



January 2012
AK Position Paper

AK position on the Proposal for a Markets in
Financial Instruments Directive to abolish Di-
rective 2004/39/EC

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator. All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

The AK position in detail

From the point of view of the AK, the review of the MiFID Directive is one of the top priorities in order to achieve a reorganisation of the financial markets in accordance with the G20 decisions. Unfortunately, the European Commission has submitted little more than a compromise paper that represents the smallest common denominator derived from the overly powerful wishes of financial institutions and poorly represented small shareholders. Therefore, as a result of this lack of will to shape policies, the most urgent problems remain unsolved:

- The legalisation of organised trading facilities (OTF) and systematic internalisers (SI) further strengthens the **regulatory arbitrage** between differently regulated trading venues. The scope of the Directive is riddled with a multitude of exemptions, which make any efficient control practically impossible for the competent regulatory authorities. **OTC trading** will continue to take place outside the regulated trading venues and probably rise with the increased regulation of trading venues which were not regulated until now. The unhealthy high volume of OTC trading on the derivatives market - according to statistics of the Bank for International Settlements, the volume in 2010 was tenfold the amount of the World GDP, hence about USD 600 trillion, a figure that has even grown in the meantime - will not be reduced to an extent corresponding to the real economy; on the contrary, it will grow even further. This increases the counterparty risk and the level of speculation losses;

in the end, the bill for this will once again have to be footed by the taxpayer, as the investment business still remains the most important business sector of many major banks. Due to the lack of separation between trading against proprietary capital and banking business, saving deposits remain at risk through speculations. Thus, practically all financial institutions within the EU remain systemically relevant. In this context, it is also worth mentioning that in spite of the shock triggered by the crisis nothing has changed in respect of the structure of the financial market: hence, the assets administered by the three largest British banks amount to 333 % of the British Gross Domestic Product. The situation is similar in Ireland, France and Spain.

Finally, competition between financial trading venues is above all competition at the expense of securities and thereby regulatory arbitrage, which in the end results in unfair competition.

That is why the AK demands the deletion of all exemptions and optional exemptions. All trading venues must be subject to the same regulatory requirements. The special form of a "SME trading venue" contributes to the lack of clarity and is rejected by the AK. Trading outside these trading venues must be prohibited, entailing the consequence that transactions on unregulated trading venues are not suable under Civil Law (see also Amendment Applications to Article 2 und 3, Article 20, Article 20 (a) new, Article 35)

- In addition and for the reasons referred to above, it is also urgently required to reduce at least the option of creating virtual liquidity, in particular by so-called "market makers". Due to the current immensely high level of liquidity, **pseudo liquidity** created by preparing offers, which do not have to be complied with by the tenderer, has a damaging effect; the result is a completely distorted picture in respect of actual supply and demand.

The AK demands the introduction of binding sales and purchase offers (see Amendment Application Article 52 (8)new)

- Another negative aspect of the proposal is that algorithmic trading and its special form "high frequency trading" (HFT) are regulated too softly. The problem that price volatility increases due to algorithmic trading and in particular due to HFT and that this also has an effect on the real economy, without the existence of any connection with fundamental economic data, is not being addressed. The obligation of "trade marking" is missing, hence a mandatory disclosure who has placed the order - a machine or a trader. Finally, high frequency trading is to be banned as an economically undesirable form of trading, as it does not involve any positive impulses for society. A holding period in the order book supplements these measures.

The AK demands the obligation to "trade marking", hence the disclosure of the identity of the client - man or machine - as well as the ban on "high frequency trading" (see also Amendment Applications to Article 17, Art 52 (4)(a)new, Art 31(1)(a) new).

- With regard to Corporate Governance, reference is only made to the monistic "board system" (one-tier board); the term "management body" is mentioned throughout. The questions regarding the dualistic system (two-tier board) with the clear separation of supervisory board and executive board - which applies in various forms among other in Germany, Denmark, Finland or Austria - are not taken into consideration.

From the point of view of the AK, the Directive has to be supplemented in such a way that both organisational systems are considered to enable a harmonised application (see also Amendment Applications to Article 9).

- Small investor protection like disclosure requirements as well as half-hearted bans on commission are insufficient from our point of view. There is no product control so that the sale of structured products (coupling products) to small investors is able to continue; the legal protection for small investors remains inadequate.

Banning "execution only" and the sale of structured products and prohibiting coupling transactions, as well as extending the statute of limitation and introducing a presumption of a causal connection in favour of small investors are from our point of view minimum requirements on efficient small investor protection (see also Amendment Applications to Article 16, Article 24, 25 and Article 25 (a) new), Article 80 (a) new).

- It is to be welcomed that now the problem of commodity speculations, if only cautiously, has been recognized as a possible trigger for the high volatility of commodity prices. This restrained recognition of the problem is probably the reason for the intention to introduce transparency and, even more important, position limits. However, this form of regulation has been strongly weakened by the option to introduce alternative regulations with the same effect. This is added by the fact that there is no common control of the maximum position limits, which are permitted within the EU so that these can be easily bypassed by switching between different trading venues.

The AK demands an EU-wide control of the position limits. These are to be regulated uniformly on all trading venues; alternative options must not be permitted. The regulations for commodity derivatives should apply to all derivatives (see also Amendment Applications to Article 59 and 60), e.g. position limits also for foreign exchange derivatives.

- Finally, the AK cannot share the fundamental trust of the European Commission in the "market". Complete free market access in respect of financial services in combination with the country-of-origin principle was a significant aspect, which deepened the financial market crisis in the European Union. The market was opened for investment service providers beyond the borders of the country of origin, whilst the regulator continues to be confined to the "national border". The cooperation of the country of destination with the country

of origin also seems to come up against limits. In addition, the country of origin has possibly only a limited interest in the comprehensive supervision and control of "its" financial enterprise in all EU states. Against this background, the BAK also has considerable reservations concerning the regulation in respect of third countries.

The AK demands that EU Member States are given the competence to ban the admission of investment service providers or the services themselves without delay or that they are provided with the option to impose conditions if this is necessary to maintain the stability of the financial market. A list of possible cases as well as a definition of excessive speculations, which are harmful to the economy as a whole, has to be prepared for this purpose. The AK demands to include such a security procedure in the Directive (see also Amendment Applications to Article 3, Article 16, Article 36-38, Article 41-43, Article 46).

- Finally, the AK is concerned about the tendency to present legislative acts, which are not aimed at EU citizens, but only at a small circle of experts. Whereby the complexity finds its reason above all in the European Commission's willingness to compromise by creating more exemptions than rules for the financial sector. The lack of willingness to shape legislative policy finds its peak in the introduction of more than 30 (!) delegated acts, whereby fundamental decisions are only made after the approval of the European Parliament. From the point of view of the AK, it is questionable whether the Directive in

its present form ensures sufficient democratic legitimization.

The AK therefore suggests the following amendment proposals:

Title I - Definitions and Scope

Article 2.1. Exemptions

European Commission

1. This Directive shall not apply to insurance undertakings (...)

persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity, (...)

persons, who do not provide any investment services or activities other than dealing on own account, (...)

n) Transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under these Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations.

2. The rights conferred by this Directive...

1. This Directive shall not apply to

Delete a) to m)

n) Transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under these Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations..

2. The rights conferred by this Directive...

Reason:

There should be no exemptions in favour of certain market participants. On the one hand, granting exemptions results in a number of loopholes, which can also be used by institutions to which the Directive applies; for example when the parenting company wants to bypass the regulation via the subsidiary. On the other hand, some exemptions are so complex that their impact is difficult to assess. For example, the important definition when "an activity is to be considered as ancillary to the main business on a group level" as well as for determining when "an activity is provided only in an incidental manner" is passed to the delegated act so that due to the text of the Directive, the actual extent of the exemptions cannot be estimated.

