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Konsultation zu den am 20. Oktober 2011 veröffentlichten Legislativvorschlägen der Europäischen Kommission im Zusammenhang mit dem MiFID-Review

Sehr geehrte Damen und Herren,

in dieser Sache bedanken wir uns verbindlich für den Bundesverband der Wertpapierfirmen, zu den Legislativvorschlägen der Europäischen Kommission (MiFID II und MiFIR) zur Überarbeitung der bisherigen Richtlinie über Märkte für Finanzinstrumente (MiFID) Stellung nehmen zu können.

„Vor die Klammer gezogen" ist jedoch darauf hinzuweisen, dass es aufgrund der Vielzahl der vorgesehenen, die Vorschläge konkretisierenden, *„delegierten Rechtsakte"* (allein 25 im Rahmen des Richtlinienvorschlags und weitere 20 im Rahmen des Verordnungsentwurfs) zum gegenwärtigen Zeitpunkt schwer fällt oder gar unmöglich erscheint, eine realistische, hinreichend konkrete Folgenabschätzung hinsichtlich möglicher Auswirkungen der die Komplexität des bestehenden Regelwerks ohnehin weiter erhöhenden Legislativvorschläge vorzunehmen. Auch aus diesem Grund möchten wir uns zum jetzigen Zeitpunkt der Diskussion auf einige wenige, aus unserer Sicht besonders bedeutsame Punkte beschränken:[1]

Organisierte Handelssysteme („organised trading facilities", OTF)

Soweit neben den bisher bestehenden *regulierten Märkten* (RM) und *multilateralen Handelssystemen* (MTF) unter der Bezeichnung *organisierte Handelssysteme*

[1] Soweit sich zahlreiche Aspekte des Konsultationspapiers der Europäischen Kommission vom Dezember 2010 in den jetzt vorgelegten Legislativentwürfen wiederfinden, sei zudem auf unsere hierzu seinerzeit erarbeitete Stellungnahme verwiesen, die wir unserem Schreiben als Anlage beifügen. Die dortigen Einschätzungen sind nach wie vor gültig und insofern auf die aktuellen Legislativvorschläge übertragbar.

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(OTF) nunmehr eine weitere Kategorie aufsichtsrechtlich überwachter Handelsplattformen normiert werden soll, haben wir zwar durchaus Verständnis für den damit verfolgten Regulierungszweck, für funktional vergleichbare Tätigkeiten beim Zusammenführen von Handelssystemen gleiche Wettbewerbsbedingungen und ein vergleichbares Aufsichtsregime (Stichwort: *„level playing field"*) zu etablieren, allerdings halten wir den Ansatz, dieses Ziel mit der Schaffung einer neuen "Kategorie" von Handelsplätzen erreichen zu wollen, für nicht durchgängig überzeugend.

Unabhängig von der bereits begrifflichen Abgrenzungsproblematik, die sich aus dem Umstand ergibt, dass jede Form des aufsichtsrechtlich überwachten Wertpapiergeschäfts im Lichte der zahlreichen bestehenden Organisationsanforderungen selbstredend als „organisierte" Form des Handels bezeichnet werden kann, wäre es aus unserer Sicht im Hinblick auf ein anzustrebendes möglichst einheitliches Regulierungsniveau konsequenter, die bestehende Definition der Kategorie der *multilateralen Handelssysteme* so zu erweitern, dass hiervon zukünftig auch bisher nicht regulierte Formen der Orderzusammenführung (Stichwort: *„broker-crossing-systems"*) mit erfasst würden.

Demgegenüber birgt die in Art. 2 Abs. Nr. 7 MiFIR vorgeschlagene Legaldefinition, welche das Vorliegen eines OTFs im Wesentlichen als Auffangtatbestand im Sinne des Nichtvorliegens eines RM oder MTF bestimmt, die Gefahr einer nicht unerheblichen Abgrenzungsproblemtik und damit einhergehender zukünftiger Rechtsunsicherheit. Soweit der Betreiber eines OTF indes – anders als im Falle eines RM oder MTF – *nicht* verpflichtet werden soll, ein auf *„nichtdiskretionären"* Regeln basierendes System zu implementieren, ist zumindest nicht unmittelbar ersichtlich, wie hierdurch einheitliche Wettbewerbsbedingungen und eine diskriminierungsfreie Zusammenführung einzelner Kundenaufträge sichergestellt werden sollen.

Transparenzanforderungen für Handelsplätze

Wir begrüßen grundsätzlich das Bestreben der Europäischen Kommission, die Anwendung der Vorschriften für die Herstellung einer angemessenen Vor- und Nachhandelstransparenz weiter zu vereinheitlichen bzw. deren einheitliche Anwendung sicher zu stellen. Das gleiche gilt für die geplante Ausweitung der bisher allein für Aktien geltenden Transparenzanforderungen auf Anleihen, strukturierte Finanzprodukte, Emissionszertifikate und Derivate, wie sie im Übrigen für den hiesigen Börsenhandel im Grunde ohnehin bereits bestehen bzw. etablierter Praxis entsprechen.

