



European Parliament

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Draft opinion of the Economic Committee of the European Parliament for a Market in Financial Instruments Directive (MiFID) to abolish Directive 2004/39/EC (“Ferber-Report”) – evaluation and draft amendments

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

The instability of the European and global financial markets has a severe impact on the European workers and taxpayers. Therefore, BAK closely follows the regulatory efforts of the European Commission and the European Parliament.

Despite of the enforcement of some regulatory projects few things have changed on the financial markets. According to the most recent statistics of the Bank for International Settlements, currently the volume of derivatives traded over the counter amounts to **708 000 000 000 000 Dollar**, equaling more than 10-fold the world’s GDP. By the way, this value is higher than before the outbreak of the international financial crisis in 2008, when trade was taking place mainly unregulated.

However, a critical review of the present draft amendments of the Economic Committee, BAK leaps to the conclusion that the rapporteur did not even pretend to capture the most urgent problems within the financial markets. Instead, the 216 draft amendments mainly deal with procedural details.

If the present review does not address at least the following subject matters:

- Empowering ESMA to approve financial products;
- Ban on commercial practices that impede a transparent and reliable price-finding process by increasing volatility and instability, as high-frequency-trading, OTC trade;

- Placed orders have to be considered binding – currently, 90% of orders are withdrawn before being placed; this has severe negative consequences for the price finding function of market places;
- Obligatory disclosure of identity (trade marking);
- Ban on the sale of structured products to retail clients within the EU;
- Reduction of trading venues, re-channeling the trade to regulated trading venues, that is stock-exchanges under public-law;
- Closure of loopholes (e.g. exemptions, vague wording and generous provisions for third countries' financial undertakings),

this whole exercise represents itself as the perpetuation of MiFID as it stands with some cosmetic changes. From BAK's point of view, this approach will not lead to a substantial change of the very unstable situation of the financial markets.

It is high time to face reality: Complicated, incomprehensive regulatory provisions comprising highly differentiated laws according to the relevant market concerned (MTF, OTF, SI, SME-exemptions) have become necessary because of the abolition of the „concentration rule“. At the same time, no convincing evidence for the stated cost advantages deriving from trading venues, regulated at different intensity, has been forwarded by the European Commission. Indeed, the scarcely available data lead to the assumption that at present the “cost per value of trading” has increased. Moreover, the newly emerged trading venues are characterized by few, very big players (partially vertically integrated financial undertakings), which are active as bidders, market place and data reporting services providers. One thing is fact: bearing in mind the above mentioned OTC-trading volume the regulatory arbitrage will increase and trade will be progressively channeled to unregulated trading venues (that is outside of any of those regulated under MiFID).

With a view to the upcoming vote relating to „MiFID recast“, we take the occasion to briefly express our concerns about the rapporteur's draft proposal:

Regulatory arbitrage

It is highly regrettable that the present draft opinion adopts the EU-Commission's approach, adding new trading venues to the already highly fragmented financial market, while subjecting the various categories under a different degree of regulation.

This adds to a multitude of exemptions (Art 2 and 3) from the application, riddling the scope of the Directive and rendering 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.

<p>BAK therefore requests you, dear Member of the Parliament, to advocate for the abolition of all exemptions and facultative exemptions from the Directive. All trading venues have to be subduced under the same regulatory provisions. New categories like “organized trading facilities“ as well as special conditions for „SME trading venues“ contribute to the lack of clarity. Trading outside these trading venues must be prohibited, entailing the</p>

consequence that transactions on unregulated trading venues are not suable under Civil Law. To this end, we propose amendments to articles 2,3, 5, 20, 20 (a) new, 35 and 99, attached in Annex I.

Harmful commercial practices

The rapporteur's attempt to put high frequency trading under regulatory control by proposing that all orders entered into the system are valid for **500 milliseconds** (ÄA 113) seems to be a contracted effort. From BAK's point of view, only an explicit ban can bring an end to this counterproductive trade practice which does not offer any value-added for real economy. This ban has to be complemented by the obligation of a minimum holding period in the order book as well as by the mandatory disclosure of the identity (trade marking) – a machine or a trader.

BAK kindly requests you, dear Member of the Parliament, to advocate for the amendment of the Directive accordingly. To this end, we propose draft amendments to articles 17, 31 (1)(a) new, 51 and 53, enclosed in the Annex I.

Commodity speculation

Politics have finally identified the financialisation of commodity markets as an important challenge for regulatory measures. Extremely volatile prices are not only the cause for European consumers to fall into poverty trap but have also a devastating impact on developing countries. They are mainly to be ascribed to the participation of financial investors in commodity trading, whose final purchase decisions are usually made independently from fundamentals. Thus, financial investors have to be seen as the cause for herding, levering out the price finding function of commodity markets. Hence, the introduction of position limits is not sufficient, but preventative measures have to be applied to fight excessive speculation by excluding certain market participants, namely pension funds, commodity index funds and stock exchange traded funds.

