns and raise a lot of questions. On the one hand, the market related exemption for some OTF contracts (Council) could shift trading from regulated markets and MTFs to OTFs and would at least take several commodity derivatives out of the scope of the position limits. The EP-text, on the other hand exempts partially also trading on regulated markets and MTF which is already regulated under MiFID I. We therefore generally prefer drafting the definition without exemptions related to markets, subjective elements or settlement issues.

However, especially concerning European electricity and gas markets possible negative consequences of the proposed expansion of the definition of commodity derivatives require further discussion and a solution. An exemption for electricity and gas wholesale derivatives should be considered. Such an exemption could reasonably be combined with a review clause assessing the advantages and risks of exempting such derivatives from the scope of MiFID, in particular regarding effects of full EMIR and REMIT (Directive 1227/2011) implementation. Furthermore with a view to clearing obligations under EMIR, the threshold for OTC-commodity derivatives in Art. 11 Commission Delegated Regulation (EU) 149/2013 needs to be increased taking into account the extended scope of the definition in MiFID and the developments in energy market design.

### Annex I section C (6a) MiFID Insurance contracts

We strongly oppose these definition. We do not agree with an extension of MiFID to specific insurance contracts. We do favour to tackle these issues in the revision of IMD. (see above)

### Annex I section C (11a) MiFID – “Definition “financial instrument” – derivatives”

The Parliament version plans further specifications with a view to the definition of the term “financial instrument” pursuant to Annex I C nos. 7 and 10 (derivatives). We oppose the inclusion of this text that is based on level 2 specifications of the current MiFID definition into the level 1.

## **II. MiFIR**

### **1. Scope of application**

#### Article 1 paragraph (4a) MiFIR EP-draft

On the basis of our assessment, a declaratory significance is attributed to Art. 1 paragraph (4a) MiFID EP-draft. Based on our assessment, Title VII contains no sections tailored to credit institutions and investment firms but only intervention powers which are materially bound to activities such as the sale of financial instruments, and which

apply to everyone. The addition to the text is therefore dispensable and should be deleted.

## **2. Restrictions regarding OTF trading and Trading Obligation**

We agree with the Council proposal for a trading obligation for shares as compromise between objective to trade on transparent markets and the needs of investment firms to carry out parts of their trading outside such markets for legitimate reasons.

However certain aspects of the Council proposal are unclear and raise several questions. We therefore would welcome additional clarification and definitions in this regard (e.g. a definition of "internal matching system", a clarification what kinds of trades are covered by Art. 20c MiFIR, a clarification which trades "do not contribute to the price discovery process" and a definition of "non-addressable liquidity trades").

With regard to the trading obligation in article 2a paragraph (1) MiFIR EP-Draft the scope of application of OTFs is limited to the non-equity area. Article 20 paragraph (1a) MiFID (EP-draft) creates a further restriction, according to which trading via an OTF (with non-equity instruments which are admitted to a trading venue) is only to be allowed if the order is large in scale. We are still skeptical regarding a restriction of OTF trading in shares. From our point of view, there are legitimate reasons to trade shares via OTF (e.g. trading of large amounts of shares). OTF trading in shares should be allowed as long as the transparency requirements match with other platforms.

In addition due to the restrictions on OTF trading in the EP-text an OTC-definition would be needed, were it would be very challenging to avoid unintended loopholes. The trading obligation of the Council avoids these problems too.

## **3. Transparency**

We strongly support more market transparency and a strict limitation of applicable waivers from pre-trade and post-trade transparency for the equity markets. Waivers should only be foreseen if justified and needed in order to avoid negative impacts, as for example in the case of large in scale orders.

### Art. 4 MiFIR Draft – "Waiver of pre-trade transparency for equity instruments"

From our point of view the reference price waiver and the waiver for negotiated transactions which privilege specific market participants and trading venues to the disadvantage of the market as a whole, are especially problematic. We would therefore prefer a deletion of these waivers.

The proposed double cap approach of the council will not limit the use of the waiver profoundly. The operational concept appears too complex and partly counterproductive regarding the purpose of a reduction in "dark" trading. If the waivers will be kept we therefore prefer a restriction on the basis of the standard market size (e.g. at least more than a nightfold of the standard market size).

If a cap approach has to be used it should to be calculated with regard to a percentage of the trading in a specific financial instrument on that respective platform to be a real limitation and should be combined with a minimum order size such as the threefold of the standard market size.

However, if as a second or third best solution a double cap would be kept, at least the thresholds should be reduced sufficiently (e.g. below 1% per trading venue and below 2% in Europe).

We further oppose to the **exemption concerning illiquid shares, depositary receipts, ETFs**, certificates or other similar financial instruments from the limitations both waivers. We do not see a necessity to apply different rules to illiquid shares in this regard. Such rules would hamper transparency concerning these instruments significantly, because even the few existing orders would not be published.

#### Art. 7 MiFIR Draft – “Pre-trade transparency requirements for non-equity instruments”

The EP waives the pre-trade transparency requirements for hedging transactions with non-financials. From our point of view this makes it difficult to define the exceptions to the rule in an indisputable and legally clear manner.