Im Hinblick auf den erkennbaren Elan, mit dem sich die Europäische Kommission der Überarbeitung und Ausweitung der bestehenden Transparenzanforderungen anzunehmen scheint, gilt es jedoch gleichzeitig auch Augenmaß zu bewahren, damit „im Eifer des Gefechts" zukünftig nicht auch etablierte und langjährig bewährte Marktmodelle beschnitten oder gar in ihrer Existenz gefährdet werden. Dies betrifft aus unserer Sicht in besonderem Maße die von Börsenbetreiber zu

Börsenbetreiber leicht abweichenden, aber gleichwohl einen einheitlichen Typus bildenden Formen des hiesigen Parketthandels, wie er gerade in Deutschland eine lange Tradition besitzt.

Bekannter Maßen stellte es im Rahmen der Level I und Level II Verhandlungen zur Einführung der MiFID seinerzeit eine nicht unerhebliche Herausforderung dar, das insofern typische hiesige Marktmodell unter Verwendung *„geschlossener Orderbücher"*) auf europäischer Ebene zu vermitteln und dessen Fortbestand im Hinblick auf die durch die Finanzmarktrichtlinie gebotenen Vorhandelstransparenzanforderungen sicherzustellen.

Zwar ist nicht erkennbar, dass die vorliegenden Legislativvorschläge unmittelbar darauf abzielen, die Vereinbarkeit der im hiesigen Parketthandel etablierten Marktmodelle im Hinblick auf die überarbeiteten Vorhandelstransparenz-vorschriften gezielt in Frage zu stellen, jedoch bedarf es aus unserer Sicht im weiteren Verhandlungs- und Rechtsetzungsprozess unbedingt der gesonderten Aufmerksamkeit, dass im Zuge erweiterter Anforderungen hier nicht "versehentlich das Kind mit dem Bade ausgeschüttet" wird. Insoweit bitten wir mit Nachdruck darum, dass sich die deutschen Verhandlungsführer ausdrücklich dafür einsetzen, dass der Fortbestand des hiesigen Parketthandels durch die anstehende Überarbeitung der MiFID-Transparenzvorschriften auch zukünftig nicht in Frage gestellt wird.

Weitere Vorschriften, soweit sie die Veröffentlichung und Verfügbarkeit von Marktdaten betreffen

Hier stimmen wir mit der Beurteilung der Europäischen Kommission insoweit überein, als die mit der Einführung der MiFID einher gegangene deutliche Fragmentierung des Wertpapierhandels teilweise zu Problemen im Hinblick sowohl auf die Verfügbarkeit als auch die Qualität von Marktdaten geführt hat und gleichzeitig mit einem signifikanten Anstieg der mit dem Bezug von Marktdaten für die Handelsteilnehmer verbundenen Kosten verbunden war.

Dies war sicher so nicht intendiert, zumindest aber mit Blick auf die angesprochene Kostenbelastung in gewisser Weise vorhersehbar. Ursächlich hierfür war nicht zuletzt der Umstand, dass die regulatorischen Anforderungen der MiFID selber eine zunehmend "unelastische" Nachfrage nach Handelsdaten bei einer gleichzeitig stark oligopolisierten Anbieterstruktur geschaffen haben. Im Zuge der Errichtung zahlreicher neuer Handelsplätze – und den damit entstandenen zusätzlichen Datenquellen – und aufgrund des – nicht zuletzt durch den Hochfrequenzhandel – insgesamt deutlich gestiegenen Datenvolumens haben sich im Ergebnis seit Einführung der MiFID die aus dem Marktdatenbezug resultierenden Aufwendungen für die Handelsteilnehmer vielfach dramatisch erhöht.

Trotz des seitens der Europäischen Kommission durchaus erkennbaren Problembewusstseins, ist allerdings bisher nicht erkennbar, wie die vorgeschlagenen Neuregelungen tatsächlich zu einer Reduzierung der Kostenbelastung beitragen sol-

len. Im Gegenteil: Soweit Veröffentlichungen von Nachhandelsdaten zukünftig allein über sog. genehmigte Veröffentlichungssysteme (*„approved publication arrangements" – APA*) möglich sein sollen, steht zu befürchten, dass sich hierdurch eine weitere Kostensteigerung für diejenigen Wertpapierfirmen ergibt, die Nachhandelsdaten bisher über ihre eigen Webseite veröffentlicht haben. Nach unserem Dafürhalten sollte dies auch weiterhin möglich sein, zumal die betroffenen Firmen ja ohnehin umfänglich der Aufsicht unterliegen. Dem stünde zudem nicht entgegen, dass man einheitliche Datenformate verbindlich vorschreibt, wodurch zukünftigen Anbietern sog. konsolidierter Datenticker (*„consolidated tape providers"*) eine marktbreite Datenaggregation erleichtert würde.

