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To the Members of the
European Parliament

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Proposal for a Regulation on markets in financial instruments and amending of the European Market Infrastructure Regulation (EMIR) on OTC Derivatives, central counterparties and trade repositories

The Austrian Federal Chamber of Labour (BAK) is the legal representation of interest for about 3.2 million employees and consumers in Austria. It represents its members in all social, educational, economical and consumer policy matters both at national and Brussels EU level

The BAK welcomes the objectives specified by the Commission in the draft regulation, namely the creation of uniform legal requirements on different types of trading venues for financial instruments, the avoidance of regulatory arbitrage, the provision of more legal certainty and a reduction in the complexity of the Regulation. However, the Member States must have the option of creating their own higher level rules in various sectors in respect of transparency, ensuring stability, etc.

However, the BAK takes a very critical view of the complexity of the set of rules. On the one hand, it is probably possible to present the already difficult subject in a clearer manner. On the other hand, in particular the fact that – as in the case of the Directive – several significant points refer to the instrument of a delegated act, is giving cause for concern. For example, the already detailed set of rules has been linked with further 22 such acts to the Commission resp. the European Security and Markets Authority (ESMA). In view of this, it will not be easy for both Parliament and Council to assess resp. to agree to various regulations; after all their scope depends on the delegated acts.

Finally, the legislative technique of the Regulation is also characterised by a huge granting of waivers.Hence, no attempt has been made to create a uniform set of rules for all market participants and market venues. The credo is maintained that the competition between

market venues is an objective desired by society as a whole, ignoring the negative effects resulting from this competition, and hence making not the slightest attempt to remove these negative effects on the economy as a whole.. From the outset, the problems ignore issues such as unfair competition based on regulatory arbitrage between two differently regulated trading venues, and in particular the steadily growing, harmful high volume of OTC derivatives, whose notional amount outstanding according to the Bank for International Settlements amounted to USD 583 billion in June 2010, 15% higher than in 2007, before the outbreak of the economic and financial crisis. Due to the fact that these virulent issues have not been addressed as a problem right from the start, the effectiveness of the measures proposed in the regulation draft has to be considered as rather low, meaning that significant changes are required.

Financial instruments and transparency, reporting obligations

The aim to determine uniform requirements regarding the transparency of transactions on financial services markets is welcomed. The purpose of the regulation is to cover a broader range: depository receipts, exchange-traded funds, certificates and similar financial instruments. In addition, the transparency requirements for bonds, structured finance products admitted for trading on a regulated market or for which a prospectus has been published, for emission allowances and derivatives admitted to trading on MTF or OTF and also for those derivatives, for which central clearing comes into consideration and/or which have to be reported to trade repositories, should be increased.

However, the competent authority may grant waivers for individual investment firms, market operators or trading venues, for instance in case of particularly large in scale orders. The BAK rejects this type of waivers because they result in different treatment of market participants, in incompleteness of data and in legal uncertainty as to who is granted these waivers and who is not. But the BAK requests to consider such waivers in cases where the stability of the financial market is at risk. Here too, the public interest in stable financial markets has top priority.

Furthermore, the transparency requirements do not at all cover all financial instruments; again other rules for example apply to systematic internalisers (compare next paragraph). For instance, a significant part of the OTC transactions is exempt from pre-trade transparency. The rules only apply to OTC traded shares in case of systematic internalisation. The fact that OTC financial instruments, which are deemed particularly illiquid or customized, would not be subject to the transparency obligations within the scope of MiFID or MiFIR, also gives cause for concern. Recital 12 leads to the conclusion that there is also no obligation that these have to be reported to a trade repository (within the meaning of the EMIR). However, it is exactly these derivatives, which have to be classified as questionable in respect to tax and regulatory arbitrage. In this context, the BAK points to the massive volume of OTC derivatives. There is a major part of this, where one can by no means assume that it fulfils the characteristics to come under the transparency regulations. Hence, a large part of the volume of OTC derivatives will remain “in the dark”.

In general, this also applies in view of a lack of reporting obligations for financial instruments, which are not traded on an organised basis. The BAK is by no means able to follow the argumentation that in doing so “unnecessary administrative burdens” are avoided for investment firms (compare Recital 27). However, overall the BAK has a positive view of the improved reporting obligations.

The BAK welcomes that at least a part of the derivatives has to be traded on regulated markets, does, however, still see great deficiencies overall in respect of the rules for derivatives, in case of EMIR as well as in respect of MiFID and MiFIR. Above all, only a part of this huge area has been covered, given the fact that the trading obligation set out in Article 26 only concerns eligible and sufficiently liquid derivatives. Because a number of participants has been exempt from this obligation and as it is becoming apparent that the process of identifying and determining derivatives subject to trading obligation will be lengthy and drawn-out; in particular compared to the rapid creation of “financial innovations” by the market-participants themselves.

Organised trading venues (regulated markets, MTF and OTF), systematic internalisers and central counterparties

The BAK welcomes the central objective of the regulatory proposal to handle the entire organised trade on regulated trading venues. However, if the transparency requirements orientate themselves on the various types of instruments and trade, and if certain instruments are more likely to be traded on certain types of trading venues, this de facto means different conditions for the trading venues themselves. At the same time for example, different requirements for trading with financial instruments may shift their use in favour of those with less strict requirements.