After all, the provisions for "activities of investment companies" also concern all rules in respect of transparency requirements, conduct of business rules etc. Why for example should these not apply to insurance companies or pension funds in case of "transactions provided in an incidental manner" or "ancillary activities" etc.?

Finally, the complex regulations on exemptions also complicate supervision and render any review resource-intensive.

Article 3 Optional exemptions

European Commission

Amendment Application

1. Member States may choose not to apply this Directive to any persons for which they are the home Member State,

(...)

Delete the entire Article

Reason:

See Article 2. It is especially mentioned that the financial crisis has shown that the complexity of various financial instruments has not been taken on board by many investment companies, credit institutions etc. That is why the MiFID rules must also fully apply to transactions, which "only" concern investment advice. Therefore, the intention of the European Commission to provide for a restriction

of the exemptions is not appropriate. The proposed legislation results in a system of rules for exemptions, which is basically a misguided legal approach. This is added by the fact that optional exemptions will result in (unfair) competition of the systems within the EU.

Title II - Authorisation and operating conditions for investment firms

Article 5 (2)

Proposal by the European Commission

Amendment Application

By way of derogation from paragraph 1, Member States shall allow any market operator to operate an MTF or an OTF, subject to the prior verification of their compliance with the provisions of this chapter.

Member States shall allow any market operator to operate an MTF or an OTF, subject to the compliance with the provisions of this chapter.

Reason:

the aim is to clarify that with regard to registration requirements and other conditions for operating trading systems no deviating requirements in comparison to "conventional" regulated trading venues exist.

Article 6 Scope of authorisation

European Commission

Amendment Application

1. The home Member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. The authorisation may cover one or more of the ancillary services set out in Section B of Annex 1. Authorisation shall in no case be granted solely for the provision of ancillary services.

1. The home Member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. The authorisation may cover one or more of the ancillary services set out in Section B of Annex 1. Authorisation shall in no case be granted solely for the provision of ancillary services. **ESMA reviews the authorisation on suspicion of infringements against the provisions on authorisation resp. in case of a complaint by interested third parties within an appropriate**

2. An investment firm seeking authorisation to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation shall submit a request for extension for its authorisation.

3. (...)

Reason:

the reason lies in paragraph 3 of this article, namely that the authorisation by the Member State is valid for the entire EU and that an investment company shall be allowed to provide the services or perform the activities, for which it has been authorised throughout the EU; either through the establishment of a branch or the free provision of services. According to this, a review of the authorisation by ESMA has to be provided so that any interpretation of the rules in a Member State, which is too generous, does not apply to all other Member States.

period of time and may cancel the authorisation to ensure the stability of the financial market.

2. An investment firm seeking authorisation to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation shall submit a request for extension for its authorisation. **ESMA reviews the authorisation on suspicion of infringements against the provisions on authorisation resp. in case of a complaint by interested third parties within an appropriate period of time and may reject the authorisation to ensure the stability of the financial market.**

3. (...)

Article 8 Withdrawal of authorisations

European Commission

The competent authority may withdraw the authorisation issued to an investment firm where such an investment firm does not make use of the authorisation within 12 months, (...)

Reason:

see reason in the Amendment to Article 6. The authorisation must be withdrawn if the serious facts referred to exist.

Amendment Application

The competent authority **or ESMA must** withdraw the authorisation issued to an investment firm where such an investment firm:
a) does not make use of the authorisation within 12 months...

Article 9 Management body

European Commission

1. Member States shall require that all members of the management body of any investment firm shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties. Member States shall ensure that members of the management body shall, in particular, fulfil the following requirements:
(a) Members of the management body shall commit sufficient time to perform their functions in the investment firm. They shall not combine at the same time more than one of the following combinations:
i) one executive directorship with two non-executive directorships;
ii) four non-executive directorships;

Amendment Application

(...)
i) one executive directorship with two non-executive directorships;
ii) four non-executive directorships;

Executive or non-executive directorships held within the same group shall be considered as one single directorship.

Competent authorities may authorise a member of the management body of an investment firm to combine more directorships than allowed under the previous sub-paragraph, taking into account individual circumstances and the nature, scale and complexity of the investment firm's activities.

3. Member States shall require investment firms to take into account diversity as one of the criteria for selection of members of the management body. In particular taking into account the size of their management body, investment firms shall put in place a policy promoting gender, age, educational, professional and geographical diversity on the management body.

(...)

4. ESMA shall develop draft regulatory standards to specify the following:
 (a) the notion of sufficient time commitment of a member of the management body to perform his functions in relation to the individual circumstances and the nature, scale and complexity (...)

ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2014.

(delete)

3. Member States shall require investment firms to take into account diversity as one of the criteria for selection of members of the management body **as well as to introduce a women's quota of 40 % in their management bodies by 1 January 2015 at the latest.** In particular taking into account the size of their management body, investment firms shall put in place a policy promoting gender, age, educational, professional and geographical diversity on the management body and disclose this strategy at least once a year.

(...)

4. ESMA shall develop draft regulatory standards to specify the following:
 (a) the notion of sufficient time commitment of a member of the management body to perform his functions in relation to the individual circumstances and the nature, scale and complexity (...)

ESMA shall submit those draft regulatory technical standards to the Commission **6 months after this Directive has come into force at the latest.**

Reason:

the AK is decidedly in favour of restricting the mandates of board members and supervisory board members as this ensures more time and quality within internal supervisory bodies. This shall also apply to group-intern supervisory board functions. The draft in question provides for competent authorities to allow individual members, taking into account specific circumstances, and the nature, scale and complexity of the firm's business, to assume more than the functions referred to above, so that any further exemption rule does not appear to be necessary. In the Green Paper on Corporate Go-

vernance, the AK already requested a uniform women's quota of 40 % on management and supervisory boards. In terms of a targeted measure, this request, in combination with clearly defined aims towards a better and more diverse management and supervisory structure, is indispensable.

The necessary details, which will be decided by legal act by the European Commission at the proposal by ESMA, should - within the meaning of efficiently implementing this Directive - be available closer to the time.

Article 12 Assessment period

European Commission

(...)

5. If the competent authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed as approved.

6. The competent authorities may (...)

Amendment Application

(...)

5. If the competent authorities decide in favour of an authorisation, they will inform the interested acquirer by notification after the expiry of the assessment period at the latest.

6. The competent authorities may (...)

Reason:

the decision on granting authorisation to an investment firm by another person may have a significant effect on the financial stability of a country. Therefore, such a decision should not be approved of upon expiry of the period, but by express notification.

Article 13 Assessment

European Commission

...

3. Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their competent authorities to examine the proposed acquisitions in terms of the economic needs of the market.

(...)

Reason:

in view of the great significance of these criteria (for example with regard to the concentration of the market or financial stability in a country) these must be allowed to flow into the assessment.

Article 16 Organisational requirements

European Commission

1. The home Member State shall require that investment firms comply with the organisational requirements set out in paragraphs 2 to 8 and in Article 17.

2. An investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Directive as well

Amendment Application

...

(delete)

(...)

Amendment Application

1. **The country, on whose territory services are provided by an investment firm,** requires that investment firms comply with the organisation requirements set out in paragraphs 2 to 8 and in Article 17. **Close cooperation between the country of origin and the country of destination has to be ensured.**

2. **An investment firm shall establish by comprehensive strategies and procedures** to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Directive as

as appropriate rules governing personal transactions by such persons.

3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 23 from adversely affecting the interests of its clients.

4. An investment firm shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To this end the investment firm shall employ appropriate and proportionate systems, resources and procedures.