Algorithmischer und Hochfrequenzhandel

Die vorgeschlagene zukünftige Regulierung in den Bereichen des algorithmischen- und Hochfrequenzhandels wird von uns dem Grundsatz nach begrüßt. Dies betrifft insbesondere die Anforderungen an geeignete und wirksame Systeme zur Risikokontrolle und zur Verhinderung einer Beeinträchtigung eines ordnungsgemäßen Handels auf den jeweiligen Märkten.

Soweit die Betreiber von Handelsalgorithmen, die sich ähnlich wie ein *„market maker"* verhalten, zukünftig verpflichtet werden sollen, *„Handelsplätze zu jeder Zeit, unabhängig von den vorherrschenden Marktbedingungen, regelmäßig und kontinuierlich mit Liquidität [zu versorgen]" (Art. 17 Abs. 3 MiFID Überarbeitungsvorschlag)*, haben wir für die vorgeschlagene Regelung insofern Verständnis, als sie darauf abzielt, der Gefahr massiver kurzfristiger Liquiditätseinbrüche zu begegnen. Allerdings halten wir die gewählte Verpflichtung ihrem Umfang nach für zu weit gehend und nicht hinreichend praktikabel. Demgegenüber besteht bei traditionellen *market makern* und vergleichbaren Funktionen (etwa den hiesigen Spezialisten und Qualified Liquidity Providern) regelmäßig eine vertragliche Vereinbarung zwischen Marktbetreiber und *market maker* über den Umfang der Einstandspflicht im Sinne einer kontinuierlichen Liquiditätsversorgung. An diesem Grundprinzip auf der Basis von vertraglichen Regelungen sollte unseres Erachtens festgehalten werden, zumal dies im Falle der bisher keinerlei diesbezüglicher Verpflichtungen unterliegenden *„algorithmischen market maker"* konzeptionell durchaus übertragbar wäre, indem die Betreiber solcher Handelsstrategien verpflichtet werden könnten, mit den jeweiligen Marktbetreibern entsprechende Vereinbarungen zur Sicherstellung einer angemessenen Liquidität zu treffen.

Darüber hinaus erscheint uns der Vorschlag, dass unterschiedliche transaktionsauslösende Algorithmen in derselben Weise *ex post* identifizierbar sein sollen, wie der für ein Handelsgeschäft verantwortliche Händler, durchaus überzeugend, auch wenn die damit verbundenen organisatorischen Anforderungen, nicht zuletzt aufgrund des häufig sehr kurzen „Lebenszyklus" der beständig fortentwickelten Algorithmen eher nicht unerheblich sein dürften.

Erhebliche Zweifel haben wir demgegenüber auch hinsichtlich des erzielbaren regulatorischen Nutzens einer geplanten periodischen Vorlage von Beschreibun-

gen der eingesetzten algorithmischen Handelsstrategien bei den Aufsichtsbehörden, zumal bisher unklar ist, wie und zu welchem Zweck diese die vorgelegten Informationen auswerten sollen. Dies gilt umso mehr, als aufgrund der beständigen Weiterentwicklung von Algorithmen diese zum Zeitpunkt der Einreichung regelmäßig bereits veraltet sein dürften. Unbestritten ist indes, dass den Aufsichtsbehörden ein umfassendes Informations- und ggf. Interventionsrecht für die Fälle zugestanden werden sollte, in denen begründete Anhaltspunkte dafür vorliegen, dass der Einsatz bestimmter Algorithmen den ordnungsgemäßen Handel gefährden.

Regulierung des Handels von Derivaten, Warenterminkontrakten und Emissionszertifikaten

Unsere Beurteilung der vorgeschlagenen deutlich ausgeweiteten bzw. „engmaschigeren" Regulierung von Märkten für derivative Produkte fällt differenziert aus. So begrüßen wir ausdrücklich das Bemühen, im Zuge der Umsetzung der G20-Beschlüsse von Pittsburg, möglichst viele der bisher allein im OTC-Markt gehandelten Derivate auch an Börsen und sonstigen überwachten Handelsplattformen handelbar zu machen. Auch gegen die Einbeziehung von Emissionszertifikate in das bestehende Regulierungsgefüge bestehen grundsätzlich keine Bedenken.

Demgegenüber haben wir deutliche Vorbehalte hinsichtlich der vorgeschlagenen Vorschriften für Marktteilnehmer und Ermächtigungen der Aufsichtsbehörden im Rahmen eines geplanten regulatorischen „Positionsmanagements". Insbesondere im Hinblick auf die vorgesehenen weitreichenden Interventionsbefugnisse, die sich bis auf die Ebene von Einzelpositionen individueller Handelsteilnehmer erstrecken sollen, sehen wir hierbei zumindest die Gefahr eines sich anbahnenden Paradigmenwechsels, weg vom Primat eines angemessenen ordnungspolitischen Rahmens, hin zu einer stärker auf direkte Marktinterventionen gestützten Aufsichtspolitik.