Regulated markets and MTF are determined by the “non-discretionary execution” of transactions. This means that these will be executed according to predetermined rules. In contrast, OTF have the option of providing services, which are functionally different from the services, which regulated markets and MTF may offer their members and participants. It surely has to be welcomed that OTF operators are prohibited trading against their own proprietary capital. Nevertheless, BAK sees more disadvantages than advantages in this concept. Based on previous experiences in view of MTF it has to be expected that this is accompanied by a further fragmentation of the market. Hence, OTF are granted discretionary powers, for example permitting them to limit client access. This includes the intention of trading derivatives on OTF as well. These discretionary powers are discriminating and not justifiable in the interest of society as a whole. In order to actually guarantee security, continuity and transparency on European financial markets, it would be an important step to lead trading in MTF and OTF back to regulated markets.

The macroeconomic advantages in respect of investment firms being permitted to operate trading venues are not evident. When the Commission refers to the “achievements” of the old MiFID, it cites increased competition, a wider choice of service providers and of financial instruments. However, it is exactly these developments that make up the facts,

which significantly contribute to the instability of the financial markets. They stand for the formation of bubbles, the puffing up of trade and volume, an increase of non-transparency and volatility as well as a rise in the complicated interdependence of trade activities and institutions. In the meantime, many studies dispute that these markets have any price formation skills based on fundamental data (compare most recent UNCTAD, June 2010, “Price Formation in Financialized Commodity Markets”).

Almost the same applies to the assumption of the Commission that competition between trading venues and CCPs would lead to an optimal result for the economy as a whole, when in fact this might lead to new risks for the stability of the financial market, for example when the competition between CCPs is carried out on the basis of reduced security standards. In addition, competition between trading venues might also have the effect that financial actors prefer those CCPs, which provide the “most favourable clearing” in form of less stringent guarantee requirements.

If the BAK is already critical with regard to OTF, its scepticism is even increased when it comes to systematic internalisers (SI). The difficult handling of this issue is also reflected in the text of the Commission. It states, that SI may also participate in organised trade. However, SI are not deemed operators of regulated trading venues, even though they bring together third party interests functionally in the same way as these. This has an effect on the central aim of the regulatory proposal itself, namely that the entire organised trade should take place on regulated trading venues. That special caution has to be exercised in particular with regard to SI lies in the fact that they are permitted to execute client transactions against their own proprietary capital. That is why the BAK demands that SI may not be permitted to manage client funds (such as saving deposits), as it is obvious that they might use the funds deposited to deal in proprietary trading - unknown to their clients. The BAK welcomes the fact that they have to inform the client if they contact him as counterparty. It is also positive that SI “should” not be permitted to bring together third party buying and selling interests. However, the text is not specific and is not consistent for example with Article 14.

Although the fact that transparency requirements on SI are slightly raised means that things are going in the right direction, it is by no means sufficient. It has to be universally rejected that SI enjoy special regulations in respect of transparency, particularly as they “appear” to be the same as trading venues and especially this practice steps up the fragmentation of the market. After all, the OTC sector is huge and transactions by SI against their own proprietary capital are deemed to be OTC transactions. The BAK is also against the idea that potential clients may be treated differently. This provides SI with an additional competitive advantage over organised trading venues and further contributes to non-transparency. The BAK has absolutely no understanding for the extremely laborious construct that OTC transactions are not subject to systematic internalisation and thereby not to minimum transparency requirements, if they are “non-systematic and irregular”. This almost invites to bypassing the regulations. All in all the BAK urges the Commission to follow its own prime objective and to manage the entire organised trade via regulated trading venues.

Supervisory measures on product intervention and positions

Here too the Regulation is basically moving in the right direction; however, various restrictions render the approach, namely the expansion of powers of ESMA and the relevant authority to intervene, toothless. The BAK regards securing part of or the entire financial system as the utmost public interest. Hence, an intervention must also take place, even if other authorities have taken measures; it should not be allowed to be delayed by lengthy coordination processes. The range must also go beyond marketing, distribution and sale of financial instruments and positions, and also concern the withdrawal of admissions and the trade with certain financial instruments in general. A temporary restriction should also not be contemplated.

Having said that the BAK would ask you, dear Member of Parliament to ensure that

- all traded financial instruments are to be subject to the same transparency rules and reporting obligations, incl. those that are not traded on organised markets,
- systematic internalisers are subject to the same rules (in respect of transparency, reporting obligations, etc.) as regulated trading venues,
- systematic internalisers are not permitted to manage client funds (e.g. saving deposits),
- the trading and clearing obligation for derivatives is implemented soon and that it is far more comprehensive both in respect of financial instruments and participants; for example, the clearing obligation must apply to all trading venues and participants,
- the expansion of supervisory measures covers a larger area; it should for example also include the admission of investment firms and trading venues, whereby the relevant conditions should apply without restrictions and
- that it is not possible to undermine the rules via third country firms

However, the BAK welcomes among other the following objectives and provisions:

- the aim that the entire organised trade should take place on regulated trading venues,
- the steps towards improving transparency and reporting obligations,
- the steps towards expanding the supervisory measures on product intervention and positions, as well as furnishing the ESMA with coordination and emergency powers.

II – Transparency of trading venues
Article 3 – Pre-trade transparency for trading venues in respect of shares, …

European Commission	Amendment Application
2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a non-discriminatory basis to the arrangements, (…)	2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access **on a non-discriminatory basis** to the arrangements, (…)

Reason: the obligation to make public quotes and offer prices and the depth of the trading position must cover all financial instruments, including OTC instruments. The term “on reasonable commercial terms” leaves too much scope for interpretation.