5. An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all its obligations.

6. An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that

well as appropriate rules governing personal transactions by such persons.

3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view **to taking comprehensive measures designed to** exclude the possibility that conflicts of interest as defined in Article 23 adversely affect the interests of its clients.

4. An investment firm shall take **comprehensive** steps to ensure continuity and regularity in the performance of investment services and activities. To this end, the firm shall employ **comprehensive systems as well as far-reaching resources and procedures**.

5. An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes **comprehensive and far-reaching** steps to avoid **associated** operational risks. Outsourcing of important operational functions may not be undertaken in such a way as to impair **in any way** the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all its obligations.

6. An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance with the requirements under this Directive, and in particular to ascertain that

the investment firm has complied with all obligations with respect to clients or potential clients.

the investment firm has complied with all obligations with respect to clients or potential clients.

On providing the service pursuant to Article 25(1 and 2), the investment firm is obliged to hand over to clients and potential clients without delay any records prepared (investor profile).

6 (a) (new) The investment firm is obliged to offer their clients the option of recording telephone conversations and to obtain approval as defined in Data Protection Directive 94/46/EC. All records may only be used for the purpose of evidence and legal enforcement in respect of the contents of the orders.

7. Records shall include the recording of telephone conversations or electronic communications involving, at least, transactions concluded when dealing on own account and client orders when the services of reception and transmission of orders and execution of orders on behalf of clients are provided.

Records of telephone conversations or electronic communications recorded in accordance with sub-paragraph 1 shall be provided to the clients involved upon request and shall be kept for a period of three years.

(...)

9. An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the client's rights and, except in the case of credit institutions prevent the use of client funds for its own account.

(...)

7. Records shall include the recording of telephone conversations or electronic communications involving, at least, transactions concluded when dealing on own account and client orders when the services of reception and transmission of orders and execution of orders on behalf of clients are provided.

Records of telephone conversations or electronic communications recorded in accordance with sub-paragraph 1 shall be provided to the clients involved upon request and shall be kept for a period of **ten** years.

(...)

9. An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the client's rights and **(delete)** prevent the use of client funds for its own account.

(...)

Reason:

the ties to the country where the services are provided are justified because the country of destination is better equipped to determine any local infringements. Apart from that, the formulation does by no means exclude ensuring the requirements by the country of origin. The following Amendment Applications aim at a clearer formulation of these sensitive provisions. The amendment of paragraph 9 is to ensure that client funds are not used for own accounts, in particular by credit institutions.

Concerning investor protection, a mandatory regulation to hand over all records to the client, is indispensable from the point of view of consumers. In the past, many consumers did not receive their investor

profile or any records on their investment recommendations. A mandatory regulation to provide clients with such records would significantly facilitate the provability in case of any disputes. Telephone records touch on the secrecy of communication and thereby the Charter of Fundamental Rights of the EU. Against this background, approval within the meaning of the Data Protection Directive is required. In view of the protection of employees, an explicit restriction of the purpose of use seems to be essential. Extending the retention period to 10 years is necessary to ensure that investors can actually enforce their rights after a loss has occurred.

Article 17 Algorithmic trading

European Commission

Amendment Application

1 a (new)

An investment firm that engages in algorithmic trading must be subject to a separate authorisation procedure. Thereby it has to show in a clear and understandable manner, which benefits for the economy as a whole result from its activities, and that no negative effects such as increased volatility, putting the stability of the financial market at risk, or distortion of prices derives from its activities. If this is not proven in a clear and understandable manner, the authorisation of such an investment firm must be prohibited. The European Commission is preparing a proposal for a list of possible macroeconomic positive and negative effects through algorithmic trading.

1. An investment firm that engages in algorithmic trading, shall have in place effective systems and risk controls to ensure that its trading systems are resilient and have sufficient capacity, are subject to appropriate trading thresholds and limits and prevent the sending of erroneous orders or the system otherwise functioning in a way that may create or contribute to a disorderly market.

2. An investment firm that engages in algorithmic trading shall at least annually provide to its home Competent Authority a description of the nature of its algorithmic trading strategies, details of the trading parameters or limits to which the system is subject, the key compliance and risk controls that it has in place to ensure the conditions in paragraph 1 are satisfied and details of the testing of its system.

A competent authority may at any time request further information from an investment firm about its algorithmic trading and the systems used for that trading.

1. An investment firm that engages in algorithmic trading shall have in place effective systems and **professional** risk controls to ensure that its trading systems are resilient and have sufficient capacity, are subject to **comprehensive** trading thresholds and limits and prevent the sending of erroneous orders or the system otherwise functioning in a way that may create or contribute to a disorderly market **or speculations which are damaging for the economy as a whole.**

2. An investment firm that engages in algorithmic trading shall on a **monthly basis** provide to its home Competent Authority a description of the nature of its algorithmic trading strategies, details of the trading parameters or limits to which the system is subject, the key compliance and risk controls that it has in place to ensure the conditions in paragraph 1 are satisfied and details of the testing of its system. **Apart from that it proves once a month that its activities have not resulted in negative effects on the market and to the economy as a whole (as recorded in a list by ESMA).** A competent authority may at any time request further information from an investment firm about its algorithmic trading and the systems used for that trading. If this information is not made available or if the review of this information by the authorities provides a negative result, the activity of this investment firm has to be prohibited.

4. An investment firm that provides direct electronic access to a trading venue, (...)

4. An investment firm that provides direct electronic access to a trading venue, (...)

4 a (new)

An investment firm takes all technical and organisational measures to collect a Financial Transaction Tax. It ensures the settlement of this tax as soon as the relevant legal regulation has come into force.

4 b (new)

High Frequency Trading, a special form of algorithmic trading, is prohibited. ESMA is preparing a proposal for a definition of this special form of trading.

4 c (new)

ESMA prepares an annual report on algorithmic trading. This report contains a list of investment firms, their business model and an impact assessment of its activities on the market concerned in particular and the economy as a whole in general. This report must be submitted to the European Commission, the Council and the Parliament. In case of increased risks or a lack of macroeconomic benefit, it is necessary to impose a general ban on this practice.

(...)

Reason:

algorithmic trading needs to be scrutinized; after all this concerns machine-controlled trading on a large scale, which quasi “automatically” determines important data of our economic life, which means that price developments - if at all - can only be understood by a small highly specialised group of experts. The macroeconomic benefit of this practice is fundamentally questionable; it must therefore be proven for

each individual business model, which otherwise has to be banned; the same applies if it would trigger increased disturbances of the market or even put the stability of the market at risk.

Article 19 Specific requirements for MTFs

European Commission

(...)

3. Member States shall require that investment firms or market operators operating an MTF to have arrangements to identify clearly and manage the potential adverse consequences, operation of the MTF or for its participants, of any conflict of interest between the interest of the MTF its owners or its operator and the sound functioning of the MTF.

(...)

5. Member States shall ensure that Articles 24, 25, 27 and 28 are not applicable to the transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. (...)

Reason:

These provisions increase the safety of securities trading. They should therefore also apply to the transactions depicted in the proposal. Apart from that, trading on an MTF must be subject to the provisions of the trade in the same way as trading on regulated markets. In any case, it should be considered to abolish these trading venues (MTF und OTF). After all, permitting MTFs was also the start for an excessive fragmentation of the market, accompanied by regulatory arbitrage.

Amendment Application

(...)

3. Member States shall require that investment firms or market operators operating an MTF to have arrangements to identify clearly and manage the potential adverse consequences, operation of the MTF or for its participants, of any conflict of interest between the interest of the MTF its owners or its operator and the sound functioning of the MTF.

These arrangements are specified by ESMA.

(...)