Auch wenn wir hierbei erst am Anfang einer sicherlich umfangreichen politischen Debatte stehen und wir grundsätzlich durchaus Verständnis dafür aufbringen können, dass in Folge der Finanzkrise und der Diskussion um die in letzter Zeit zu beobachtenden zunehmenden Preisschwankungen im Bereich des Warenterminhandels der Bereich des Derivatehandels insgesamt stärker in den regulatorischen Fokus rückt, so ist gleichzeitig mit Nachdruck darauf hinzuweisen, dass die mit direkten Markteingriffen verbundenen Gefahren nicht unterschätzt werden dürfen. Auch weiterhin muss daher gelten, dass regulatorische Eingriffe auch zukünftig stets in transparenter und nachvollziehbarer Weise einem Rechtfertigungszwang im Sinne des vorherigen Nachweises eines Marktversagens unterliegen und der Versuchung einer, wie auch immer gearteten, politisch motivierten „Steuerung" von Marktpreisen widerstanden wird.

Verbote von bestimmten Produkten und Marktaktivitäten

Die zuvor zum Ausdruck gebrachten Bedenken gelten in gleicher Weise auch im Hinblick auf die geplanten Möglichkeiten zu einem direkten Verbot bzw. zu einer Beschränkung hinsichtlich einzelner Produkte oder Aktivitäten durch die Europäische Wertpapieraufsicht ESMA oder die nationalen Aufsichtsbehörden. Zwar enthalten die einschlägigen Artikel 31 und 32 MiFIR entsprechende Hinweise darauf, dass bei den benannten Eingriffen das Verhältnismäßigkeitsprinzip zu wahren und negative Auswirkungen auf die Markteffizienz zu vermeiden sind; alles in allem erscheinen uns die eine Intervention rechtfertigenden Tatbestandsvoraussetzungen für eine solch weitreichende Ermächtigung bisher jedoch zu vage, uneinheitlich und unausgewogen.

Dabei wird niemand ernsthaft bestreiten wollen, dass eine Interventionsbefugnis – angemessene und transparente Entscheidungsverfahren vorausgesetzt – bei einer *nachgewiesenen* ernsthaften Gefährdung der Integrität der Finanzmärkte bzw. der Stabilität des gesamten oder eines Teils des Finanzsystems grundsätzlich gerechtfertigt und geboten erscheint. Ob dies in gleicher Weise indes bereits bei Annahme einer nicht weiter präzisierten *„Gefahr"* für den Anlegerschutz (Art. 31 Abs. 2 (a) MiFIR) oder gar für den Fall *„erheblicher Bedenken"* hinsichtlich einer möglichen Gefährdung des Anlegerschutzes (Art. 32 Abs. 2 (a) MiFIR) gelten sollte, erscheint indes fraglich. Hier bedarf es unseres Erachtens zumindest einer weiteren deutlichen Präzisierung der die benannten weitreichenden Markteingriffe rechtfertigenden Tatbestandsvoraussetzungen und zwar bereits auf *„Level I"* und nicht erst auf der Stufe *„deligierter Rechtsakte"* der Europäischen Kommission. Eine Präzisierung ist dabei nicht zuletzt im Hinblick auf das verfolgte Ziel einer Stärkung des Anlegerschutzes selbst geboten, da gegenwärtig z.B. völlig unklar ist, wie im Falle eines verhängten Produktverbotes im Hinblick auf die bereits vertriebenen, im Markt (und damit im Besitz von Anlegern) befindlichen, unter das Verbot fallenden Produkte verfahren werden soll.

Mit freundlichen Grüßen

Michael H. Sterzenbach
Geschäftsführer

Anlage:
Stellungnahme des bwf vom 28.01.2011 zur European Commission's public consultation regarding the review of the Markets in Financial Instruments Directive (MiFID)

Anlage

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your reference

your message of

city_date
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Review of the Markets in Financial Instruments Directive (MiFID)

Dear Sir, dear Madam,

The *Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V. (bwf)*[1] is a trade association representing securities trading firms and brokers at the stock markets throughout Germany. The bwf therefore expressly welcomes the opportunity to participate in the European Commission's public consultation regarding the review of the Markets in Financial Instruments Directive (MiFID). We have no objections regarding the publication of our response by the Commission services on its website.

However, before answering the questions set out in the consultative document we would like to express our serious concerns regarding the timing of the consultation and the length of the consultation period. Given the large scope of the review covering numerous different areas and highly complex issues, we find the consultation periode and the fact that the consultation did start shortly before the year-end holiday season not only inappropriate but dangerous in the light of the potential effects the MiFID review will have on the orderly functioning of European financial markets. In particular comparably smaller associations with limited resources must find it basically impossible to answer the almost 150 questions raised based on appropriate consideration, analysis and discussion with member firms which will be directly affected by the review. We therefore have to limit the number of questions answered as well as the amount of detail provided in our response in a way we would not have to do in a more appropriate consultation context.

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

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

We agree with the proposed definition in principle. However, to further clarify the concept, it should be made clear that "admission for trading" differs from a formal "listing" of a security at a regulated market, which can imply further legal consequences especially or the issuer.

(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.