Article 4 Granting of waivers

European Commission	Amendment Application
(1) Competent authorities shall be able to waive and investment firms and market operators operating an MTF or an OTF to make public the information referred to in Article 3(1) based on the market model or the type and size of orders in the cases defined in accordance with paragraph 3. In particular the competent authorities shall be able to waive the obligation in respect of orders that a large in scale compared with normal market size for the share, depositary receipt exchange-traded fund, certificate or other similar financial instrument or type of share depositary receipt, exchange-traded fund, certificate or other similar financial instrument in question. (…)	(1) Competent authorities shall be able to waive and investment firms and market operators operating an MTF or an OTF to make public the information referred to in Article 3(1) based on the market model or the type and size of orders in the cases defined in accordance with paragraph 3. The competent authorities shall be able to waive the obligation **for reasons of safeguarding financial stability alone**. (…)
Reason: waivers of pre-trade transparency requirements should only be considered if publications would lead to significant risks for financial stability. The reasons suggested by the Commission as to where these waivers should be individually granted by the authorities, makes the application of regulation uncertain and random. This also results in a discrimination of those market participants, who do not benefit from these waivers. In addition, very large orders are proof of the high market concentration or the use of large levers, which are part of the actors´ dominant role in any case. The basic principles for a functioning market also include best possible information. Any concerns with regard to high frequency trading are best dispelled by prohibiting high frequency trading.	

Article 5 Post-trade transparency requirements for trading venues in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments

European Commission	Amendment Application
(…) 2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a non-discriminatory basis to the arrangements, (…)	(…) 2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access **on a non-discriminatory basis** to the arrangements, (…)

Reason: the term “on reasonable commercial terms” leaves too much scope for interpretation.	

Article 6 Authorisation of deferred publication

European Commission	Amendment Application
1. Competent authorities shall be able to authorise regulated markets to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument or that class of share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument. (…) ESMA shall monitor the application of these arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are applied in practice. (…)	1. Competent authorities shall be able to authorise regulated markets to provide for deferred publication of the details of transactions based on their type or size. In particular, the competent authorities may authorise the deferred publication in respect of transactions **if the immediate publication would lead to significant market disruptions and/or the financial stability is at risk.** (…) ESMA shall monitor the application of these arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are applied in practice. **(…)**
Reason: deferred publication should only be permitted for macroeconomic reasons. Any softening of the obligation to publish undermines the aims of the Regulation in question.	

Article 7 Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives

European Commission	Amendment Application
(…) 2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a non-discriminatory basis to the arrangements, (…)	(…) 2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access **on a non-discriminatory basis** to the arrangements, (…)
Reason: the term “on reasonable commercial terms” leaves too much scope for interpretation.	

Article 8 Granting of waivers

European Commission	Amendment Application
1. …	1. …

2. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF or an OTF to make public the information referred to in paragraph 1 of Article 7 based on the type and size of orders, and method of trading in accordance with paragraph 4. In particular, the competent authorities shall be able to waive the obligation in respect of orders that are large in scale compared with normal market size for the bond, structured finance product, emission allowance or derivative or type of bond, structured finance product, emission allowance or derivative in question. (…)	2. Competent authorities shall be able to waive the obligation for regulated markets and investment firms and market operators operating an MTF or an OTF to make public the information referred to in paragraph 1 of Article 7 based on the type and size of orders, and method of trading in accordance with paragraph 4. **However, this only applies if the authority comes to the conclusion that financial stability is at risk** In particular, the competent authorities shall be able to…
Reason: Compare Article 4	

Article 9 – Post-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives

European Commission	Amendment Application
(…) 2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access, on reasonable commercial terms and on a non-discriminatory basis to the arrangements, (…)	**(…)** 2. Regulated markets and investment firms and market operators operating an MTF or an OTF shall give access **on a non-discriminatory basis** to the arrangements, (…)
Reason: the term “on reasonable commercial terms” leaves too much scope for interpretation.	

Article 10 Authorisation of deferred publication

European Commission	Amendment Application
1. Competent authorities shall be able to authorise regulated markets and investment firms and market operators operating an MTF or an OTF to provide for deferred publication of the details of transactions based on their type or size. In particular, competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market	1. Competent authorities shall be able to authorise regulated markets and investment firms and market operators operating an MTF or an OTF to provide for deferred publication of the details of transactions based on their type or size. This is admissible **if the immediate publication would lead to significant market disruptions and/or the financial stability is at risk.**

size for that structured finance product, emission allowance or derivative or type of bond, structured finance product, emission allowance or derivative. Regulated markets and investment firms and market operators operating an MTF or an OTF shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication (…)	 **It must be possible to implement this waiver immediately for it to fulfil its purpose. At the same time, ESMA has to be informed of this waiver so it can review it and if applicable, prescribe it to other trading venues, or - if it does not follow the reason of the competent authority - repeal the waiver.**
Reason: Compare Article 6	

Article 12 Obligation to make pre- and post-trade data ~~available on a reasonable commercial basis~~ (Amendment)

European Commission	Amendment Application
1. Regulated markets, MTFs and OTFs shall make the information published in accordance with Articles 3 to 10 available to the public on a reasonable commercial basis. The Information shall be made available free of charge 15 minutes after the publication of a transaction. 2. The Commission may adopt, by means of delegated acts in accordance with Article 41…	1. Regulated markets, MTFs and OTFs shall make the information published in accordance with Articles 3 to 10 **available to the public**. The Information shall be made available free of charge 15 minutes after the publication of a transaction. 2. **(delete)**
Reason: the term "on a reasonable commercial basis" leaves too much scope for interpretation. The public interest in symmetric information outweighs any commercial considerations.	