(delete)

Article 20 Specific requirements for OTFs

European Commission

Amendment Application

1. Member States shall require ...

Delete (entire Article)

Reason:

there are pros and cons for creating a further category of regulated trading venues. Maybe, it is possible to make currently opaque market structures and off-market transactions more transparent. On the other hand, this would fragment the market even further. And, there is the additional attraction to transfer transac-

tions and less regulated MTFs to even less regulated OTFs. There is a danger that the in any case the very high trading frequency and the very high volume of open derivative positions will rise again. Therefore, opaque market structures and OTC transactions have to be banned (see Article 20a new).

New Article 20a (new) Ban on unregulated trading venues

European Commission

Amendment Application

Trading taking place off regulated trading venues has to be diverted to regulated trading venues; otherwise it has to be banned. Member States shall ensure that unregulated trading venues are banned on their territory.

Reason:

it must be the aim to provide a legal framework for investment services. The reverse order, namely that market developments provide the scope for regulation would consequently require a continuous revision of the present Directive.

Article 23 Conflicts of interest

European Commission

1. Member States shall require investment firms to take all steps,...

2. Where organisational or administrative arrangements made by the investment firm in accordance with Article 16(3) to manage conflicts of interest are not sufficient to ensure with reasonable confidence, that risks of damage to client interests will be prevented, (...)

The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 measures to:

(a) to define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and/or disclose conflicts of interest when providing various investment and ancillary services and combinations thereof;
(...)

Reason: changes would make rules clearer.

Amendment Application

1) Member States shall require investment firms to take **comprehensive** steps,...

2. Where organisational or administrative arrangements made by the investment firm in accordance with Article 16(3) to manage conflicts of interest are not sufficient to ensure that risks of damage to client interests will be prevented in a **sustainable manner**, (...)

The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 measures to:

(a) to define the steps that investment firms **have to fulfil** to take to identify, prevent, manage and/or disclose conflicts of interest and ancillary services and combinations thereof;
(...)

Section II - Provision to ensure investor protection

Article 24 General principles and information to clients

Art 24 (3)

European Commission

3. Appropriate information shall be provided to clients and potential clients about:

- the investment firm and its services: when investment advice is provided information shall specify whether the advice is provided on an independent basis and whether it is based on a broad or on a more restricted analysis of the market and shall indicate whether the investment firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended to clients; (...)

Reason:

the proposed regulation is incomplete as clients also want to know whether the on-going assessment of the suitability is binding and contractually guaranteed. Before, it was often the case in Austria that such an on-going assessment was only promised verbally, and no legal entitlement existed. Many small investors relied on the verbal promise.

Amendment Application

3. Appropriate information shall be provided to clients and potential clients about:

- the investment firm and its services: when investment advice is provided information shall specify whether the advice is provided on an independent basis and whether it is based on a broad or on a more restricted analysis of the market and shall indicate whether the investment firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended to clients **or whether this on-going assessment of the suitability will not take place;** (...)

Article 24 (5)

European Commission

5. When the investment firm informs the client that investment advice is provided on an independent basis, the firm

- i) ...
- ii) shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients.

Reason:

only providing information concerning independence is an expression of an inadequate regulatory system as the regulation on commissions is dependent on the information given to clients.

Article 24 (7)

European Commission

7. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component.

Amendment Application

5. When the investment firm **provides** the client with independent investment advice,

- i)...
- ii) shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients.

Amendment Application

7. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component.

A coupling product or a product combination of investment and savings products may not be offered to small investors.

ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations in paragraph 1.

Reason:

savings products, which are subject to deposit protection and securities that for example securitize rights to claim (such as bonds) or co-owner rights (for example share certificates in an investment fund), do not only have basically different legal and factual characteristics; they are also aimed at private investors with different expectations as to risk and yield. Savings products are suitable for small investors who are risk averse; investment products are suitable for investors, who are willing to take a greater risk. The combination of two products with greatly different risk-yield profiles unites

ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations in paragraph 1.

product characteristics, which do not belong together. Ultimately, in particular small investors find it impossible to make a risk-oriented product selection in respect of the coupling products referred to. There is also reason to fear that for example the combination of "secure" (savings deposit) and "risky" (equity fund) products results in small investors falsely rating a product mix as "secure". Combined products neither fulfil the basic requirement of transparency, nor the primacy of simplicity (simple product); therefore they may be overall rated as unsuitable for small investors.

Article 25 Assessment of suitability and appropriateness and reporting to clients

Article 25 (2)

European Commission

2. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 1 ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

Amendment Application

2. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 1 **obtain from** the client or potential client the **necessary** information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client.

Where the investment firm considers on the basis received under the previous subparagraph 1 that the product or service is not appropriate to the clients or potential clients, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format.

Where clients or potential clients do not provide the information referred to under the first subparagraph, or where they provide insufficient information regarding their knowledge and experience, the investment firm shall warn them that the firm is not in a position to determine whether the service or product envisaged is appropriate for them. This warning may be provided in a standardised format.

Reason:

the formulation in the text of the Directive should be harmonised in paragraph 1 and 2, as the appropriateness test also requires a certain quality of information. In our opinion, the current term “ask” is too non-committal and inappropriate.

Article 25 (3) Execution only

European Commission

3. Member States shall allow investment firms when providing investment services that only consist of execution or the reception and transmission of client orders with or without ancillary services, with the exclusion of the ancillary service specified in Section B (1) of Annex 1 to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 2 where all the following conditions are met:
(...)

Where the investment firm...

...or potential clients. **(delete)**

Where the clients ...

... is appropriate for them. **(delete)**

Amendment Application

3. Member States shall allow investment firms when providing investment services that only consist of execution or the reception and transmission client orders with or without ancillary services, with the **exclusion of services to small investors, and** of the ancillary service specified in Section B (1) of Annex 1 to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 2 where all the following conditions are met:
(...)

Reason:

due to the fact that also simple saving deposits and bonds, which require little explanation, have over the years been converted to complicated product variants (structured deposits, structured bonds) in the product differentiation process, the BAK regards the differentiation into complex and non-complex products as being out of date. Small investors should

always be able to expect a higher level of service. In view of the execution-only provision, an exception should be made for small investors so that these services will also be subject to appropriateness test.

Article 25 (a) (new) Presumption of a causal connection

European Commission

Amendment Application

Member States shall ensure that investment firms when providing investment services as defined in this paragraph, are liable to non-professional clients for providing an investment service that does not conform to the Directive, in particular in respect of existing conflicts of interest, infringement against the obligation to act in the best interest of the client, against the information obligation or the obligation to conduct a suitability and appropriateness test, unless the investment firm supplies proof that the client, even if the investment service had conformed to the Directive, would not have taken a different investment decision.

Reason:

practice shows time and again that in particular non-professional clients do not always have a concrete idea of the product they have been offered, not least because the investment firm does not or does not adequately meet its information obligations. The consequence with regard to the legal enforcement of claims for damages is that information not conforming to the Directive - such as the failure to inform about risks -

is regarded as not being the cause for the investment decision. A legal presumption according to which in case of investment services, which do not conform to the Directive, the causal connection for the investment decision is presumed, resolves this problem. At the same time, such a regulation also has a general preventive effect as investment firms have to take into account that non-professional clients will find it easier to enforce any claims for damages.

Article 30 Transactions executed with eligible counterparties

European Commission

(...)
 2) Member States shall recognise as eligible counterparties for the purposes of this Article investment firms, credit institutions, (...) national governments and their corresponding offices including public bodies that deal with public debt at national level, central banks and supranational organisations.
 (...)