We strongly advocate a "same business, same rules" approach which poses the same set of requirements to trading venues which are in direct competition with each other. We therefore understand and support the Commission's attempt to ensure that all forms of organised trading on different venues are appropriately regulated and any form of regulatory arbitrage will be avoided. A task, which becomes even more challenging in the light of fast than ever changes in trading technology and market structure.

However, it is far from self evident that this task could be achieved most efficiently by the introduction of an additional type of trading venues. The introduction would inevitably further increase the complexity of the legal framework and make the differentiation between the various types of venues more complex.

In other words, one advantage of the existing framework lies in its simplicity: Aside from regulated markets, there is one concept for organised trading in a multilateral structure ("multilateral trading facilities") or on a bilateral, markt maker oriented structure ("systemic internalisers"). Generally speaking, those two concepts cover the two possible basic designs of organised trading. Therefore, we would like to suggest that in a first step it should be examined whether the avoidance of any regulatory loopholes in the field of organised trading cannot be – more consistently – achieved by a clarification and if necessary elaboration of the existing definitions of MTFs and Sis, as well as the assurance of a more stringent enforcement of existing standards.

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

We are concerned that the introduction of a new type of trading venue in its currently very vague definition could – unintentionally – cover certain forms of trading against a firm's proprietary capital (e.g. order execution on a "VWAP" basis) which clearly do not define a "trading venue" in the sense originally introduced by MiFID. – The technical definition and scope of the "organised trading facilities" therefore needs at least to be clarified.

From a semantic point of view the term "organised" appears much too broad. Not alone that it could be viewed as a superordinated concept to MTFs and Sis alike, it would be furthermore almost arbitrary or meaningless in anticipation of the actual level of regulation in the financial markets, where basically every form of trading legally requires an "organised" framework of some kind.

> ***(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?***

Aside from our above mentioned general concerns regarding the introduction of an additional type of trading venue, it would be only consequent to introduce a distinctive corresponding type of investment service for operating an OTF in case the concept should be introduced.

> ***(5) What is your opinion about converting all alternative organised 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 consultation document does not provide any insight how such thresholds should be determined and – equally important – monitored in practice. Furthermore, given the heterogeneous structure and size of financial markets within the member states, it would be at least very difficult to define generally accepted universal thresholds for different classes (and potentially sub-classes) of financial instruments. Therefore we would prefer a circumscribable definition which characterizes an OTF (and discriminates it from other trading venues) based on distinct qualitative criteria.

Since the consultation paper does not provide any justification or a practical concept how a possible cap on non RM/MTF activities could be achieved, the question remains somewhat theoretical. However, it is to be appreciated that the Commission opens a debate about the consequences of different levels of regulation of different trading venues which – according to the original MiFID paradigm – shall form a "level playing field". One lesson to be learned from the financial crisis is indeed that especially regulated markets with their high level of transparency, functional stability, efficient price formation and strict independent market surveillance, offer a comparably high level of stability and reliability even under servere market conditions. – As a conclusion, trading on RMs and to some lower extent on MTFs can be regarded to be "desirable" from a regulatory/systemic risk point of view.

Equally true, not every product is suitable for being traded on a RM or MTF and there are therefore legitimate reasons for OTC markets.

We also think that bans or other forms of direct market intervention are usually a relatively poor and inefficient regulatory instrument since they need to be continuously monitored and enforced, bear the risk of unintended negative side effect (e.g. the reduction of the overall economic activity in a particular market) and usually induce circumventions. A more promising approach would be to create regulatory incentives for the usage of RMs and venues of comparably high standards. – However, such a concept certainly could not be achieved by MiFID alone.

(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

We consider it to be desirable that as many derivatives as possible *could* be traded on regulated markets as the trading venue with the highest regulatory standards. As an alternative to OTC trading, it would contribute to the stability and reliability of the overall market structure, especially in times of crisis and market failures/inefficiencies in the OTC segment.

At the same time, we have to keep in mind that central clearing and tradability in an exchange like environment are two different things. With respect to the degree of standardisation the requirements are simply different. A derivatives contract may be eligible for central clearing without having reached the level of standardisation (fungibility) required to be traded on a RM or MTF.

Therefore, in our view the regulatory framework should help to set the right incentives to promote standardisation and enable derivatives to be traded on RMs or MTFs rather than making trading on a specific venue mandatory which could in practice rather be an obstruction than a driver to further standardisation.

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

Since trading activities in general become more and more automated and supported by technology, utmost care should be given to a clear and unambiguous definition of automated and high frequency trading. We agree in the analysis that HFT rather is a tool than a strategy in itself. Furthermore strategies applied may be rather traditional (e.g. market making) or innovative.

Therefore any reference to a specific strategy, except for the extremely short time horizon under which computerised "decisions" are made should be excluded from the definition. E.g. the characterisation given in footnote 37 that HFT "involves positions being closed at the end of the day" may be descriptive for the behaviour of many HF-traders. However it is not constitutive for HFT as such. Furthermore it seems to be important to complete the definition of automated trading by the requirement that aside from the automated determination of the different as-

pects of an order, the order will be initiated by the algorithm and will be send for execution to a connected trading venue without human intervention.