Title III – Transparency for investment firms trading OTC including systematic internalisers

Article 13 a (new)

European Commission	Amendment Application
	Investment firms operating systematic internalisation may not at the same time manage client funds, such as saving deposits.
Reason: the clear separation of retail and investment sector is necessary to protect taxpayers against state subsidies to rescue bankrupt, systematic relevant SI.	

Article 13 – Obligation for investment firms to make public firm quotes

European Commission	Amendment Application
1. Systematic internalisers in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall publish a firm quote in those shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments admitted to trading on a regulated market or traded on an MTF or an OTF for which they are systematic internalisers and for which there is a liquid market. In the case of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments for which there is no liquid market, systematic internalisers shall disclose quotes to their clients on request.	1. Systematic internalisers in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments shall publish a firm quote in those shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments admitted to trading on a regulated market or traded on an MTF or an OTF for which they are systematic internalisers and for which there is a liquid market. In the case of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments for which there is no liquid market, **they provide a public list describing the instruments and their prices.**
2. This Article and Articles 14, 15 and 16 shall apply to systematic internalisers when dealing for sizes up to standard market size. Systematic internalisers that only deal in sizes above standard market size shall not be subject to the provisions of this Article.	**2. Delete**
3. Systematic internalisers may decide the size or sizes at which they will quote. The minimum quote size shall at least be the equivalent of 10% of the standard market size of a share, …	**3. Quotes have to be specified in such a way that they can easily be compared with those in the relevant market. This also means the one to one adoption of standard market sizes.** …
5. The market for each share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument shall be comprised of all orders executed in the European Union in respect of that financial instrument excluding those large in scale compared to normal markets size.	5. The market for each share, depositary receipt, exchange-traded fund, certificate or other similar financial instrument shall be comprised of all **orders** executed in the European Union in respect of that financial instrument**.**
Reason: as far as possible, systematic internalisers have to be subject to the terms and conditions of other market participants and trading venues.	

Article 14 Execution of client orders

European Commission	Amendment Application
(…) 2) Systematic internalisers shall, while complying with the provisions set down in Article 27 of Directive [new MiFID], execute the orders they receive from their clients in relation to the shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments for which they are systematic internalisers at the quoted prices at the time of reception of the order. However, they may execute those orders at a better price in justified cases provided that this price falls within a public range close to market conditions.	(…) 2) **Systematic internalisers must, while matching their clients' orders, meet the conduct of business rules and the obligation to execute the orders at the best conditions for their clients. This also applies to professional clients and qualified counterparties.**
3) Systematic internalisers may also execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with requirements established in paragraph 2, (…)	**3) and 4) delete** **(…)**
Reason: the provisions proposed significantly contribute to the fragmentation of the market.	

Article 16 – Access to quotes

European Commission	Amendment Application
1. Systematic internalisers shall be allowed to decide, on the basis of their commercial and in an objective non-discriminatory way, the investors to whom they give access to their quotes. To that end there shall be clear standards for governing access to their quotes Standards. Systematic internalisers may refuse to enter into or discontinue business relationships with investors on the basis of commercial considerations such as the investor credit status, the counterparty risk and the final settlement	1. **Quotes of systematic internalisers have to be publically available. The conditions for concluding transactions are identical with those of regulated trading venues.**

of the transaction. 2. In order to limit the risk of being exposed to multiple transactions from the same client systematic internalisers shall be allowed to limit in a non-discriminatory way the number of transactions… 3. In order to ensure the efficient valuation of shares, depositary receipts, exchange-traded funds, certificates… (…)	**2. (delete)** **3. (delete)** **(…)**
Reason: as the volumes traded this way may be considerable, it is in the public interest that this type is handled according to the rules of regulated trading venues. After all, this business type very much resembles a trading venue. Exclusions from the quotes and certain trading partners result in further fragmentation of the market. In addition, it results in distorted competition between regulated trading venues and systematic internalisers, if the latter are able to "choose" business partners. Furthermore, only certain investors have access to favourable market conditions.	

Article 17 – Obligation to publish firm quotes in bonds, structured finance products, emission allowance and derivatives

European Commission	Amendment Application
1. Systematic internalisers shall provide firm quotes in bonds and structured finance products admitted, to trading on a regulated market or for which a prospectus has been published emission allowances and derivatives which are clearing-eligible or are admitted to trading on a regulated market or are traded on an MTF or an OTF when the following conditions are fulfilled: (a) they are prompted for a quote by a client of the systematic internaliser; (b) they agree to provide a quote. 2.) (…)	**1. Systematic internalisers shall provide firm quotes for all bonds and structured finance products, for emission certificates and derivatives they are dealing with. Thereby they comply with the prevailing standard sizes traded on regulated trading venues. It is not permitted to discriminate against individual clients. The conduct of business rules and the obligation to execute the orders at the best conditions for clients apply** **2. to 5. delete** **(…)**
Reason: a transparent market requires the availability of quotes for all financial instruments including those that are traded OTC or those not processed by a clearing house.	

Article 19 – Post-trade disclosure by investment firms, including systematic internalisers, in respect of shares etc.