Amendment Application

(...)
 2) Member States shall recognise as eligible counterparties for the purposes of this Article investment firms, credit institutions, (...) national governments and their corresponding offices including public bodies that deal with public debt at national level, central banks and supranational organisations.
However, municipal authorities and regional administrative bodies have to be exempt.
 (...)

Reason: the inappropriateness of this classification for the authorities referred to has already been announced in the recital, a fact we want to refer to at this point.

Article 31 Monitoring of compliance with the rules of the MTF or the OTF and with other legal obligations

European Commission

1. Member States shall require that investment firms and market operators operating an MTF or OTF establish and maintain effective arrangements and procedures, relevant to the MTF or OTF for the regular monitoring of the compliance by its users or clients. Investment firms and market operators operating an MTF or an OTF shall monitor the transactions undertaken by their users or clients under their systems in order to identify breaches of those rules, (...)

Amendment Application

1. Die Member States shall require that investment firms and market operators operating trading venues establish and maintain effective arrangements and procedures relevant to the **trading venues** for the regular monitoring of the compliance by the users or clients of **the trading venue**. Investment firms and market operators operating **the trading venues** shall monitor the transactions undertaken by their users or clients under their systems in order to identify breaches of those rules, (...)
1(a)(new) Member States shall ensure that investment firms and market operators, operating a trading venue, record their transaction to ensure identification of the client ("trade marking").

2. Member States shall require investment firms and market operators operating an MTF or OTF to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority.

Member States shall also require investment firms and market operators operating an MTF or an OTF to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through its systems.

Reason:

each breach must be subject to reporting in order to exclude any discretion as to what is serious and what is not. "Trade marking" is necessary to provide the competent authority with information as to how many orders have been placed by machines and how many by persons and to which extent computer-controlled trading is responsible for any market distortion.

Article 35 SME growth markets

European Commission

Member States shall provide that...

Reason:

this provision does not concern a special form of MTFs whose general purpose it is to promote SMEs (as could be concluded from the headline), but: "the majority of issuers whose financial instruments are admitted to trading on the market are small and medium-sized enterprises." Hence, "small" fi-

2. Member States shall require investment firms and market operators operating **a trading place** to report significant breaches of its rules or disorderly trading conditions or conduct that may involve market abuse to the competent authority **(delete)**.

Member States shall also require investment firms and market operators operating **trading venues** to supply the relevant information without delay to the authority competent for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through its systems.

Amendment Application

Delete (entire Article)

ancial enterprises are also included. There is reason to fear a loophole, which in particular financial institutions might use to "soften" the MTF Regulation. It must be the aim to reduce the number of authorised trading venues to make efficient regulation to be possible in the first place.

Article 36 Freedom to provide investment services and activities

European Commission

1. (...) Member States shall not impose any additional requirements on such an investment firm or credit institution in respect of the matters covered by this Directive.

(...)

6. Member States shall, without further legal or administrative requirement, allow investment firms and market operators operating MTFs and OTFs from other Member States, to provide appropriate arrangements on their territory so as to facilitate access to and use of their systems by remote users or participants established in their territory.

(...)

Reason:

maintaining the stability of the financial market must be the utmost priority. Should this be put at risk in a country, where a certain investment service has been authorised, the Member State must be able to take appropriate steps.

Amendment Application

1. (...) **Member States may impose additional requirements on such an investment firm or credit institutions in respect of the matters covered by this Directive if this is required to maintain the stability of the financial market or to prevent excessive speculation, which has a negative effect on the economy as a whole. This measure must be accompanied by information and the provision of reason to ESMA.**

(...)

6. Member States shall **(delete)** allow investment firms and market operators operating MTFs and OTFs from other Member States, to provide appropriate arrangements on their territory so as to facilitate access to and use of their systems by remote users or participants established in their territory. **If this is required to maintain the stability of the financial market or prevent excessive speculation, which has a negative effect on the economy as a whole, legal or administrative requirements, including the rejection of access, may be imposed.**

(...)

Article 38 Access to regulated markets

European Commission

(...)

2. Member States shall not impose any additional regulatory or administrative requirements in respect of matters covered by this Directive, on investment firms exercising the right conferred by paragraph 1.

Reason:

transparency regarding market participants must also exist with regard to regulated markets. If the stability of the financial market is at risk the Member State concerned must be able to take appropriate action.

Article 41 Establishment of a branch

European Commission

1.)...

(d) ... sufficient initial capital is at free disposal of the branch;

(...)

(f) the third country where the third country firm is established has signed an agreement with the Member State where the branch should be established, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on income and on capital and ensures an effective exchange of information on tax matters, including, if any, multilateral tax agreements;

Amendment Application

(...)

2. Access of an investment firm to the regulated market of another Member State is subject to reporting. Member States shall impose additional regulatory or administrative requirements in respect of matters covered by this Directive, on investment firms exercising the right conferred by paragraph 1 if the stability of the financial market is at risk.

Amendment Application

1.)...

(d) ...**the branch must comply with the same requirements concerning the initial capital as an investment firm from another Member State.**

(...)

(f) the branch must be subject to the same taxation in the country of destination as other investment firms with corresponding business model.

An effective exchange of information on tax matters, including, if any, multilateral tax agreements **must also take place.**

(...)

2. Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services to retail clients in those Member States' territory shall establish a branch in the Union.

3) The Commission may adopt a decision in accordance with the procedure referred to in Article 95 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third country (...) and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this Directive.

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;

(...)

2. Member States shall require that a third country firm **providing investment services in its territory shall, in any event, establish a branch in the Union.**

3) The Commission may adopt a decision in accordance with the procedure referred to in Article 95 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third country (...) and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this Directive. **In the Member State's territory (in the same way as other investment firms with corresponding business model) the branch is subject to the provisions of the present Directive and all other European and national regulations.**

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, **which is at least equivalent to that of the country of destination or to European provisions;**

(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) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.

(...)

Reason:

the problem of tax evasion and escaping into tax exile as well as regulatory arbitrage by means of constructions with third countries must be tackled as a matter of urgency. Under no circumstances must the options of bypassing tax obligations be extended again. In addition, such incomplete regulations would result in unfair competition at the expense of EU investment service providers.

(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; which are at least equivalent to those of the country of destination or to European provisions;

(c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions, **which are at least equivalent to those of the country of destination or to European provisions;**

(d) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation, **which are at least equivalent to those of the country of destination or to European provisions.**

(...)

Therefore the rules - in accordance with the Amendment Application have to be specified in more detail. Terms such as "appropriate" or "sufficient" are too vague and have to be rejected.

Article 42 Obligation to provide information

European Commission

...
(d) information about the initial capital at free disposal of the branch.

Reason:

the proposed change results from reasons to maintain the stability of the financial market.

Amendment Application

...
(d) information about the initial capital **of the branch and the maximum leverage that shall be carried out in the coming financial year.**

Article 43 Granting of the authorisation

European Commission

(...)
2. The branch of the third country firm authorised in accordance with paragraph 1, shall comply with the obligations laid down in Articles 16, 17, 23, 24, 25, 27, 28(1) and 30 of this Directive and in Articles 13 to 23 of Regulation (EU) No. .../... [MiFIR] and the measures adopted thereto and shall be subject to the supervision of the competent authority in the Member State where the authorisation was granted.

Member States shall not impose any additional requirements on the organisation and operation of the branch in respect of matters covered by this directive.

Reason:

exemptions from MiFID or MiFIR damage fair competition and the stability of the financial market.

Amendment Application

(...)
2. The branch of the third country firm authorised in accordance with paragraph 1, shall comply with all obligations **of this Directive and of Regulation (EU) No. .../... [MiFIR] and the measures adopted thereto** and shall be subject to the supervision of the competent authority in the Member State where the authorisation was granted.

