4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

13 January 2012

Markus Ferber MEP
By Email: econ-secretariat@europarl.europa.eu

Dear Herr Ferber

Re: Regulatory Law Committee response to Markus Ferber MEP's Questionnaire on the European Commission's proposals for MiFID II/MiFIR.

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

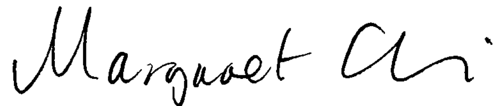
This response to your questionnaire in respect of the European Commission's proposals on the review of the Markets in Financial Instruments Directive ("**MiFID II**") and the proposed Markets in Financial Instruments Regulation ("**MiFIR**") has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms across Europe who operate in or use the services provided by the financial markets. European clients include banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

The Committee's response is submitted under cover of this letter in the format requested. Many of our comments are directed at issues where we think the proposals need greater clarity, as we regard legal certainty is critical to achieving a robust framework and harmonized implementation across Member States.

The CLLS is registered on the European Commission's Transparency Register, and its registration number is **24418535037-82**.

We would be delighted to discuss any of our suggestions or observations with you. You may contact me by telephone on +44 (0) 20 7295 3233 or by email at margaret.chamberlain@traverssmith.com.

Yours sincerely



Margaret Chamberlain
Chair, Regulatory Law Committee
CLLS

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THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu **by 13 January 2012.**

Name of the person/organisation responding to the questionnaire	**The City of London Law Society (CLLS) Regulatory Law Committee**

Theme	**Question**	**Answers**
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	Article 2.1(i) The exemption applies where the defined activity is an "ancillary activity". The concept of an "ancillary activity" needs more clarity. The draft text of the directive contains guidelines in Article 2(3) for the Commission's subsequent delegated acts on the definition of "ancillary" activities, i.e. the extent to which the activity reduces risk and the capital employed in carrying out the activity.

		We favour some clarification of "ancillary" in the directive, but have two concerns with the guidelines: first, the extent to which a service reduces risk is not logically a relevant criterion in deciding whether a service is ancillary to a non-investment commodity service provided by another group company. In fact, a connected investment service may be provided to a customer that does not reduce risk for either party. Second, there seems no objective reason for taking into account the capital employed in deciding whether a service is ancillary. Other factors such as connection between the two group companies' services to the client would seem to be more relevant. Article 2.1(k) The Commission has not justified the radical change involved in the deletion of this exemption which ignores the CESR-CEBS Technical Advice (see below). The argument in section 5.2(c) of the original Consultation Document seems misconceived, and the 2011 consultation does not deal with this point. Although a number of entities that rely on this exemption may be described as "commodity derivatives trading houses", there are many that are essentially physical commodity businesses that use this exemption at the margin for certain activities which do not easily fall within the scope of the other exemptions in Article 2. The CESR-CEBS Technical Advice stated (at paragraph 214): "Deletion of the exemptions in Articles 2(1)(i) and (k) could

		have unforeseen consequences. There is a danger that because other exemptions do not take full account of the specificities of commodity derivatives markets and their participants, some primarily non-financial firms which do not raise similar regulatory issues to MiFID investment firms would be brought inside the scope of the directive." We continue to believe the Commission must produce a detailed and rigorous impact assessment and cost-benefit analysis before making a legislative proposal in direct conflict with this advice. The Commission has produced no argument of regulatory failure nor evidence to support change. If, notwithstanding the above, this exemption is deleted, we believe that the deletion should only take effect once any new prudential regime for commodity firms, which is to be the subject of a report by the Commission to the Parliament and Council, has taken effect. We note that the report is to be made by 31 December 2014, which suggests that it may be necessary for Article 2.1(k) to continue in force under the new directive on a transitional basis, at least.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	Whilst we note the Commission's impact assessment, we are not convinced that this has made out the case for inclusion of emission allowances within MiFID. Emissions allowances are not a derivative instrument but have more similarities with an underlying commodity or asset (currently trading energy, metals or other similar commodities is not regulated under MiFID even though derivatives on those commodities are regulated under MiFID). We question the resources and ability of financial regulators to contribute to the regulation of this market in an effective way. Given this, we continue to believe that serious