European Commission	Amendment Application
1. Investment firms which, either on own	1. Investment firms which, either on own

account or on behalf of clients, conclude transactions in shares, depositary receipts, exchange-traded funds, certificates or other similar financial instruments admitted to trading on a regulated market or which are traded on an MTF or an OTF, shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA. (….)	account or on behalf of clients, conclude transactions with **financial instruments** admitted to trading on a regulated market or **which are traded on an MTF, an OTF or OTC**, shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA. (…)
Reason: transparency has to extend to all traded financial instruments	

Article 20 – Post-trade disclosure by investment firms, including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives

European Commission	Amendment Application
1. Investment firms which, either on own account or on behalf of clients, conclude transactions in bonds and structured finance products admitted to trading on a regulated market or for which a prospectus has been published, emission allowances and derivatives which are clearing-eligible or are reported to trade repositories in accordance with Article [6] of Regulation [EMIR] or are admitted to trading on a regulated market or are traded on an MTF or an OTF shall make public the volume and price of those transactions and the time at which they were concluded. This information shall be made public through an APA. (…)	**1. Investment firms, which either on own account or on behalf of clients conclude transactions with finance products, shall make public the volume and price of those transactions and the time at which they were concluded. This includes in particular also OTC financial instruments that are neither admitted to trading on trading venues and/or eligible for central clearing and/or are not reported to trade repositories in accordance with Article [6] of Regulation [EMIR].** This information shall be made public through an APA. (…)
Reason: more transparency is required in particular with regard to the financial instruments in question.	

IV – Transaction reporting

Article 22 – Obligation to maintain records

European Commission	Amendment Application
1… 2. The operator of a regulated market, MTF or OTF shall keep at the disposal of	… 2. The operator of a regulated market, MTF, **an OTF or a systematic internaliser** shall

the competent authority, for at least five years, the relevant data relating to all orders in financial instruments which are advertised through their systems.	keep at the disposal of the competent authority, for at least five years, the relevant data relating to all orders in financial instruments which are advertised through their systems.
Reason: as significant volumes are traded by SI, the regulations also have to apply to these.	

Article 23 – Obligation to report transactions

European Commission	Amendment Application
… 2. The obligation laid down in paragraph 1 shall not apply to financial instruments which are not admitted to trading or traded on an MTF or an OTF, to financial instruments whose value does not depend on that of a financial instrument admitted (…) 5. The operator of a regulated market, MTF or OTF shall report details of transactions in instruments traded on their platform which are executed through their systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3. (…)	… **2. (delete)** 5. The operator of a regulated market, MTF, **OTF or a systematic internaliser** shall report details of transactions in instruments traded on their platform which are executed through their systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3. (…)
Reason: SI have to be subject to the same regulations as all other regulated markets to prevent unfair competition.	

Title V – Derivatives

Article 24 – Obligation to trade on regulated markets, MTFs or OTFs

European Commission	Amendment Application
1. Financial counterparties as defined in Article 2(6) and non-financial counterparties that meet the conditions referred to in Article [5(1b)] of Regulation [ ] (EMIR) shall, conclude transactions which are not intragroup transactions as defined in Article [2a] of Regulation [ ] (EMIR) with other financial counterparties as defined in Article 2(6) or non-financial counterparties that meet the conditions referred to in Article Regulation [ ] (EMIR) [5(1b)} of Regulation [ ] (EMIR) in	**1. Counterparties conclude transactions that belong to a category of derivatives, pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 26 and listed in the register referred to in Article 27 on the following venues: (…)**

derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 26 and listed in the register referred to in Article 27 only on: (a) regulated markets, (b) MTFs; (c) OTFs; or (d) Third country trading venues, (…)	
2. (…) The trading obligation shall also apply to third country entities that would be subject to the clearing obligation if they were established in the Union, which enter into derivatives transactions pertaining to derivatives declared subject to the trading obligation, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such obligation is necessary or appropriate to prevent the evasion of any provision of this regulation.	2. (…) The trading obligation shall also apply to third country entities that would be subject to the clearing obligation if they were established in the Union, which enter into derivatives transactions pertaining to derivatives declared subject to the trading obligation, provided that the contract has a substantial and foreseeable effect within the Union or where such obligation is necessary or appropriate to prevent the evasion of any provision of this regulation.
3. Derivatives declared subject to the trading obligation shall be eligible to be admitted to trading or to trade on any trading venue as referred to in paragraph 1 (…)	3. Derivatives declared subject to the trading obligation shall be eligible to be admitted to trading or to trade on any trading venue as referred to in paragraph 1 (…)
Reason: There is no justification in respect of waivers from the MiFID or MiFIR that could outweigh the public interest in financial market regulation.	

Article 25 – Clearing obligation for derivatives traded on regulated markets

European Commission	Amendment Application
The operator of a regulated market shall ensure that all transactions in derivatives pertaining to a class of derivatives declared subject to the clearing obligation (…)	The **operator of a regulated market, an MTF, OTF or a systematic internaliser** must ensure that all transactions in derivatives pertaining to a class of derivatives declared subject to the clearing obligation (…)
Reason: the fact that the clearing obligation only applies to regulated markets does not make sense and undermines the objective of market stabilisation.	

Article 26 – Trading obligation procedure

European Commission	Amendment Application

(…) 2. In order for the trading obligation to take effect, (a) the class of derivatives or a relevant subset thereof has to … (b) the class of derivatives or a relevant subset thereof are to be considered to trade only on the venues referred to in Article 24(1). 3. In developing the draft implementing technical standards, ESMA shall consider the class of derivatives… 4. ESMA shall, on its own initiative, in accordance with the criteria in paragraph 2 and after conducting a public consultation, identify and notify to the Commission the classes of derivatives and individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 24(1), but for which no CCP has yet received authorisation under Article 10 or 11 of Regulation ----/---- (EMIR) which is not admitted to trading or traded on a venue referred to in Article 24(1). Following a notification by ESMA, the Commission may publish a call for development of proposals for the trading of those derivatives on the venues referred Article 24(1). (…)	(…) 2. In order for the trading obligation to take effect, (a) the class of derivatives… (b) **(delete)** **(delete)** **4. ESMA will, by February 2012,** in **accordance with the criteria in paragraph 2 identify and notify to the Commission the classes of derivatives and individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 24(1), but for which no CCP has yet received authorisation under Article 10 or 11 of Regulation ----/---- (EMIR) which is not admitted to trading or traded on a venue referred to in Article 24(1).** **The Commission will publish this immediately and issue the relevant call.** (…)
Reason: further loopholes have to be avoided. Any further delay and insecurity is no longer acceptable.	