The characterisation of HFT as a subcategory of automated trading seems to be appropriate. Last but not least, since the definition of automated and high frequency trading shall define the scope of potential regulatory provisions for this kind of activities, it should always refer to the principal of the trade.

(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?

The sheer percentage of automated and high frequency trading in the overall trading activity (at least for the equity markets) justify to make firms active in this field subject to regulatory oversight and to require authorisation.

Aside from the general practical problems in defining and monitoring quantitative thresholds as already discussed in question (5) we would find it more appropriate to base the requirement for authorisation on qualitative rather than quantitative criteria. If the conclusion is correct that it is in particular the risk of malfunction/trading system errors of any automated and in particular HFT computer installation, which can have negative impact the orderly functioning of markets, than the "normal" trading volume of a firm cannot be seen as a reliable indicator for the potential systemic risk arising from its activities.

(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?

The existing legal framework in Europe already obliges firms to have risk management systems employed which are adequate and proportionate to a firm's proprietary and client-related execution business. We therefore believe that it is first and foremost a regulatory monitoring – and where needed enforcement – exercise in order to insure that automated and high frequency trading are dealt with appropriately from the point of regulatory oversight. However this might require an ongoing analytical and educational exercise on the side of regulators in order to keep on track with fast changing technological developments in this field. Accordingly, the technological as well as the administrative resources of existing market surveillance infrastructure need to be "upgraded" and expanded in order to effectively monitor – and if necessary intervene.

As far as "sponsored" acess is concerned, it cannot be denied that hard competition among sponsoring firm and the strong economic incentives for ever lower latency (which may be further reduced by "naked" or insufficiently monitored "sponsored" access) can put significant pressure on "sponsoring" firms to offer "sponsored" access arrangements which are weighting aspects of "speed" higher

than those of "safety", regulatory oversight therefore should indeed give "sponsored" access arrangements special attention.

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

We consider it to be self evident that especially fully electronic markets – even more if a growing part of orders executed are purely computer driven – need close monitoring and effective "circuit breakers" (e.g. "volatility-interruptions") must be in place to provide for an orderly function of the market in periods of stress and in order to minimise the risks arising from erroneous trades or program failures. Aside from the recent experience with the US "flash crash", it is not a new insight that trading "decisions" made by computers bear their very own threats for the orderly functioning of security markets – with the "program trading crash" of 1987 being already an historical text book example.

Regulators and policy makers alike therefore should have a close look not only at HFT entities themselves but at market operators and the surveillance infrastructure in place as well. Without any doubt, it is a simple necessity for the utility of the market as a whole as well as for any single trader that market surveillance and operational control of market infrastructure, in terms of resources and technology, can operate on eye level even with the most sophisticated and technological equipped market participants. Furthermore, the current discussion about co-location and pre-filtering unveils that in a world of steadily increasing competition for order-flow and high margin pressure possible conflicts of interest for market operators should not be neglected from a regulatory point of view.

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

Access to market infrastructure should be offered on a non-discriminatory basis in general; this also holds true for co-location facilities. Even more since co-location inevitably creates a form of "privileged access" to a trading venue itself, which can raise questions of overall fairness of a market place. It is hard to deny that those market participants who are not able or do not want to invest in co-location arrangements increasingly find themselves at a technological disadvantage. However, the economic impact of such a competitive weakness may still vary according to the individual business model. – Therefore, if co-location facilities are accepted and available, regulation should ensure that the "barriers of entry" to use these services are as low as possible. Here, a non-discriminatory access is a necessary pre-condition.

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

In principle smaller tick sizes enable investors to set more precise order limits thereby contributing to efficient price formation. However, from the perspective

of an investor who does not operate in very short time frames the marginal utility of ever smaller tick sizes is clearly diminishing and may be even negligible beyond a certain point. In less liquid markets, tick sizes which are too narrow could even be disadvantageous for the price formation process, since the increased number of possible trading limits resulting from smaller tick sizes may aggravate order-matching.

Furthermore, there can be little doubt that the systematic reduction of tick sizes observed in the recent past were first and foremost intended to extract liquidity from other trading venues by creating further possibilities for inter venue arbitrage rather than promoting a more accurate asset-pricing. We therefore support the idea that implementing measures should stipulate the definition of harmonised *minimum* tick sizes on a European level. Tick sizes should be defined on the basis of the price level and market liquidity of specific securities and these definitions should be subject to periodic review.

(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?

We understand that the fact that the provided liquidity by HFT "market makers" may be less reliable in situations of high volatility compared to the liquidity provided by a traditional market maker/specialist on e.g. on a regulated market, may raise some regulatory concerns regarding the overall market stability. However, even committed market makers/specialists on exchange may find it necessary to reduce their amount of (voluntary) provision of liquidity to the market in order to limit their exposure to market risk and to protect their (regulatory) capital.