		consideration should be given to whether a different form of regulation, for example by DG Climate Change, would be more appropriate. For example, the recently adopted EU Regulation on Energy Markets Integrity and Transparency (REMIT) introduced a market abuse, transparency and registration regime for European power and gas markets which would be a more appropriate model than MiFID for regulation of the underlying trading market. In any event, we think that an increase in the scope of regulation should be justified not just at the level of the threshold decision to include the instrument type but also at the level of the application of each individual provision to emission allowances. We can see little evidence that this level of analysis has been done and are concerned that the specific issues relevant to the emission allowances market have been and may continue to be ignored given the number of issues which need to be considered as part of the MiFID negotiations. To the extent that emission allowances are brought into the scope of MiFID, we believe that a mechanism needs to be found to ensure that in the negotiations the specific merits of extending individual provisions of MiFID are considered fully in each case and would urge the Parliament to facilitate such consideration. On structured deposits, we think that the approach proposed is not a proportionate approach and could lead to arbitrary distinctions between different deposit products depending on how the interest rate is calculated. We favour as an alternative the approach (option 2) outlined in the Commission's PRIPs

		paper of November 2010. The key distinction should be between instruments where exposure is only taken against the credit risk of the institution in which the capital is invested (which should be treated as a deposit not subject to MiFID) and those instruments where the invested capital is subject to downside market risks (which should be treated as an investment instrument subject to MiFID). We do not think that the definition in Article 1(3) of MiFID as clarified by recital (26) achieves this result as it seeks to draw a distinction between different methods of calculating interest rates rather than focussing on the fundamental distinction referred to above.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	For a core service greater certainty is appropriate on the scope of the activity of "safekeeping and administration...". It is currently cast as "Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management". This is a potentially wide and unclear scope, with no other core service being cast in such expansive terms. This is particularly important as custody services are very sensitive to the "third country" issue (which we discuss more generally in response to Question 4). In some cases, in order to hold a third country investment it must be held with a local custodian, so there is a concern that promotion of this previously ancillary service to core status would restrict EU investor access to jurisdictions where the proposed MiFID regime for third country firms will simply not be legally or

		practically workable. Access to third country custodians is a concern that was considered at length during consultation relating to the AIFMD. Clarity is needed on how the MiFID core service relates in scope to and would interact with the activities required of the "depositary" for the purposes of the AIFMD, where delegation to third country firms is permitted without the third country restrictions and requirements currently proposed for MiFID core services. Further, Recital 36 of AIFMD invited the Commission to examine the possibilities of putting forward an appropriate horizontal legislative proposal that clarifies the responsibilities and liabilities of a depositary and governs the right of a depositary in one Member State to provide its services in another Member State. Clarification is needed as to how such a possible EU passport regime for depositaries under AIFMD would interact with passporting of the new core service of "safekeeping and administration…" under MiFID. Tighter drafting in respect of scope could helpfully be linked with a recital explaining how this promotion to a core service is expected to enhance investor protection.
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	Issuers, investors and firms in the EU interact with third country investment firms in many different ways that are vital for companies raising capital, investors diversifying their investments in emerging and developed markets and EU firms relying on third country firms to develop their services for EU and non-EU clients. Extending the MiFID authorisation requirements in the way that the Commission proposes would significantly damage the ability of EU investors and firms to

		access the services of third country firms in this way. For example: • Fund managers and brokerage desks at investment banks interact with brokerage and other firms from dozens of countries around the world, including many newly emerging markets. The Commission's proposal would effectively ban firms from those countries ever even picking up the phone, sending research or providing other marketing information, even where they are interacting with an EU authorised firm, unless they can clearly establish that each and every interaction is in response to a specific request. This would restrict the ability of EU firms to put their and their clients' money to work in those markets, especially the newly emerging markets where it is very unlikely that it will be possible to demonstrate equivalence of regulation or reciprocity (after all it is the function of the eligible counterparty to determine what protection it and its clients need in those markets). Even for firms from the very few countries that are likely to meet these requirements and are willing to register with ESMA, the Commission's proposal would effectively ban those firms providing the wide range of services that EU fund managers and investment firms need, such as custody, advice and investment management. It would also mean that global clients and counterparties that are themselves investment firms or banks performing investment activities may need a licence to solicit EU banks and investment firms that provide services to them.

		This would make it very difficult to run an investment management or global trading operation from within the EU. • It is likely that EU private and public sector issuers will increasingly need to diversify their funding sources to raise debt and equity capital outside the EU e.g. in the Islamic markets of the Middle East and (when their currencies liberalise) in the large developing economies with capital surpluses. In practice, this will mean issuers in the EU relying on the services of underwriters, distributors and corporate finance advisers in those countries. Even today, issuers frequently turn to the US, Hong Kong and Singapore as part of their funding strategies. This is especially important for EU banks which will have growing funding needs for both debt and equity finance to meet Basel III standards. The Commission's proposal would only allow firms from those markets to provide the necessary services to EU issuers, even those that qualify as professional investors or (according to the national implementation of MiFID) eligible counterparties, if they can demonstrate the highly unrealistic proposition that their services result entirely from the unsolicited approach by the EU issuer. Putting up a "do not call" sign outside the EU is not the right thing for the EU at a time when EU investors and issuers will increasingly need the services of third country firms as Asian and other markets develop and when the EU is seeking to retain its many financial centres against growing international competition. Putting up walls to keep out third country firms also