Title VI – Non-discriminatory clearing access for financial instruments
Article 28 – Non-discriminatory access to a CCP

European Commission	Amendment Application
1. Without prejudice to Article 8 of Regulation [ ] (EMIR), a CCP shall accept to clear financial instruments on a non-discriminatory and transparent basis, including as regards collateral	1. Without prejudice to Article 8 of] (Regulation [ ] (EMIR), a CCP shall accept to clear financial instruments on a non-discriminatory and transparent basis, including as regards collateral

requirements and fees related to access, regardless of the trading venue, on which a transaction is executed. This in particular should insure that a trading venue has a right to non-discriminatory treatment in terms of (…) 6.a) ... the conditions under which access could be denied by a CCP, including conditions based on the volume of transactions, the number and type of users or other factors creating undue risks; (…)	requirements**, which also have to include the counterparty risk associated with the individual trading venue,** and fees related to access, regardless of the trading venue, on which a transaction is executed. **Basically, it should be ensured** that a trading venue has a right to non-discriminatory treatment in terms of (…) **1a (new) Collateralisation and margin depositsmust assure financial market stability and be carried out at such a level, which ensures fair competition.** 6.a) ... the conditions under which access could be denied by a CCP, including conditions based on **securing the stability of the financial sector,** the volume of transactions, the number and type of users or other factors creating undue risks**; in particular collateralisation and margin deposits at an adequate level have to be required.** (…)
Reason: mapping the risk is only makes sense if the counterparty risk is included. The stability of the financial sector should also be explicitly mentioned.	

Article 29 – Non-discriminatory access to a trading venue

European Commission	Amendment Application
(…) 6.a) the conditions under which access could be denied by a trading venue, including conditions based on the volume of transactions, the number of users or other factors creating undue risks; (…)	(…) 6.a) the conditions under which access could be denied by a trading venue, including **securing the stability of the financial sector,** including conditions based on the volume of transactions, the number of users or other factors creating undue risks; (…)
Reason: The condition "securing the stability of the financial sector" should be explicitly mentioned.	

Article 30 – Non-discriminatory access to and obligation to license benchmarks

European Commission	Amendment Application
1. ...	1. ...

<table>
<tr><td>Access to that information shall be granted on a reasonable commercial basis within three months following the request by a CCP or a trading venue, and in any event at a price no higher than the lowest price at which access to the benchmark is granted, (…)</td><td>Unrestricted access to that information shall be granted within three months following the request by a CCP or a trading venue, and in any event at a price no higher than the lowest price at which access to the benchmark is granted,, (…)</td></tr>
<tr><td colspan="2">Reason: in the context with stabilising the financial market, public interest in transparency has to be put before any existing intellectual property rights; access to it must therefore be unrestricted and may not be subject to particular commercial interests. Any restrictions would only apply if they were in the public interest.</td></tr>
</table>

Title VII Supervisory measures on product intervention and positions
Article 31 – ESMA powers to ~~temporarily~~ intervene (Amendment)

European Commission	Amendment Application
1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the union: (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or (b) a type of financial activity or practice. A prohibition or restriction may apply in circumstances, or be subject to exceptions	1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, **intervene in suitable form in the Union. It may among other prohibit or restrict the following or make it subject to the following conditions:** a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or (b) a type of financial activity or practice. **(c) (new) the trading of certain financial instruments in general or trading these on a certain trading venue or by a systematic internaliser,** **(d) (new) the admission resp. the proceeded admission of investment firms, regulated trading venues and data transmission services,** **(e) (new) algorithmic trading,** **(f) (new) admission of third country firms,** **(g) (new) the mutual access as regulated in the new MiFID and MiFIR, for example of investment firms to trading venues and vice versa.** **A prohibition or restriction may apply in**

specified by ESMA. 2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled: (a) the proposed action addresses a threat to investor protection or to the orderly functioning and the integrity of the financial markets or to the stability of the whole or part of the financial system in the Union; (b) regulatory requirements under Union legislation that are applicable to the relevant financial instrument or activity do not address the threat; (c) a competent authority or competent authorities have not taken action to address the threat or actions that have been taken do not adequately address the threat.	**circumstances specified by ESMA.** 2. ESMA will only take a decision under paragraph 1 **if the following condition is fulfilled:** (a) the proposed action addresses a threat to investor protection or to the orderly functioning and the integrity of the financial markets or to the stability of the whole or part of the financial system in the Union; **(b) delete** **(c) delete** **(new) Under this condition, ESMA must also take action if one or more competent authorities have taken action to address the threat to financial market stability.**
3. When taking action under this Article ESMA shall take into account the extent to which the action: (a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action; and (b) does not create a risk of regulatory arbitrage.	**3. (delete)**
Where a competent authority or competent authorities have taken a measure under Article 32, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 33. …	Where a competent authority or competent authorities have taken a measure under Article 32, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 33. …
6. ESMA shall review a prohibition or	

restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not reviewed after that three month period it shall expire. (…)	**6. ESMA imposes a prohibition or a restriction without time limit. However it can lift a prohibition or restriction by notification if it comes to the conclusion that the relevant conditions are no longer fulfilled.** (…)
Reason: the competences of ESMA have to be expanded in order to achieve an integrated and stable financial market.	