BAK calls on you, dear Member of the Parliament, to advocate for the corresponding amendment of the directive. To this end we propose the draft amendment relating to article 59, enclosed in the Annex I.

Small investor protection

In this context it appears that the main priority for the rapporteur encompasses market access for financial institutions as uncomplicated as possible, small investor protection representing rather an obstacle than a political aspiration for better regulation. Austrian courts are confronted by thousands of law-suits of small investors against financial undertakings, which had sold them structured or highly speculative products as safe investments. However, according to the EU-Commission's MiFID draft directive, this practice should continue to be admissible. The rapporteur tops this approach by proposing a further softening in his amendments 64 (structured products), 70 (abolishment of ban of acceptance of commissions), 71 and 75. From BAK's point of view, this is unacceptable, taking into consideration that small investors have to support large rescue and restructuring bank-packages in their role as tax payers.

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 for efficient small investor protection. BAK therefore asks you, dear Member of the Parliament, to advocate for the draft amendments as proposed in Annex I relating to articles 24, 25, Artikel 25 (a) new and 80 (a) new.

Corporate Governance

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.

Therefore, we kindly request you, dear Member of the Parliament, to advocate for the amendment of the Directive in such a way that both organisational systems are considered to enable a harmonised application; see draft amendments relating to articles 9 and 16 in Annex I.

As to the most important draft amendments of “**Ferber-Report**“, we would like to forward the following **evaluation**:

ÄA 32-38	–	The Directive should apply on all market participants without any exemptions in order not to offer alternatives for circumvention.
ÄA 39	–	The introduction of a new category of „SME“-market places leads to further fragmentation of the regulatory framework; therefore the proposed amendment should be rejected.
ÄA 53, ÄA 155	–	Telephone records or records of electronic communication should remain mandatory without alternatives.
ÄA 56-58	–	High frequency trading should be generally abolished rendering special provisions redundant.
ÄA 59, ÄA 116, ÄA 117	+	The proposal enhances better regulatory overview.
ÄA 64	–	This proposal should be rejected, foreseeing direct sale of products to small investors. Sale of structured investments to small investors should expressly be banned.
ÄA 68, 69, 70,	–	Ban on commissions for the sale to small

71, 72, 75		investors is a pre-requisite for their efficient protection. Therefore, the present proposal should be rejected.
ÄA 85	+	The inclusion of OTF into the provision concerning the temporarily or total suspension of trading supports the avoiding of regulatory arbitrage.
ÄA 113, 116	-	The regulatory enforcement of keeping orders entered into the system for at least 500 milliseconds seems to be technically impossible. High frequency trading offers no value-added to real economy, distorts prices and therefore has to be banned.
ÄA 119	+	Rendering the placing of orders, which are subsequently recalled, more expensive seems to offer a good solution to reduce virtual liquidity. This provision should be amended by a minimum holding period for all trading venues (see Annex I)
ÄA 123, ÄA 126	-	Any exemption or delay from the disclosure obligation in case of trading suspension should be rejected.
ÄA 130, ÄA 131, ÄA 132	+	The deletion of alternative regulation instead of position limits as foreseen by the Commission's proposal is the best solution to avoid regulatory arbitrage.
ÄA 133	-	No exemptions should be allowed when fixing position limits.
ÄA 134	-	In exceptional cases Member States must have the competence to set stricter standards for position limits. This principle should apply as long as no harmonized position limits exist within the EU.

We kindly request you, dear Member of the Parliament, to support the proposed amendments of the draft Directive in order to finally achieve the stabilization of the financial markets and financial transactions.

Yours faithfully

Herbert Tumpel
President
F.d.R.d.A.

Günther Chaloupek
on behalf of the director general
F.d.R.d.A.

Annex I: Draft amendments

ANNEX I

Draft Amendments

- **Prevention of regulatory arbitrage**

Article 2.1. Exemptions

European Commission	Amendment Application
<p>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, (...)</p> <p>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.</p> <p>2. The rights conferred by this Directive...</p>	<p>1. This Directive shall not apply to Delete a) to m)</p> <p>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..</p> <p>2. The rights conferred by this Directive...</p>
Reason: There should be no exemptions in favour of certain market participants.	

Article 3 Optional exemptions

European Commission	Amendment Application
<p>1. Member States may choose not to apply this Directive to any persons for which they are the home Member State, (...)</p>	<p>Delete the entire Article</p>
Reason: Optional exemptions will result in (unfair) competition of the systems within the EU.	

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: all trading venues shall be submitted under the same regulatory requirements.	

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 transactions 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 35 SME growth markets

European Commission	Amendment Application
Member States shall provide that...	Delete (entire Article)
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" financial 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 99 Transitional provisions

European Commission	Amendment Application
	Delete entire article
Reason: the approach to allow existing third country firms to be active up to for years without authorisation renders the provisions concerned ad absurdum.	