		imprisons EU issuers, investors and firms in the EU and prevents them accessing and serving international markets. However, the issues with the Commission's proposals are not limited to cross-border business. The Commission's proposals would also significantly damage the ability of many third country firms, particularly banks from around the world, to retain their branches within the EU. It is unlikely that very many countries will pass the Commission's equivalence tests or meet standards of reciprocity. The EU benefits from banks and firms from all round the world coming to the EU to carry on business. On the other hand, the Commission is right to identify the patchwork of existing national regimes as being a costly deterrent to third country firms that wish to provide cross-border services to or trade with EU clients and counterparties. Many Member States have national regimes which are unduly restrictive and which unduly limit the ability of issuers, investors and firms in their country to access international markets. In addition, the simple multiplicity of differing national regimes creates a barrier to cross-border business. Accordingly, we consider that the right way forward is to introduce harmonised EU regimes which allow: • EU branches of third country firms subject to equivalent third country prudential regulation and authorised in a Member State to obtain a passport to perform investment services and activities (and ancillary services) for all categories of clients and counterparties across the EU

		from the branch, subject to the branch complying with MiFID business conduct rules; • Third country firms subject to equivalent third country prudential and business conduct regulation to register with ESMA to obtain a passport to perform investment services and activities (and ancillary services) with "per se" professional clients in a Member State on a cross-border basis (i.e. otherwise than through a branch in that Member State); and • Third country firms to perform investment services and activities (and ancillary services) on a cross-border basis only with eligible counterparties in a Member State without needing authorisation in that Member State or to register with ESMA (this should also allow third country firms to provide services to EU persons where functions have been delegated to the third country firm in accordance with the MiFID, UCITS or AIFMD legislation governing delegation of functions). However: • Member States should be able to retain their existing national regimes under which they authorise branches of third country firms to perform investment services and activities (and ancillary services), subject to the existing condition that they do not grant more favourable treatment than to firms with their head office in other Member States and to a requirement that the branch must comply with MiFID conduct of business rules (but such a branch would not benefit from a passport unless it also met the additional requirements for the passport);

		• Member States should also be able to retain their existing national regimes under which they allow third country firms to perform investment services and activities (and ancillary services) with clients and counterparties within their territory on a cross-border basis, subject to the requirement that these must not impede third country firms relying on the harmonised EU regimes described above; • It should be made clear (in the recitals to MiFID2 and MiFIR) that a person performing investment services or activities (or ancillary services) on a cross-border basis is not regarded as providing services in a Member State triggering requirements for authorisation or registration where: o The services are provided at the exclusive initiative of an investor in the EU, including where marketing takes place in the context of an ongoing client relationship; o The services result from the provision of information on a website which does not target persons in that Member State other than persons with whom the third country firm is permitted to deal; o The services or activities are performed for a MiFID authorised firm or a MiFID authorised firm acts as an intermediary in relation to the services or activities of the third country firm (e.g. where an EU investor buys securities on a third country stock exchange through a MiFID authorised firm which instructs a third country firm on behalf of the EU

		investor); o The services are provided outside the Member State e.g. where the client travels outside the EU to obtain the service or the characteristic performance takes place outside the Member State. • There should be a clear definition of third country firm which also covers third country banks performing investment services and activities and which makes clear that third country firms can rely on the exemptions in Article 2 MiFID2 where their services and activities within the EU fall within those exemptions. The review should be guided by the following considerations: • There should be a differentiated approach which distinguishes between the treatment of branches in the EU of third country firms and the position where clients and counterparties in the EU transact business with a third country firm which does not operate from a branch in the country where the client or counterparty is located. • In practice, the third country firms that establish branches in the EU are mainly banks which perform investment services and activities from their EU branch under local licences. It is relatively unusual for a third country non-bank investment firm to operate through a branch in the EU. Therefore, it is very important that the regime for branches accommodates the position of third country banks. • Third country firms with a branch in the EU should be able to qualify for a passport to perform all forms of

		investment services or activities from the branch for clients and counterparties across the EU. It should be a condition of access to this passport that the firm is subject to prudential rules in the third country that are equivalent to EU requirements. • However, Member States should be free to continue to authorise third country branches which do not want access to the passport in the same way as they do today (i.e. subject to the requirement that they do not grant more favourable treatment). There is no evidence that these national authorisations damage the single market or cause investor detriment. Nevertheless, it should be made clear that all third country firms operating in the EU through branches (whether or not under the passport regime) should comply with the same MiFID business conduct rules as EU firms. • Eligible counterparties should be able to access the cross-border services of third country firms without the third country firm having to register with ESMA or meet an equivalence standard. Eligible counterparties should be responsible for protecting their own interests and those of their clients. They should not be in effect restricted from accessing the full range of investment services and activities including investment advice, underwriting, investment management and custody. • The authorisation regime should not cut across the provisions of the UCITS directive, MiFID and AIFMD allowing EU firms to delegate functions to third country firms. Where delegation takes place in accordance with applicable EU legislation then the third country firm