Article 32 – ~~Product~~ intervention (Amendment) by competent authorities

European Commission	Amendment Application
1. A competent authority may prohibit or restrict in or from that Member State: (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or (b) a type of financial activity or practice.	1. A competent authority may prohibit or restrict in or from that Member State: a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or (b) a type of financial activity or practice. **(c) (new) the trading of certain financial instruments in general or trading these on a certain trading venue or by a systematic internaliser,** **(d) (new) the admission resp. the proceeded admission of investment firms, regulated trading venues and data transmission services,** **(e) (new) algorithmic trading,** **(f) (new) admission of third country firms,** **(g) (new) the mutual access as regulated in the new MiFID and MiFIR, for example of investment firms to service providers and vice versa.**
2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that (a) a financial instrument or activity or practice gives rise to significant investor protection concerns or poses a serious threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system; (b) existing regulatory requirements under Union legislation applicable to the financial	2. A competent authority may take the action referred to in paragraph 1 if it is satisfied **(delete)** that **a) the activity concerned gives rise to significant investor protection concerns or poses a threat to the orderly functioning and the integrity of financial markets or the stability of whole or part of the financial system.** **(b) (delete)**

instrument or activity or do not sufficiently address the risks referred to in paragraph (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;	
(c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants, who may hold, use or benefit from the financial instrument or activity;	(c) (**delete)**
(d) it has properly consulted with competent authorities in other Member States that may be significantly affected by the action ; and	(d) **(delete)**
(e) the action does not have a discriminatory effect on services or activities provided from another Member State.	(e) **(delete)**
A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority.	A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority.
3. The competent authority shall not take action under this Article unless, not less than one month before it takes the action, it has notified all other competent authorities and ESMA in writing of details oft: (…)	**3. (delete)**
4. (…)	4. (…)
Reason: speedy and consequent action is needed if financial stability is in danger; hence there is a threat to the stability of the financial market. The reviews suggested etc. would seriously endanger the effectiveness of the measures.	

Article 33 Coordination by ESMA

European Commission	Amendment Application
1. ESMA shall perform a facilitation and coordination role in relation to action taken by competent authorities under Article 32. In particular ESMA shall ensure that action	1. ESMA shall perform a facilitation and coordination role in relation to action taken by competent authorities under Article 32. **In particular ESMA shall ensure that**

<table>
<tr><td>taken by a competent authority is justified and proportionate and that where appropriate a consistent approach is taken by competent authorities.

2. After receiving notification under Article 32 of any action to be imposed under that Article, ESMA shall adopt an opinion on whether it considers the prohibition or restriction is justified and proportionate.
(…)</td><td>action taken by a competitive authority is adequate to achieve the objective associated with it, such as securing the stability of the financial market.

2. After receiving notification under Article 32 of any action to be imposed under that Article, ESMA shall adopt an opinion on whether it considers the prohibition or restriction is suitable and adequate.
(…)</td></tr>
<tr><td colspan="2">Reason: During the financial crisis it became evident that a too vehement taking action of authorities was by no means a problem. On the contrary exactly the opposite was the case, so ESMA has to review whether the measures determined are sufficiently far-reaching.</td></tr>
</table>

Article 35 – Position management powers of ESMA

European Commission	Amendment Application
1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where all conditions of paragraph 2 are satisfied take one or more of the following measures:	1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where all conditions of paragraph 2 are satisfied take one or more of the following measures: **aa (new) determination of EU-wide position limits for a natural or legal entity that have to be adhered to by all trading venues; ESMA must be immediately notified if the position limit is exceeded;**
(a) request from any person information including all relevant documentation regarding the size and purpose of a position or exposure entered into via a derivative]; (…) c) limit the ability of a person from entering into a commodity derivative.	(a) request from any person information including all relevant documentation regarding the size and purpose of a position or exposure entered into via a derivative];; (…) c) limit the ability of a person from entering into a commodity derivative. **ESMA has to set the limit immediately if the EU-wide position limit is exceeded.** **(d) (new)** **The exclusion of individual users and/or user categories** **Apart from that, a prohibition of access for pension funds, commodities index funds and exchange-traded funds to commodity derivative markets has to be imposed. In addition, proprietary trading by investment firms that also manage client funds and trading with commodity derivatives for systematic internalisers are prohibited.**
2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled: (…) (b) a competent authority or competent authorities have not taken measures to	2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled: (…) (b) **(delete)** (…)

<table>
<tr><td>address the threat or measures that have been taken do not sufficiently address the threat.
(…)

3. When taking measures referred to in paragraph 1 ESMA shall take into account the extent to which the measure
(a) does significantly address the threat to the orderly functioning and integrity of financial markets or of delivery arrangements for physical commodities, or
(…)
(b) does not create a risk of regulatory arbitrage;
(c) does not have a detrimental effect on the efficiency of financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

(…)

8. ESMA shall review its measures referred to in subparagraph (c) of paragraph 1 at appropriate levels and at least every three months. If a measure is not renewed after that three month period, it shall automatically expire. Paragraphs 2 to 8 shall apply to a renewal of measures.
(…)</td><td>3. When taking measures referred to in paragraph 1 ESMA shall take into account the extent to which the measure
(a) does significantly address the threat to the orderly functioning and integrity of financial markets or of delivery arrangements for physical commodities, or
(…)
(b) (delete)

(c) (delete)

(…)