- **Harmful trading practices**

Article 17 Algorithmic trading

European Commission	Amendment Application
	<p>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.</p>
<p>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.</p>	<p>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.</p>

<p>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.</p> <p>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.</p> <p>4. An investment firm that provides direct electronic access to a trading venue, (...)</p>	<p>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.</p> <p>4. An investment firm that provides direct electronic access to a trading venue, (...)</p> <p>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.</p> <p>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.</p> <p>4 c (new) ESMA prepares an annual report on</p>
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	<p>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.</p> <p>(...)</p>
<p>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.</p>	

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

European Commission	Amendment Application
<p>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, (...)</p>	<p>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, (...)</p> <p>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”).</p>

<p>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.</p>	<p>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).</p>
<p>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.</p>	<p>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.</p>
<p>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.</p>	

Article 51 Systems resilience, circuit breakers and electronic trading

European Commission	Amendment Application
<p>(...)</p>	<p>4 (a) (new) Member States require that all trading venues have to maintain orders in the order book for at least 24 hours. (...)</p>
<p>Reason: A retention period is necessary to 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.</p>	

Article 53 Suspension and removal of instruments from trading

European Commission	Amendment Application
<p>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</p>	<p>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)</p>

<p>damage to the investors' interests or the orderly functioning of the market.</p> <p>Member States shall require (...)</p> <p>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, (...)</p> <p>2. (...)</p> <p>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.</p>	<p>Member States shall require (...)</p> <p>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.</p> <p>2. (...)</p> <p>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.</p>
<p>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.</p>	

- **Commodity speculation**

Article 59 Position limits

European Commission	Amendment Application
<p>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</p>	<p>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.</p>

<p>(a) support liquidity, (b) prevent market abuse, (c) support orderly pricing and settlement conditions.</p> <p>(...) taking account of the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market.</p> <p>(...)</p> <p>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 ...</p>	<p>In order to ensure efficient control, ESMA has to introduce a position management with automatic review thresholds in order to</p> <p>(aa) (new) ensure the stability and the continuous development of the financial market,</p> <p>(ab) (new) ensure the best possible support of a stable macroeconomic development by trading derivatives for example by defining and sanctioning “excessive speculation”,</p> <p>(a) support liquidity, (b) prevent market abuse, (c) support orderly pricing and settlement conditions.</p> <p>(...) taking account of the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market.</p> <p>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.</p> <p>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.</p> <p>(...)</p> <p>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 ...</p>
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<p>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 (...)</p>	<p>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 (...)</p>
<p>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).</p>	

- **Small investors**

Article 24

European Commission	Amendment Application
<p>5. When the investment firm informs the client that investment advice is provided on an independent basis, the firm</p> <p>i) ...</p> <p>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.</p> <p>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</p>	<p>5. When the investment firm provides the client with independent investment advice,</p> <p>i)...</p> <p>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.</p> <p>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</p>

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

Article 25 (3) Execution only

European Commission	Amendment Application
<p>(...)</p> <p>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</p>	<p>(...)</p> <p>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</p>

without the need to obtain the information or make the determination provided for in paragraph 2 where all the following conditions are met: (...)	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
	<p>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.</p>
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 80 (a) (new) Limitation of small investors' claims

European Commission	Amendment Application
	<p>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.</p>
<p>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 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.</p>	

- **Corporate governance**

Article 9 Management body

European Commission	Amendment Application
<p>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:</p> <p>(a) Members of the management body shall commit sufficient time to perform their functions in the investment firm.</p>	<p>(...)</p>

<p>They shall not combine at the same time more than one of the following combinations:</p> <p>i) one executive directorship with two non-executive directorships;</p> <p>ii) four non-executive directorships;</p> <p>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.</p> <p>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.</p> <p>(...)</p> <p>4. ESMA shall develop draft regulatory standards to specify the following:</p> <p>(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 (...)</p> <p>ESMA shall submit those draft regulatory technical standards to the Commission by 31 December 2014.</p>	<p>i) one executive directorship with two non-executive directorships;</p> <p>ii) four non-executive directorships;</p> <p>(delete)</p> <p>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.</p> <p>(...)</p> <p>4. ESMA shall develop draft regulatory standards to specify the following:</p> <p>(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 (...)</p> <p>ESMA shall submit those draft regulatory technical standards to the Commission 6 months after this Directive has come into force at the latest.</p>
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Reason: The BAK 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-internal 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 Governance, the BAK 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 16 Organisational requirements

European Commission	Amendment Application
(...) <p>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.</p> (...)	(...) <p>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.</p> (...)
Reason: The amendment of paragraph 9 is to ensure that client funds are not used for own accounts, in particular by credit institutions.	