Member States **may, if it is required to maintain financial stability,** impose additional requirements on the organisation and operation of the branch in respect of matters covered by this directive.

Article 44 (new) Provision of services in other Member States

European Commission

1. A third country firm authorised in accordance with Article 43 shall be able to provide the services and activities in other Member States of the Union without the establishment of new branches. (...)

Reason:

Member States must - in accordance with the specific situation of their country - be granted the same right to inspection as the "first" Member State. In this context, the public interest in maintaining the stability of the financial market takes precedence over the free movement of services. Apart from that, the proposed cooperation procedure involves considerable time and effort and requires the preparation of an additional procedure, making the regulation ponderous and inefficient.

Article 46 Withdrawal of authorisations

European Commission

The competent authority which granted an authorisation under Article 43 may withdraw the authorisation issued to a third country where such a firm:
(...)

d) has seriously and systematically infringed the provisions
(...)

Amendment Application

Complete deletion of this Article and replace:

Art 44 (new)

A third country firm intending to provide services and activities in other Member States of the EU is subject to a new authorisation procedure as defined in Article 43.

Amendment Application

The competent authority which granted an authorisation under Article 43 **resp. the authority of the host Member State must** withdraw the authorisation issued to a third country where such a firm:
(...)

d) **has more than twice** infringed the provisions
(...)

Reason:

infringing several times the provisions of the Directives is sufficient to justify a withdrawal of the authorisation, and necessary to ensure the stability of the financial market in the public interest. The authority of the Host Member State itself must have the option of taking immediate action.

Title III - Regulated markets

Article 47 Authorisation and applicable law

European Commission

Amendment Application

1.) Member States shall reserve authorisation as a regulated market to those systems ...

1. (...)

(...)

5.) ...

5.) (...)

f (new) if this is required to maintain the stability of the financial market.

Reason:

Due to the fact that this concerns a central public interest this option has to be provided.

Article 51 Systems resilience, circuit breakers and electronic trading

European Commission

Amendment Application

1) Member States shall require a regulated market to have in place effective systems, procedures and arrangements to ensure its trading systems are resilient (...) to ensure continuity of its services if there is any unforeseen failure of its trading systems.

1) Member States **stipulate the appropriate measures in order to ensure that all trading venues implement** effective systems, procedures and arrangements to ensure its trading systems are resilient (...) to ensure continuity of its services if there is any unforeseen failure of its trading systems.

2. Member States shall require a regulated market to have in place effective

2. Die Member States **stipulate the appropriate measures in order to ensure**

systems, procedures and arrangements to reject orders that exceed pre-determined volume and price thresholds (...) to be able to cancel, vary or correct any transaction

3. Member States shall require a regulated market to have in place effective systems, (...) to limit the minimum tick size that may be executed on the market.

4. (...)
Member States shall also require that the regulated market set appropriate standards regarding risk controls and thresholds on trading through such access and is able to distinguish and if necessary to stop orders or trading by a person using direct electronic access separately from or trading by the member or participant.
(...)

Reason:

the term “requires” is based on out-of-date presumptions regarding the “self-control in the market”. Apart from that, the security measures have to apply to all trading venues, hence also to MTFs and (in case of authorisation, to which the BAK is opposed) to OTFs. A retention period is necessary to

that all trading venues implement effective systems, procedures and arrangements to reject orders that exceed pre-determined volume and price thresholds (...) to be able to cancel, vary or correct any transaction.

3. Member States stipulate **the appropriate measures in order to ensure that all trading venues implement** effective systems, (...) to limit the minimum tick size that may be executed on the market.

4. (...)
Member States stipulate minimum standards that all trading venues set reliable high standards regarding risk controls and thresholds on trading through such access and is able to distinguish and if necessary to stop orders or trading by a person using direct electronic access separately from or trading by the member or participant. **It must be possible to assign the individual trading activities to individual market participants.**

4 (a) (new) Member States require that all trading venues have to maintain orders in the order book for at least 24 hours.

(...)

8. (new) Member States require that any bid placed on the trading venue regarding the purchase or sale of a product is binding and has to be executed.

prevent any damaging market influence by high-frequency trading. The new regulation that only binding bids may be placed, prevents the creation of “virtual” liquidity.

Article 53 Suspension and removal of instruments from trading

European Commission

1. Without prejudice to the right of the competent authority under Article 72(1)(d) and € to demand suspension or removal of an instrument from trading, the operator of the regulated market may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such a step would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

Member States shall require (...)

Member States shall require that other regulated markets, MTFs and OTFs trading the same financial instrument also suspend or remove that financial instrument from trading, (...)

2.(...)

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to specify the list of circumstances constituting significant damage to the investors' interests and the orderly functioning of the internal market referred to in paragraphs 1 and 2 and to determine issues relating to the non-disclosure of information about the issuer or financial instrument as referred to in paragraph 1.

Reason:

it must be possible to suspend trading in substantiated cases without the requirement to clarify or contend difficult legal issues because of unclear formulations.

Amendment Application

1. Without prejudice to the right of the competent authority under Article 72(1)(d) and (e), to demand suspension or removal of an instrument from trading, the operator of **a trading venue** may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market. **(delete rest)**

Member States shall require (...)

Member States shall require that other regulated markets, MTFs and OTFs trading the same financial instrument **also suspend or remove that financial instrument from trading.**

2. (...)

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to specify **situations, which constitute significant reasons for the damage of the investor's interest according to paragraphs 1 and 2 (for example to maintain the stability of the financial market) and the orderly functioning of the internal market.**

Article 55 Access to the regulated market

European Commission

(...)

5. Member States shall ensure that the rules on access to or membership of the regulated market provide for the direct or remote participation of investment firms and credit institutions.

6. Member States shall, without further legal or administrative requirements, allow regulated markets from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and trading on those markets by remote members or participants established in their territory.

(...)

Reason: access to remote participation and the provision of the arrangements referred to must be at the discretion of the Member State.

Amendment Application

(...)

5. Member States shall ensure that the rules on access to **a trading venue** or the membership **to the trading venue** provide for the direct participation of investment firms and credit institutions.

6. delete

(...)

Article 56 Monitoring of compliance with the rules of the regulated market and with other legal obligations

European Commission

1. Member States shall require that regulated markets establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with their rules. Regulated markets shall monitor the transactions and orders undertaken by their members or participants under their systems in order to identify breaches of those rules disorderly trading conditions or conduct that may involve market abuse.

2. Member States shall require the operators of the regulated markets to report significant breaches of their rules

(...)

Amendment Application

1. Member States shall require that **all trading venues** establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with their rules. **Member States control the trading venues in respect of monitoring** the transactions and orders undertaken by their members or participants under their systems in order to identify breaches of those rules disorderly trading conditions or conduct that may involve market abuse.

2. Member States shall require the operators of the regulated markets to report **(delete)** breaches of their rules

(...)

Reason:

the rule is aimed at the outdated presumption of “self-control of the market”. All trading venues must be subject to the same requirements to avoid regulatory arbitrage. In the interest of stabilising the

financial markets, operators of regulated markets should not have the discretion to decide whether the reporting obligation applies.

Title IV - Position limits and reporting

Article 59 Position limits

European Commission

1. Member States shall ensure that regulated markets, operators of MTFs and OTFs which admit to trading or trade commodity derivatives apply limits on the number of contracts which any given market members or participants can enter into over a specific period of time or alternative arrangements with equivalent effect such as position management with automatic review thresholds to be imposed in order to

- (a) support liquidity,
- (b) prevent market abuse,
- (c) support orderly pricing and settlement conditions.