#### Art. 12 MiFIR EP-draft – “Access to market data”

We oppose the obligation for effective non-discriminatory access to market data in the EP-Draft, which is not needed from our point of view to make such information available.

### **4. Reporting obligations**

#### Art. 23 paragraphs (1) and (6a) MiFIR EP-draft– “Obligation of national supervisory authorities to transmit the transaction data to a single system, appointed by ESMA”

We do not agree to the obligation to transmit data to such a system, which is very challenging from a technical point of view and seems not necessary. The current system works without such an obligation.

Access to a central database by the national supervisory authorities could potentially result in performance problems if, for example, various countries tried to access the database within their countries at the same time. Establishing the possibility of remote access to a database for data queries of a larger scope will cause technical problems at the level of supervisory authorities.

In addition such a system will result in major costs. Due to the likely performance problems, it will be necessary to maintain a national database, which means that centralisation would not result in significant cost savings at national level.

### **5. Articles 28 to 30 MiFIR Draft – “Access rules”**

In our view Art. 28-30 should be deleted and not be included into the final text.

The provisions in Art. 28 and 29 are not needed to implement the G-20 requirements and go beyond the compromise on access that has been achieved in Articles 7 and 8 of EMIR. In addition these provisions contain major threats for the stability and liquidity of financial market because of possible contagion effects.

If such rules will be part of the final text they should be drafted in accordance with the EP-Text; i.e. they should be limited to transferable securities and money market

instruments. Such a limitation addresses the risks of access and especially avoids the still unsolved problems of access regarding exchanged traded derivatives.

However there some further aspects in the EP-text which should be taken into account:

Note should be taken that the burden of providing evidence has been made more difficult, for restricting markets' ability to function. See Article 28 paragraph (1) sentence 1 at the end: "...would **clearly** threaten the smooth and orderly functioning...". "Clearly" should be deleted; otherwise the exception to the rule hardly seems able to be proven.

Moreover in Article 28 (1) sentence 1, "orderly functioning of the CCP or the functioning of the financial market" and "systemic risk" should be given equal weighting and connected by the conjunction "or", to be matched to the clause in Article 28 paragraph (1) sentence 4.

Article 28 number 6 letter a) at the end – "factors creating undue risks": clarification is needed here to ensure that the relevant factors cannot be of an exclusive nature; otherwise there is a risk that the corresponding facts will be too tightly limited ex ante.

If the text will include exchange traded derivatives the Council text could be an acceptable solution as a second or third best solution, if it does sufficiently take into account unsolved issue of legal fungibility, especially the problems caused by different insolvency laws in a crisis, which will also lead to possible contagion effects and includes a sufficient implementation period for these rules. Such a period has to take sufficiently into account the limited experience with access regarding derivatives and should be based on a risk assessment by ESMA.

Art. 30 MiFIR is an invasion in intellectual property rights and thus has a detrimental effect on the further development of benchmarks. However, if such a provision will be kept the Council text could be the basis for an acceptable solution from our point of view.

## **6. Article 28a MiFIR Draft (new) – "Clearing obligation for equities and bonds"**

We do not support the clearing obligation for equities and bonds pursuant to article 28a MiFIR Draft in the EP text, because it will:

- Increase the costs for trading venues.
- Obligatory central clearing of equities and bonds is, in the absence of terms for the contracts with reference to the counterparty, far less justifiable with counterparty risk than for derivatives. In view of these considerations, further review would be necessary to determine whether bundling risks at the CCP will create new risks (e.g. operational)
- In any case, the terms for the clearing obligation to apply must be further specified. "When a CCP accepts to clear" does not appear sufficient here.

## **7. Articles 31 and 32 MiFIR Draft – "Product intervention powers"**

We support the Council approach in this respect. We do not agree with the additional tasks and powers for ESMA and national authorities foreseen in the EP-text. They would require the setting up of a bureaucratic and burdensome monitoring and as-

assessment system for new products with limited value. In addition this would also create liability risks for ESMA and national governments. Instead, the approach foreseen by COM and Council are more adequate to address risks for investors by new products.

#### **8. Article 35 MiFIR Draft – “Position management powers of ESMA”**

Article 35 MiFIR gives ESMA position management powers in emergency situations. The text of the European Commission and the Council provide in Article 35 paragraph (2) that ESMA may only take action if the two above conditions have both been fulfilled. Pursuant to this paragraph, ESMA may only take action if the measure addresses a threat to the integrity of financial markets (including in relation to delivery arrangements for physical commodities) or financial stability, and if one or more competent authorities have not taken (sufficient) measures to address the threat. In the Parliament version, in contrast, ESMA may take action if only one of these two conditions has been fulfilled. On the basis of the Parliament text, it is conceivable that ESMA and national authorities could take parallel measures that might not be in line with each other. At least on the basis of the version from the European Council and the European Commission, it is clear that responsibility initially lies with the national authorities. The Council text thus is preferable.