Furthermore, MiFID does not (and should not) define any requirement for market makers to provide liquidity. Existing commitments for e.g. of market makers/specialists on regulated markets are subject to contractual arrangements between the market operator and the market making/specialist firm. Such arrangements did prove valuable and sufficient even under the most severe market conditions and there is no need for regulatory intervention. From this perspective, it would be inconsistent to impose regulatory requirements for ongoing liquidity provision on high frequency traders.

(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?

We support the idea of a minimum life-span of an order in principle. This could level out the technological advantage which HFT obtain over other market participants and would reduce the risk of "quote stuffing" causing congestions of the electronic trading infrastructure. Furthermore, the acceleration of the speed in which an order can be placed and cancelled per se has not necessarily a measurable positive economic effect from a market structural perspective. Like with any other good, the marginal utility of faster continuous asset pricing is diminishing, even more so when automated "decisions", triggering price adjustments, are carried out at frequencies which make it practically impossible for any economic agent in form of a natural person to react to or at least to evaluate a situation before even newer price information arrives.

This aspect also deserves attention with respect to the best execution regime under MiFID: The question of how the process of ex ante evaluations of trading venues when market conditions are changing in milliseconds should be given appropriate attention in the future debate. We think that a reasonable definition of a minimum life-span of an order could help to restore a more level playing field among investors and would help investment firms to fulfil their best execution obligations more effectively.

However, the definition of an appropriate minimum time period for an order to rest on a trading book would be a difficult task which requires careful consideration and empirical analysis since it also could have unintended side effects. Since any prescribed minimum period for orders to rest on the order book will be a disincentive to provide additional liquidity, it will be necessary to strike a careful balance between different desirable as well as potentially negative effects. This hold particular true in more volatile market conditions where the need for a fast response to changing market conditions can be assumed to be generally higher among different groups of investors.

(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 welcome a clarification on the criteria qualifying SIs but we are not supportive for replacing the material commercial relevance test with quantitative thresholds. However, we also think that the material commercial relevance test needs to be revisited and possibly redefined. – In our view, the commercial relevance criterium should be based on the assessment of the SI activity as such and not on its contribution to the overall size and business of a firm.

(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.

In order to promote a harmonized level of investor protection and market integrity and to reduce competitive between trading venues which are in direct competition with each other we support the alignment of requirements. For the same reason RMs and MTFs should be subject to the same level of regulatory oversight.

(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 fully back the intention behind the proposal to enable trading venues to react as soon as possible in an appropriate way to any interventions in the trading process by other venues and the detection of any trading anomalies which give reasons for concern from a market surveillance point of view.

However, we are less convinced that the mandatory exchange of information among trading venues would be the best way to achieve this goal. In practice there could be a number of difficulties and inefficiencies arising from such a "spaghetti" type of information architecture for every single financial instrument, making it difficult to monitor and enforce the fulfilment of individual responsibilities arising from such a regime. We therefore would prefer that any market surveillance relevant information should be redistributed by competent authorities on a European level. In this context ESMA could function as an information hub by redistributing information it has received from national authorities to whom the information was initially reported by trading venues in their jurisdiction.

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

From a level playing field perspective, we encourage the attempt to ensure that waivers are applied consistently and coherently.

(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.

The publication of IOIs via widely accessible communication networks is already common market practice where such an "advertisement" is deemed helpful by investors expressing their trading interests. On the other hand, in cases where an investor does not wish to "unveil" his or her trading interest to a broader audience, the impact of any mandatory publication of IOIs under a pre-trade regime would be clearly prohibitive. In other words market transparency, most likely, would not be increased but reduced.

Furthermore, even though a considerable amount of IOI based transactions may be executed according to the trading interest initially indicated, it would be wrong to assume that such IOIs are "actionable" in the sense of any other limit order since they require almost always further negotiation on execution and post execution arrangements.

For the reasons given above and since we cannot identify any kind of market failure arising from current IOI practices we are not supportive of the idea to make IOIs subject to any form of mandatory pre-trade transparency under MiFID.

(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.

Assuming the relative low importance of the large in scale waver, we would not expect any significant increase in market transparency by making the publication of stubs mandatory. Furthermore, such a requirement would impact the operation of the trading process and at least would require costly adjustments to existing technical arrangements.

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

In general we think that the appropriateness of thresholds should be reviewed periodically in the light of changing market conditions and the responsibility for any potential recalibration should be delegated to ESMA. Part of the review process should be a compulsory consultation with the industry and all other stakeholders in order to ensure that decisions are made on an empirically founded and well considerate basis.

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

We think that the procedure suggested in our answer to question 32 should also be applied for any potential adjustments of publication deadlines.

Weighting the potential increase in post trade transparency and the costs incurred by a necessary adjustment of technical reporting arrangements does not justify the proposed reduction of the reporting maximal deadline to one minute.