Amendment Application

1. **Member States shall require that regulated markets, operators of MTFs and OTFs which admit to trading or trade commodity derivatives** apply limits on the number of contracts which any given market members or participants can enter into over a specific period of time. **The limits have to be reported to ESMA and shall be controlled by it. ESMA sets for members or market participants operating on different trading venues within the EU an overall limit which applies throughout the EU. In order to ensure efficient control, ESMA has to introduce a position management with automatic review thresholds in order to**

- (aa) (new) ensure the stability and the continuous development of the financial market,**
- (ab) (new) ensure the best possible support of a stable macroeconomic development by trading derivatives for example by defining and sanctioning “excessive speculation”,**

- (a) support liquidity,
- (b) prevent market abuse,
- (c) support orderly pricing and settlement conditions.

(...) taking account of the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market.

(...) taking account of the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market.

The option to the ex ante and ex post exclusion of individual users and/or user categories is to be provided. Concerning the ex ante exclusion, ESMA shall prepare a list for certain derivatives and certain traders.

This also contains a ban on accessing pension funds, commodity index funds and exchange-traded funds on derivative markets. A ban shall also be imposed on trading against proprietary capital by investment service providers also administering client funds, and for systematic internalisers with commodity derivatives.

(...)
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to determine the limits or alternative arrangements on the number of contracts ...

(...)
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to determine the limits **(delete)** on the number of contracts ...

4. Competent authorities shall not impose limits or alternative arrangements which are more restrictive than those adopted pursuant to paragraph 3 except in exceptional cases where they are objectively justified and proportionate taking into account the liquidity of the specific market and the orderly functioning of the markets. The restrictions shall be valid for an initial period not exceeding six months from the date of its publication on the website of the relevant competent authority. Such a restriction may be renewed (...)

4. Competent authorities are generally permitted to impose limits which are more restricted than those adopted pursuant to paragraph 3 to achieve the aims referred to under paragraph 1. ESMA has to be informed accordingly.

The restrictions shall be valid for an initial period not exceeding six months from the date of its publication on the website of the relevant competent authority. Such a restriction may be renewed (...)

Reason: it is inconclusive why derivatives other than commodity derivatives should not also be traded in accordance with these provisions. Member States must also be permitted - for example to secure the stability of their financial market - to introduce stricter provisions than specified by the European Commission. The ban of certain trader categories and trading against proprietary capital with commodity derivatives counteracts an

exclusively speculative interest in food products and commodities. After all, it has to be the aim to establish within the EU a harmonised obligation to introduce position limits. These position limits have to be monitored by a central authority in order to prevent bypassing them by trading on different trading venues (and thereby accumulating position limits).

Article 60 Position reporting by categories of traders

European Commission

1. Member States shall ensure that regulated markets, MTFs, and OTFs which admit to trading or trade commodity derivatives or emission allowances or derivatives thereof: (...)

The obligation laid down in point (a) shall only apply when both the number of traders and their open positions in a given financial instrument exceed minimum thresholds.

2. (...)

Reason: see Article 59. As this only concerns aggregated commodities, threshold values do not make sense.

Amendment Application

1. Member States shall ensure that regulated markets, MTFs, and OTFs which admit to trading or trade **derivatives** or emission allowances or derivatives thereof: (...)

c) (new)

The competent authorities forward this data to ESMA or the competent authorities of other Member States on request. (delete)

2. (...)

Title V - Data reporting services

Article 61 Requirement for authorisation

European Commission

(1) Member States shall require that the provision of data reporting services described in Annex 1, Section D as a regular occupation or business be subject to prior authorisation in accordance with the provisions of this section. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article 69.

(...)

Reason:

due to the fact that the entrusted undertakings fulfil special tasks - similar for example to the security sector - under safeguarding data protection and that they have to ensure access free of discrimination, they have to be subject to a special authorisation procedure and must fulfil appropriate

Article 62 Scope of authorisation

European Commission

1. The home Member State shall ensure that the authorisation specifies the data reporting service which the data reporting service provider is authorised to provide. A data reporting service provider seeking to extend its business to additional data reporting services shall submit a request for extension of its authorisation.

2. (...)

Reason: see Article 61

Amendment Application

(1) Member States shall require that the provision of data reporting services described in Annex 1, Section D as **a special occupation that in the public interest is subject to the special conditions and requirements on the reliability of the provider**, and requires the prior authorisation in accordance with the provisions of this section. **As to the entrusted tasks, the service provider shall operate as public agency.** This authorisation will be granted **by ESMA**.

(...)

requirements. As the undertakings are operating beyond intergovernmental borders, the authorisation should be granted by an EU authority (ESMA).

Amendment Application

1. The home Member State **determines (delete)** the data reporting services, which the data reporting service provider **intends to provide, and submits these for approval to EMSA**. A data reporting service provider seeking to extend its business to additional data reporting services shall submit a request for extension of its authorisation, **which also requires ESMA's approval**.

2. (...)

Article 64 Withdrawal of organisation

European Commission

(1) The competent authority may withdraw the authorisation issued to a data reporting services provider where the provider (...)

Reason:

see Article 61. In case of such serious infringements the authority may not be given discretion with regard to it taking action.

Amendment Application

(1) **ESMA or** the competent authority **has to** withdraw the authorisation issued to a data reporting services provider where the provider (...)

(e) (new) contributes to putting the stability of the financial market at risk.
(...)

Article 66 Organisational requirements (on Approved Publication Arrangements / APA)

European Commission

1) The home Member State shall require an APA to have adequate policies and arrangements in place to make public the information required under Articles 19 and 20 of Regulation (EU) NO. .../... [MiFIR] as close to real time as is technically possible, on a reasonable commercial basis. (...)

2) The home Member State shall require the APA to operate and maintain effective administrative arrangements designed to prevent conflicts of interest with its clients.

(3) The home Member State shall require the APA to have sound security mechanisms in place designed to guarantee the security of the means of transfer of information, minimise the risk of data corruption and unauthorised access and prevent information leakage before publication. (...)

Amendment Application

1) The home Member State shall require an APA to have policies and arrangements in place to make public the information required under Articles 19 and 20 of Regulation (EU) NO. .../... [MiFIR] **as close to real time as is technically possible.** (...)

2) The home Member State **obliges the APA to undertake effective administrative arrangements designed to prevent conflicts of interest with its clients.**

(3) **The Home Member State obliges the APA to arrange security mechanisms** designed to guarantee the security of the means of transfer of information, **prevent** minimise the risk of data corruption and unauthorised access and to prevent information leakage before publication. (...)

Reason:

the term “adequate” has been deleted because, in particular in this context, it is not clear what is meant by it. Any approval or rejection is only possible if a delegated act exists. A clearer wording would also be preferred concerning the other points.

Article 67 Organisational requirements (on Consolidated Tape Providers / CTP)

European Commission

(1) The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 5 and 19 of the Regulation (EU) No. .../... [MiFIR], consolidate it into a continuous electronic data stream and make the information available to the public as close to real time as is technically possible, on a reasonable commercial basis:
(...)

(2) The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 9 and 20 of the Regulation (EU) No. .../... [MiFIR], consolidate it into a continuous electronic data stream and make the information available to the public as close to real time as is technically possible, on a reasonable commercial basis including, at least, the following details:

(...)

Amendment Application

(1) The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 5 and 19 of the Regulation (EU) No. .../... [MiFIR], consolidate it into a continuous electronic data stream and make the information available to the public as close to real time as is technically possible
(delete):
(...)

(i) (new)
when stating the OTC code it is mandatory to state the counterparty
(...)

(2) The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 9 and 20 of the Regulation (EU) No. .../... [MiFIR], consolidate it into a continuous electronic data stream **and make the following information available as close to real time as is technically possible including, at least, the following details:**

(i) (new)
when stating the OTC code it is mandatory to state the counterparty
(...)