		should not infringe the authorisation requirement. • However, there should also be a regime under which third country firms subject to equivalent home state prudential and conduct of business rules can register with ESMA and obtain a passport to engage in cross-border business with the somewhat wider class of "per se" professional clients. • For the purposes of the proposed branch and cross-border passport regimes, equivalence tests should be applied on a flexible basis which reviews whether the regime offers sufficient or comparable protection to EU. It should not apply the "strict equivalence" approach applied under some directives. However, we would reiterate that eligible counterparties, especially emerging market specialists, interact with firms from dozens of jurisdictions round the world, not just the US and other developed markets, and it is unrealistic to expect that there would be equivalence assessments for many of these. Therefore, even a flexible equivalence test will not provide EU eligible counterparties with the freedoms that they need to engage in cross-border business with firms outside the EU. • Reliance on the proposed EU regimes should not be conditioned on a third country providing reciprocal treatment for EU firms. As the paper prepared for the European Parliament points out, reciprocity requirements contravene the EU's most favoured nation commitments under the General Agreement on Trade in Services (GATS) and cannot be justified under GATS as prudential measures as they are aimed at securing market

		access not protecting prudential considerations. In any event, the EU benefits from as many firms as possible from round the world participating its markets. Excluding those firms from establishing branches or interacting with EU firms on a cross-border basis does not serve the interests of growing EU markets. The appropriate way to seek to expand EU firms access to third country markets is through bilateral or multilateral trade negotiations. Reciprocity requirements are also self defeating and impractical as they rely on the third country having exactly the same approach to cross-border business. In many cases, the structural nature of third country markets will make this impossible, even though they might offer access arrangements which are sufficient in practice. • Any licensing regime for third country firms will need to address when the third country firm is regarded as providing services within a country such as to trigger the need to establish a branch or rely on specific exemptions for cross-border business. The EU regime should follow the approach adopted in many national regimes which recognises that a third country firm should not be regarded as acting within the territory of a Member State in a number of cases. In particular, it should recognise that ongoing client relationships will involve continued interactions between the third country firm and its EU client or counterparty, e.g. the provision of investment research. Services provided in that relationship should still be capable of being regarded as provided at the exclusive initiative of the client where the relationship was established in a lawful way.

		• In many cases, Member States have developed complex rules and practice to accommodate the ability of EU investors and firms to access the services of third country firms without damage to investor protection. There is no reason not to allow Member States to continue to apply these national rules for business solely within their territory, so long as they give full effect to the proposed EU level regime proposed above. • The specific EU regimes for cross-border business would not be available for third country firms performing investment services or activities for retail investors. However, this should not mean that a third country firm infringes the authorisation requirements where it performs investment services or activities outside the Member State concerned e.g. at the exclusive initiative of the client, where a MiFID authorised firm acts an intermediary between the client and the third country firm (e.g. where the client instructs an EU firm to act on its behalf to buy or sell securities on a non-EU market) or where the client travels outside the EU and receives services there. In addition, this should not preclude the third country firm relying on national regimes which may address more complex fact patterns.
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	We do not propose to respond to this question.

Organisation of markets and trading	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	The "appropriate" definition of an OTF is determined ultimately by the underlying policy intent – what is the introduction of the category trying to achieve? There are at least two fundamental problems with the definition as it stands. • The current very broad definition increases the scope of regulation in a way which gives rise to legal uncertainty (because it will be necessary but impossible for firms and other actors to know what instruments are deemed to be traded "on" an OTF, for example for the purpose of the market abuse regime – this problem is discussed further in our response to Q28 (Section 5 – Market Abuse Directive)), and • The current very broad definition creates legal uncertainty as to the location of the OTF perimeter. There is a clear policy implication that the trading on an OTF should be in some way "organised", i.e. "controlled", by the operator, as opposed to under the control of the participants. We think the Commission intends to distinguish between a system which provides an infrastructure in which participants interact with each other or other venues at their own volition (hence why it does not cover order-routing) and one in which the operator has a pivotal role in determining how or on what basis orders interact (similar to some concepts which already distinguish active and passive trading systems). This must be clarified, otherwise there is a risk of including systems where it would not be practicable, because of the very nature of the system, to impose obligations on the operator of the kind envisaged in the proposal.