8. ESMA imposes it measures referred to in subparagraphs c and d of paragraph 1 without time limit. However it can lift a prohibition or restriction by notification if it comes to the conclusion that the relevant conditions are no longer fulfilled.
(…)</td></tr>
<tr><td colspan="2">Reason: in order to be effective the powers must be clearly specified and be above any individual interests. In order to prevent that position limits on the trading venues are bypassed by changing to another trading venue position limits that apply EU-wide have to be determined and there adherence supervised.</td></tr>
</table>

Title VIII – Provision of services without a branch by third country firms
Article 36 – General provisions

European Commission	Amendment Application
1. A third country firm may provide the services listed in Article 30 of Directive [new MiFID] to eligible counterparties established in the Union without the establishment of a branch only where it is registered in the register of third country firms kept by ESMA in accordance with Article 37. 2. ESMA can register a third country firm that has applied for the provision of investment services and activities in the Union in accordance with paragraph 1 only where the following conditions are met: (a) the Commission has adopted a decision in accordance with Article 37, paragraph 1; (b) the firm is authorised in the jurisdiction where it is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country; (…)	1. A third country firm may provide the services listed in Article 30 of Directive [new MiFID] to eligible counterparties established in the Union **only with the establishment of a branch.** 2. ESMA can register a third country firm that has applied for the provision of investment services and activities in the Union in accordance with paragraph 1 only where the following conditions are met: (a) the Commission has adopted a decision in accordance with Article 37, paragraph 1; (b) the firm is authorised in the jurisdiction where it is established to provide the investment services or activities to be provided in the Union **and it is subject to at least equally effective supervision and enforcement in that third country,** ensuring a full compliance with the requirements applicable in that third country; (…)
Reason: any further market liberalisation has to be regarded with utmost caution.	

Article 37 – Equivalence decision

European Commission	Amendment Application
1. (…)The prudential framework of a third country may be considered equivalent where that framework fulfils all the following conditions: (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;	1. (…)The prudential framework of a third country may be considered equivalent where that framework fulfils **all** the following conditions: (a) firms providing investment services and activities in that third country **are subject to authorisation and to supervision and enforcement on an ongoing basis that is as least as effective as if they were providing these services within the**

(b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body; (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions; (d) firms providing investment services and activities are subject to appropriate conduct of business rules; (e) it ensures market transparency and integrity by preventing market abuse in form of insider dealing and market manipulation. (…)	**European Union;** (b) firms providing investment services and activities in that third country **are subject to at least the same level of capital requirements and at least as stringent requirements on shareholders and members of their management body, as if they would provide these within the European Union;** (c) firms providing investment services and activities**, are subject to at least as stringent organisational requirements in the area of internal control functions as if they would provide these within the European Union;** (d) firms providing investment services and activities are **subject at least as stringent conduct of business rules as if they would provide these services within the European Union;** (e) it ensures market transparency and integrity by preventing market abuse in form of insider dealing and market manipulation. **(…)**
Reason: any further market liberalisation has to be regarded with utmost caution.	

Article 39 – Withdrawal of registration

European Commission	Amendment Application
1. ESMA shall withdraw, if the conditions in paragraph 2 are fulfilled, the registration, of a non-EU firm in the register established in accordance with Article 38 when (a) ESMA has well-founded reasons based on documented evidence to believe, that in the provision of investment services and activities in the Union, the non-EU firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets, or	1. ESMA shall withdraw, if the conditions in paragraph 2 are fulfilled, the registration, of a non-EU firm in the register established in accordance with Article 38 when **(a) ESMA believes that a non-EU firm is acting in the Union in a manner which is prejudicial to the interests of investors or the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system within the Union, or**

(b) ESMA has well-founded reasons based on documented evidence to believe, that in the provision of investment services and activities in the Union, the non-EU firm has seriously infringed the provisions applicable to it in the third country and on the basis of which the Commission has adopted the Decision in accordance with Article 37, paragraph 1. 2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled: (a) ESMA has referred the matter to the competent authority of the third country and that authority has not taken the appropriate measures needed to protect investors and the proper functioning of the markets in the Union or has failed (…); and (b) ESMA informed the competent authority of the third country of its intention to withdraw the registration of the third country firm, at least 30 days before the withdrawal . 3. (…)	(b) **ESMA believes** that in the provision of investment services and activities **in the Union, the non-EU firm has infringed the provisions applicable** to it in the third country and on the basis of which the Commission has adopted the Decision in accordance with Article 37, paragraph 1. **2.) (delete)** 3. (…)
Reason: any further market liberalisation has to be regarded with utmost caution.	

Article 45 – Transitional provision

European Commission	Amendment Application
1. Existing third country firms shall be able to continue to provide services and activities in Member States, in accordance with national regimes until [4 years after the entry of this regulation]. 2. The Commission may adopt by means of delegated acts in accordance with Article 41 measures specifying an	**Delete entire Article 45**

<table>
<tr><td>extension to the period of application of paragraph 2 taking into account the equivalence decisions already adopted by the Commission in accordance with Article 37 and expected developments in the regulatory and supervisory framework of third countries.</td><td></td></tr>
<tr><td colspan="2">Reason: this provision undermines the effectiveness and the objectives of the regulation.</td></tr>
</table>

In case you would like any further information, please do not hesitate to contact Susanne Wixforth (Tel: 0043-1-50165-2122, Email: susanne.wixforth@akwien.at and Judith Vorbach (Tel: 0043-732-6906-2434, Email: vorbach.j@akooe.at).

Yours faithfully,

Herbert Tumpel
President

Günther Chaloupek
on behalf of the Director