A very general remark at this point may be worthwhile noticing as well: When setting technical standards firms have to comply with in order to fulfill their regulatory obligations, standard setters should also bear in mind the cost burden associated with the implementation of these standards. Technical installations, as well as adjustments to exiting systems, usually require a significant amount of investments. The resulting fix costs burden which needs to be broken down to unit costs (in this case per transaction). This simple economic coherence can set

small and medium size firms at a competitive disadvantage to larger competitors. In other words, the growing cost burden resulting from new or more severe regulation creates abets the process of consolidation and the disappearance of smaller entities. In other words, regulation which does not appropriately takes into account the principles of proportionality and cost/benefit considerations, unnecessarily fosters increasing concentrations of risk in the marketplace.

(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.

Given that the financial instruments in question are traded on a RM, pre- and post-trade transparency is already provided. We do not object MiFID provisions to be extended accordingly.

(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?

It is not immediately apparent that the application of the same thresholds used for equities would cause any practical problems. However we would like to suggest again that ESMA should be responsible for the proper definition of thresholds following the procedure described in our answer to question 32.

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

Aside from our general concerns regarding the introduction of an additional category of trading venues (OTFs), we strongly advocate a harmonised transparency regime for different types of venues.

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

The conception of "calibrated approach" in the consultation paper remains unclear. While it is clearly appropriate to have different levels publication requirements for issuers in different market segments, it is not apparent why the level of transparency for trade related data should be different for SME markets.

(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.

The proposal to extend the MiFID transparency regime to asset classes other than equities is to be welcomed in principle as long as careful consideration which takes into account the different market structure for different types of instruments is assured. Since markets for different instruments differ significantly in terms of liquidity, number of players, trading technology employed etc., a *"one fits it all"* approach for pre- and post-trade transparency may not be appropriate and feasible.

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

We support the Commission's intention to improve the quality and consistency of trade data and thereby facilitate the consolidation of data from different venues. As we understand the APA concept shall help to achieve this goal by ensuring certain standards in data handling, monitoring and publication. On the other hand we are concerned that the requirement of authorization and monitoring for APAs in practice could create a barrier of entry which impedes competition, abets oligopolistic market structures and thereby could have an adverse effect on the complementary goal to reduce cost of post trade data.

(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.

From a technical point of view, the proposed criteria seems to be proper and adequate.

(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 encourage the efforts to obtain a higher level of standardisation of the formats of trade reports which would promote a reduction of cost for data handling and consolidation and could also have a positive impact on competition among providers of trade reporting publication services. Therefore, the attempt to develop an universal data format should be given a higher priority than the proposed authorisation/regulation of APAs.

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

We appreciate emphatically that the Commission has identified the high cost of trade data as major issue in the process of reviewing MiFID. However, it is worth while mentioning that we are discussing potential measures to cure a problem which MiFID itself to a certain degree has created by promoting market fragmentation and thereby multiplying the sources of trade data on the one side and producing an increasing and price inelastic demand for such data on the other. In

such a framework, it is not surprising that the request to provide trade data at a "reasonable" commercial basis turned out not to be very efficient. As long as the described economic/regulatory framework remains principally unchanged, we are rather sceptical that unbundling or a more precise definition of "reasonable" cost would change this situation substantially. Especially for market participants which are dependent on real time access to a wide universe of trade data, the effect on unbundling as such will be limited.

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

Trade data should be disaggregated down to a single security, with rebates being offered for larger packages.

(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.

Idealistically, trade data should be regarded as a "Public good" which should be made available at cost level, even more since the demand for data under the MiFID framework is strongly driven by regulatory requirements, e.g. to fulfil best execution requirements. However, this seems to be rather unrealistic under current market conditions. We also accept that private for profit companies have a need to demonstrate to their shareholders the ability to generate profitable returns.

Nevertheless, the fact that the demand for market data is rather inelastic partly as a result of existing regulatory provisions, calls at least for a closer regulatory monitoring of the pricing mechanisms in these markets. Furthermore, a mechanism with the possibility of market intervention as a measure of last resort by a public agency could have some disciplining effects and therefore should be given consideration in the further discussion.

(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.

The suggested consolidated tape, to some degree, looks again like a fix to a problem MiFID has itself created. While it certainly has some attraction as a concept, a resilient cost/benefit analysis is still outstanding.

(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

In the light of the assumption stated above that market data should be regarded as a "public good" we would like to express some preference for option A at this still very abstract level of debate.

On the other hand, option B would have the advantage to comprise some competitive element as long as the assignment of one company does not create a de facto monopolistic market structure. Therefore it would be essential for the efficient implementation of option B to ensure that switching-costs and other barriers of entry are kept as low as possible.

(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).

In order to ensure a high service level which is able to keep track with fast changing market conditions and technological developments, we think that a strong involvement of industry representatives in the governance structure of an entity operating a consolidated tape would be essential. Whether this could be realised most efficiently by a public entity with a strong consultative panel of industry representatives or an industry body should be subject to further debate.

In closing, we would like to once again express our appreciation of the efforts by the European Commission to review and develop the current MiFID framework. We look forward to working further with the European Commission as the review continues and hope there will be an opportunity not only for a more in dept discussion of the points raised above but also of the issues on which we could not comment this time due to the timing and the tight deadline of the consultation.

yours faithfully,

Michael H. Sterzenbach
Secretary General