		Given the vast spectrum of systems within firms the proposals could cover, for example, order management systems that only occasionally cross client orders and are primarily routing systems (which are excluded), the Parliament should consider including a materiality/quantitative threshold in relation to business for European clients that a firm must meet before being caught by the regime. We think that the Parliament could also consider the following additional exclusions from the definition: • an exclusion for trade publication services – the definition as drafted could potentially catch such persons and we assume it is not the intention to do so. • an exclusion for internal order flow on the assumption that the publication of such information would not aid increased transparency, or any of the other policy objectives that we believe are being pursued. There is also a compelling argument that the OTF definition is currently serving too many purposes and that, perhaps, there should be at least three definitions in its place, each doing a specific job: o a definition for the purposes of MAD, addressing the need for market participants to know with certainty when instruments are within the scope of MAD (as discussed above) o a narrow definition for the purposes of MIFIR and the OTC trading obligation (as clearly only certain

		specialised venues are suitable for this purpose) and o a broader definition (but taking account of the points made above) for the purposes of operator authorisation and other general requirements.
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	Essentially the concept of OTC trading is a negative one – trading which is not caught by the definition of regulated trading venues. The boundary between OTC and OTF depends on the policy relating to the latter concept. However, insofar as MiFID does provide (in the Recitals or otherwise) for a positive definition of OTC, it should not depend on the identity of a firm's counterparty but on the bilateral nature of the transaction.
	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	To the extent that these methods of trading are used for abusive purposes they should be dealt with under the market abuse regime. If the Commission nonetheless sees a case for special regulation on risk management grounds, then the definition of algorithmic trading is too wide, capable of capturing any trading which makes use of computer technology (ie most if not all trading). The essence of algorithmic trading is that it is initiated by computer ("initiation" is not merely an example). Also, the reference in the definition to "limited" human intervention begs a number of questions and should either be removed or made the subject of level 2 guidance. Presumably the crucial test is whether human discretion is exercised in a substantive and material way. It is unclear what the exception for "routing orders" covers. For example, does it cover the case of an agency broker who sets up

		a programme to execute a client order in parcels throughout a trading day? This would seem to be a case of human discretion, or at least a lack of overall "initiation" by a computer, but it is not clear.
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	We do not propose to respond to this question.
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	We do not propose to respond to this question.
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	Both Title V and Title VI of the Regulation (1) raise issues as to the scope of the OTF definition, as discussed above in response to question 6, and (2) have a broader effect than required by the G-20 Leaders' commitment, made at the Pittsburgh Leaders Summit in September 2009, that: "All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories." We understand that EMIR and Title V are intended to satisfy that commitment. Whereas the definitions of "regulated market" and "multi-lateral

		trading facility (MTF)" seem broadly consistent with the phrase "exchanges or electronic trading platforms", the definition of "organised trading facility (OTF)" seems drafted to capture a wider range of trading arrangements (and we understand the Commission intended it to do so). As is clear from our responses to questions 6, 28 and 29, it is important that that legislators understand the implications of using these concepts in the different provisions of the Regulation and of MAD/MAR. Inconsistencies It is worth noting therefore that: • Article 24 allows greater flexibility than the G-20 statement, so that the Article 24.1 derivatives trading obligation can be discharged through trading on any OTF, but on the other hand, • Paragraph (d) of the Article restricts flexibility for EU derivatives users to access equivalent third country markets equivalent to "trading venues" as defined in the Regulation (regulated market/MTF/OTF) by imposing a reciprocity criterion. Even if there are circumstances in which a reciprocity requirement can be justified (and we question this in our response to Question 4), the restriction here may have a different effect than restrictions in relation to foreign broker access to EU clients: EU derivatives users may in this case be denied access to an equivalently regulated trading venue that offers deeper liquidity, more reliable execution and keener

		prices than an EU venue; and • Article 28 does not address the current situation that various central counterparties already offer clearing in respect of derivatives that are not traded under any arrangement that would be regarded as a trading venue. Of course, Articles 3, 4 and 4a of EMIR (Council agreed text of 4 October 2011), will result in CCPs offering clearing of derivatives executed outside of regulated markets (see definition of OTC derivatives in EMIR). However, inclusion of a venue criterion in Article 28 in addition to volume, risk and other conditions that will apply under Article 28.6, in effect leaves the development of clearing of derivatives executed truly over the counter (i.e. outside any "trading venue") as a commercial matter for CCPs. We query whether that is in fact the intention. Other international (third country) issues We are concerned about the international issues that will arise from the third country provisions in Title V, and fear the Regulation does not allow sufficient flexibility to resolve conflicts of laws and issues that may adversely affect markets. The following bullet points illustrate this: • Article 24.2 would impose the trading obligation on certain third country entities that are not established in the EU, but enter into a derivatives transaction pertaining to derivatives that are subject to the trading obligation, where the transaction has a direct, substantial and foreseeable effect within the EU;