Reason: see Article 66

Article 68 Organisational requirements (on Approved Reporting Mechanisms/ARM)

European Commission

Amendment Application

1. The home Member State shall require an ARM to have adequate policies and arrangements in place to report the information required under 23 of the Regulation (EU) No. .../... [MiFIR] as quickly as possible, and no later than the close of the following working day. Such information shall be reported in accordance with the requirements laid down in Article 23 of the Regulation (EU) No. .../... [MiFIR] on a reasonable commercial basis.

1. The home Member State shall require an ARM to have **detailed** polices and arrangements in place to report the information required under 23 of the Regulation (EU) No. .../... [MiFIR] as quickly as possible, and no later than the close of the following working day. Such information shall be reported in accordance with the requirements laid down in Article 23 of the Regulation (EU) No. .../... [MiFIR] **(delete)**.

(...)

(...)

Reason: See Article 66.

Title VI Competent authorities

Article 69 Designation of competent authorities

European Commission

Amendment Application

...
2. The competent authorities referred to in paragraph 1 shall be public authorities, without prejudice to the possibility of delegating tasks to other entities where that is expressly provided for in Article 23(4).

(...)
2. The competent authorities referred to in paragraph 1 **are exclusively public authorities. (delete)**

(...)

(...)

Reason:
in particular in this sensitive area, no tasks may be transferred to private companies or divested entities.

Article 71 Powers to be made available to competent authorities

European Commission

1. (...)
2. (...)
- d) require existing telephone and existing data traffic records held by investment firms where a reasonable suspicion exists that such records related to the subject-matter may be relevant to prove a breach by the investment firm of its obligations under this Directive; these records shall however not concern the content of the communication to which they relate;

(...)

Reason:

the in any case high level of non-transparency of the financial sectors requires such information already “where a suspicion exists” and also the option to undertake house searches.

Amendment Application

1. (...)
2. (...)
- d) require existing telephone and existing data traffic records held by investment firms where a **suspicion** exists that such records related to the subject-matter may be relevant to prove a breach by the investment firm of its obligations under this Directive; these records shall however not concern the content of the communication to which they relate;

(j) (new)
to undertake unannounced house searches.

(...)

Article 72 Remedies to be made available to competent authorities

European Commission

1. (...)
 (g) limit the ability of any person or class of persons from entering into a commodity derivative, (...)

Reason: in accordance with maintaining the stability of the financial market all derivatives have to be included. The complete exclusion from trading must also be an option.

Article 74 Publication of sanctions

European Commission

(...) unless such disclosure would seriously jeopardise the financial markets. Where the publication would cause a disproportionate damage to the parties involved, competent authorities shall publish the sanctions on an anonymous basis.

Reason:
 an anonymous publication does not make sense as this would result in even more uncertainty. Any damage incurred by an individual also increases the deterrence effect.

Amendment Application

1. (...)
 (g) limit the ability of any person or class of persons from entering into a **derivative, (...) or to decide the complete exclusion of a person or class of persons from trading.**
 (...)

Amendment Application

(...) unless such disclosure would seriously jeopardise the financial markets.
(delete)

Article 75 Breach of authorisation requirement and other breaches

European Commission

1. (...)
 z) an investment firm marketing, distributing or selling financial instruments or performing a type of financial activity or adopting a practice in contravention of prohibitions or restrictions imposed based on Article 32 of Regulation (EU) No. .../... [MiFIR].

(...)

Reason: the continuous developments of the sector require an open list.

Amendment Application

1. (...)
 z) an investment firm marketing, distributing or selling financial instruments or performing a type of financial activity or adopting a practice in contravention of prohibitions or restrictions imposed based on Article 32 of Regulation (EU) No. .../... [MiFIR].

Other omissions or breaches which might occur in practice in future and which at the discretion of ESMA also come under this sector are also included.

(...)

Article 76 Effective application of sanctions

European Commission

1. (...)

2. (...)

Reason: in particular breaches in the financial sector may result in damage, which does not only concern individual third parties, but also the general public.

Amendment Application

1. (...)

(h) (new)

The damage resulting from the breach for the economy as a whole and financial stability.

2. (...)

Article 77 Reporting of breaches

European Commission

1. (...)
- b) appropriate protection for employees of financial institutions who denounce breaches committed within the financial institution,
(...)

Reason: these employees have to receive the best possible and comprehensive protection.

Article 77 Reporting of breaches

European Commission

- ...
2. (...)

Reason: Organisations of social partners and stakeholder associations must be included in this list as they represent a large share of the population.

Amendment Application

1. (...)
- b) **best possible and comprehensive** protection for employees of financial institutions who denounce breaches committed within the financial institution,
(...)

Amendment Application

2. (...)
- (d) (new):**
Social partners, or stakeholder associations, such as small investors, consumers committed to protect their members.

Article 80 Extra-judicial mechanism for investors' complaints

European Commission

1. (...)

Member States shall further ensure that all investment firms adhere to one or more such bodies implementing such complaint and redress procedures.

(...)

Reason: this contributes to the balance of the procedures.

Amendment Application

1. (...)

Member States shall further ensure that all investment firms adhere to one or more such bodies implementing such complaint and redress procedures, **as well as to all associations referred to under Article 79(2).**

(...)

Article 80 (a) (new) Limitation of small investors' claims

European Commission

Reason: there were a number of investor scandals during the course of the financial crisis, where non-professional clients were systematically given wrong advice; this concerned in particular the failure not to provide them with information in respect of the risks involved. Many clients, who, because of this, lost their entire savings and reserves, were not able to bear the cost of litigation as the outcome of the legal proceedings was uncertain, and therefore wanted to wait for the outcome of the model case proceedings brought by the consumer protection associations. In view of the fact that such model case proceedings were also supposed to clarify controversial legal aspects, such a procedure makes sense. Due to the fact that in some Member States claims become statute-barred within only three years

Amendment Application

Claims by non-professional clients can be asserted 10 years from the date of knowledge of the provision of investment services that do not conform to the Directive.

from the date of knowledge of the damage and the party that caused it, and because the model case proceedings due to the heavy workload of the courts are normally not finally decided within in such short spaces of time, many legitimate claims by small investors have become statute-barred. An EU-wide statute of limitation of 10 years would in particular allow small investors to wait for the outcome of model case proceedings brought by consumer protection associations and subsequently enable them to enforce their claims. Currently, the investment firms rely on time to expire, and are able to see off, without any effort, many legitimate claims by clients. A statute of limitation of 10 years was already regarded as being appropriate in the Prospectus Directive.

Article 92 Exchange of information with third countries

European Commission

1. Member States and in accordance with Article 33 of Regulation (EU) No 1095/2010, ESMA may conclude cooperation agreements providing for the exchange of information with the competent authorities third countries only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 81. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

Transfers of personal data to a third country (...)

2. Where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have transmitted it, and where appropriate solely for the purposes for which those authorities gave their agreement. The same provision applies to information provided by third country competent authorities.

Reason: securing the financial stability or a well-functioning market is in the public interest and is more important than any business secrets.

Amendment Application

1. Member States and in accordance with Article 33 of Regulation (EU) No 1095/2010, ESMA may conclude cooperation agreements providing for the exchange of information with the competent authorities of third countries.

(delete)

Transfers of personal data to a third country (...)

2. Where the information originates in another Member State, **it may be disclosed to the competent authorities if it is required by them to enforce the present provisions or to ensure the orderly functioning of the market.**

Article 92 Exchange of information with third countries

European Commission

Reason: the approach to allow existing third country firms to be active up to for years without authorisation renders the provisions concerned ad absurdum.

Amendment Application

Delete entire article

Für weitere Fragen stehen Ihnen gerne

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