		• Article 24.5 would authorise the Commission to specify types of contracts that would have such an effect; • Some of the potential conflict may be avoided by the third country entity discharging the MiFIR derivatives trading obligation by trading on a domestic venue that has been determined by the European Commission to be equivalent, but only if the third country provides reciprocal recognition of EU venues. • Thus a third country entity could be obliged to trade on an EU venue: o even if its local law required it to trade on a domestic venue or prohibited it from trading on a foreign venue (or in effect prohibited it from trading on an EU venue – for example, if no members of the EU venue could access that entity for the purposes of broking business on the EU venue), o even if the local venue were regulated equivalently, but the third country did not provide venue access reciprocity for the purposes of Article 24.2, and o when trading with an EU counterparty even if there are no local requirements for platform trading in that derivative – the result being to put EU firms at a significant competitive disadvantage as against local competitors for business who can continue to trade on a bilateral basis. • We recommend that, if the equivalence and reciprocity provisions are to remain in Article 24, then the Commission needs tools to resolve conflicts and other inappropriate situations: o Arguably, Article 24.5 does not permit the Commission in specifying those derivative contract types having a direct,

		substantial and foreseeable effect within the EU, to omit any contracts that patently have such an effect; o Accordingly, Article 24.5 should also permit the Commission to exempt certain types of contract from the trading obligation. • We also submit that the G-20 commitment might be better complied with if Articles 24 and 26 permitted the European Commission in appropriate cases: o to impose the trading obligation in relation to standardised derivatives where there is an equivalent third country venue; o to grant exemptions so that the trading obligation can be discharged by trading on an equivalent third country venue even if there is no reciprocity (if reciprocity is to remain as a requirement notwithstanding the contravention of the GATS); and o to grant exemptions to allow trading away from EU or third country venues in limited cases where imposing such a requirement will unnecessarily restrict the ability of EU firms to compete in third country markets and there are limited systemic concerns. Article 27 should allow ESMA some flexibility in the data and manner of publication of the register of derivatives subject to the trading obligation, but it should be obliged to make the register available in a form that can be readily downloaded and read electronically, using generally accepted identifiers (for instruments and markets, for example) where available. As noted above in relation to question 4, the imposition of

		reciprocity requirements in any event contravenes the EU's commitments under GATS as well as being inevitably self-defeating.
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	We are not commenting on this question.
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	In considering this question, please take into account also our responses to Questions 6, 7 and 11 above and 28 below, in particular the following points: • the definition of OTF; • access to clearing in respect of derivatives not executed or arranged on a MiFIR "trading venue" (regulated market/MTF/OTF), and • interaction with EMIR. In the rest of this section we raise three issues: 1. the meaning of non-discriminatory access, given inevitable distinctions in trading venues, contract terms; 2. Access by and to third country trading venues; 3. Access to and obligation to licence benchmarks. We are not convinced these provisions are necessary at all and they have the effect of forcing firms to give their valuable intellectual property to trading venues, which raises very serious issues.

		1. *Non-discriminatory access should not mean same treatment* As indicated in response to question 11, it is not clear that place of execution or arrangement of a derivative contract is a relevant criterion in determining non-discriminatory access to clearing provided that the conditions specified by the Commission (in exercise of its powers in Article 28.6) are appropriate and that fees can be adjusted as between different venues where there are genuine differences in cost, risk, process etc. It should be made clear that "non-discriminatory access" does not mean "access on the same terms" and that CCPs should be at liberty to treat "economically equivalent" and "correlated" contracts differently so long as the different treatment is legitimate, and to demand different commercial terms so long as not discriminatory. The alternative, and worse in terms of progress towards regulatory policy and macro-economic risk objectives, would be to apply a much more granular approach to economic equivalence. As a hypothetical example, take three forward/futures/swaps contracts for North Sea oil that are almost exactly the same economically except: (a) a futures contract traded on a regulated market (and therefore subject to the exchange's rules and the relevant contract specification) in lot sizes of 1000 barrels, generally cash-settled but with a right of the buyer to elect physical settlement; (b) a swap arranged on ISDA terms by telephone through an inter-dealer broker (which may be an OTF or not a "trading

		venue" at all), the swap being cash-settled and for a quantity equivalent to a tanker (say 600,000 barrels); (c) a standardised cash-settled swap executed through a MTF but with a maturity longer than is available on the regulated market. If all were cleared through the same CCP, we might expect substantial offset, cross-margining, and similar margin/collateral requirements but there could be some significant differences, for example: • Contract (a) may entail extra costs and risks for the clearing house due to the alternative, physical delivery mechanism; • Contract (b) may entail some additional registration steps as well as risk management due to the size of the swap; and • Contract (c) may entail additional risk management (including, perhaps, additional margin or collateral) due to its longer maturity. Therefore, requiring all three to be cleared, and for the CCP to permit offset and cross-margining and to apply similar margin/collateral requirements in a non-discriminatory way, seems justifiable by reference to policy objectives. But equally it seems appropriate to allow CCPs to recognise differences in costs, risks and processes between contracts that are certainly highly correlated and in most respects economically equivalent. 2. *Access by and to third country trading venues* We believe that the broad definition of "trading venue" proposed in the Regulation, particularly the inclusion of OTFs and the

		breadth of the OTF definition will present major problems in implementing the third country access provisions in Article 28.5 (third country trading venue access to an EU CCP) and Article 29.5 (third country CCP access to an EU trading venue). As a minimum the phrase "effective equivalent" recognition" should be amended or qualified, or the Commission authorised to determine that there is sufficient reciprocity. The two provisions imply that, for reciprocity to exist, all kinds of EU trading venues must have access to CCPs in the third country and that EU CCPs must have access to all kinds of entity that would in the EU be within the definition of "trading venue". If this is not intended, then the language should be modified. We can already see that this would not work in relation to the US. In relation just to markets regulated by the CFTC, it is clear that US "designated contract markets" and "swap execution facilities" cover just part of the spectrum of venues that would fall within the MiFIR "trading venue" definition. A similar point could be made in respect of SEC-regulated venues, and in respect of other non-EEA jurisdictions. 3. *Access to and obligation to licence benchmarks* The provisions of Article 30 require fundamental reconsideration in terms of their potential impact on market development and liquidity, intellectual property rights (IPR) and international IPR agreements, and enforceability. These are serious issues which deserve full consideration at this stage and we would make just a few points:

		• it is not at all clear why trading venues/CCPs need all of the information referred to in Article 30(1)(a) in order to provide their services. We see no reason at all why providers of benchmark services should have to provide their valuable intellectual property unless it is essential for the trading or CCP function; • we are a group of financial services and regulatory lawyers, not intellectual property lawyers, but believe that, before proceeding with provisions like those in Article 30, legislators must confirm whether application of the provisions could breach international IPR conventions, and other international treaties that protect property rights (such as the European Convention on Human Rights). • many benchmarks are owned by non-EU entities, against whom this provision would be of limited enforceability, and the existence of this provision might encourage transfer of such rights by EU persons to non-EU persons as well as discouraging new entrants to the EU market for benchmark services; Providers of benchmark services often invest large sums of money in both developing and operating benchmarks and particular products which utilise benchmarks as reference points, such as traded futures contracts. The definition of benchmark includes not only indices underlying financial instruments but (arguably) prices/values in respect of the instrument itself. Often

		a number of attempts need to be made before an index or a futures contract in respect of a particular underlying asset or index is successful (and many are never successful): a key measure of success is volume, liquidity and depth of the market. IPR in respect of the terms of a futures contract or other financial instrument, the underlying index (its trade mark, methodology and values) or other benchmark data, and daily price data (including, for example, actual trading prices as well as settlement prices that an exchange may determine under its rules) provide some protection against the launch of copy-cat or plagiarising products by others who have not made the investment in product development. But if such protections were to be overridden by Article 30, the proposals might: • risk discouraging investment and innovation in relation to new benchmarks and products, such as new derivatives to hedge price risks; • result in a concentration in the provision of benchmark services (and thus a reduction of choice for consumers of such services and related products) to those organisations with sufficient scale and aligned business interests to justify and support investment in product development of the level typically required; and • fragment liquidity by allowing a venue to copy another's product just as it is becoming successful: a potential consequence of this is that the trading obligation and even, under EMIR, the clearing obligation might cease to be

		justifiable. As a result, a useful product, which had begun to be traded more transparently and to be cleared centrally, might either cease trading altogether or, more likely, be replaced by less transparent, non-cleared product.
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	We do not propose to respond to this question.
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	1. We agree that clarity as to the basis on which investment advice is provided is important, and forms a useful part of managing conflicts of interest. However, we do not consider that the current wording addresses the issue to best effect, and could result in unnecessary costs which would inevitably be passed on to consumers. We therefore suggest that the assessment requirement should be more flexible to cater for the wide range of topics on which advice might be sought. We agree that it is appropriate for an investment firm to make clear whether or not it is agreeing to take on an ongoing advisory role or simply advice on a one-off basis. We are aware that a number of disputes about which type of service was to be provided have arisen, which could have been avoided if this was spelled out. We agree that it is reasonable to expect that an investment firm that holds itself out as independent in the provision of recommendations to acquire financial products or

		services should be able to establish the basis for this, by assessing a sufficiently wide range of financial products and providers. However, we do not consider that the current wording addresses the issue to best effect, and could result in unnecessary costs which would inevitably be passed on to consumers. Two examples illustrate this. First, if an investor has genuinely reached a conclusion that he wishes to invest in a UCITS product before approaching an investment firm for advice, that firm should not be required to assess non-UCITS instruments to be able to demonstrate independence in the advice (assessment of a sufficiently wide range of providers and specific UCITS products should be enough). Second, if an investor, who wishes to raise cash by realising part of his existing portfolio, approaches an investment firm for advice about which instrument(s) should be realised, then it is not clear what the assessment referred to in draft article 24(5)(i) achieves for the consumer. We therefore suggest that the assessment requirement should be more flexible to cater for the wide range of topics on which advice might be sought. 2. We do not agree that an absolute prohibition on inducements as suggested by draft article 24(6) works for the benefit of consumers in every case. On its face it appears to eliminate a potential source of conflicts of interest. However, that ignores the potential for a better outcome for consumers by managing the conflicts (for example by disclosure to enable more effective competition) than is achieved by prohibition. It is frequently the case that investment firms need to co-operate in order to obtain the best outcome for mutual clients. In the

		circumstances of such co-operation, firms need to share the benefits accruing, or the costs involved, in order to provide these services to their client on the best basis. This may be the case in relation both to portfolio management and advice. The existing legislative protections requiring "comprehensive, accurate and understandable" disclosure and relating to the need for the inducement to both enhance the quality of the service to the client and not be contrary to the client's best interests; should together provide sufficient protection. If these conditions are met, it must be in the client's best interests to permit it to continue. If they are not, the inducement is already prohibited. So, in the absence of a much more detailed cost-benefit analysis identifying specific cases of investor detriment, we oppose the banning of inducements either for specific investment services or generally.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	In our view, it is important that the distinction between financial instruments that are considered complex and those that are considered non-complex should be easily understood, not just by investment firms, but also by clients. Creating sub-categories of particular financial instruments is likely to lead to confusion. We consider that shares, UCITS, money market instruments, bonds and securitised debt should be treated as non-complex financial instruments. The Directive should prescribe that clear criteria for the assessment of complexity, in relation to the embedding of a derivative or the incorporation of structures that could make it difficult for the client to understand the risk involved, which may expose investors to risk in a way that would render particular products unsuitable for sale on an execution-only basis should be

		developed within ESMA guidelines. Although it may not always be appropriate for shares and bonds that are not admitted to trading on a regulated market or an MTF to be sold on an execution-only basis, this is not a function of the complexity of the product, but rather of its liquidity. There are other methods by which the liquidity of such products can be guaranteed (and these could be addressed by the ESMA guidelines in paragraph 7 of Article 25). Existing risk disclosure requirements would, where relevant, require a firm to provide a warning of risks arising from illiquidity, and if required, further technical standards could be developed in respect of the disclosure of risks in respect of various kinds of non-complex instruments. Prescribing that only shares and bonds admitted to trading on a regulated market or MTF should be deemed non-complex also raises the practical difficulty of readily ascertaining in real time whether, or when, such instruments have become admitted to trading on an MTF. It is also not clear what the position would be if such an instruments ceased to be traded on an MTF (for example, through some form of suspension of trading). We consider that **all** UCITS, which are heavily regulated under the UCITS Directive, should continue to be treated as non-complex financial instruments. To the extent that it is considered necessary to draw distinctions between different UCITS instruments, Commission Regulation 583/2010 already provides a framework for ensuring that such distinctions are made clear in provider information (including Key Investor Information document). See also our response to question 28.

		Whilst we understand the reasoning behind the proposal to exclude the provision of execution-only services where the ancillary service of granting credits or loans is also provided, we remain of the view that the provision of a loan does not automatically make a transaction complex. In our view, it would be preferable to address the concern by providing that retail clients who require credit or loans in order to purchase financial instruments should benefit from an appropriateness assessment.
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	Execution policies must adequately describe the methods used by firms and we would expect these points to be covered where they are relevant. We consider that the existing MiFID requirements relating to execution policies adequately cover points such as the distinction between types of instrument, clients and order; the use of internal matching engines; and the use of single execution venues. We note that delegated acts setting out criteria for best execution, factors and detail of information to be provided to clients have yet to be fleshed out, and technical standards have yet to be developed in respect of data - in our view, further legislation is unnecessary: proper supervision of the existing requirements by regulators is the most appropriate means for meeting the Commission's objectives. There is also some potential for clients to find themselves overloaded by a significant increase in volume of information on execution policies, which retail clients, in particular, may have little interest in and may not understand. The Directive would require investment firms to summarise, for

		each class of financial instruments, and make public on an annual basis, the top five execution venues on which client orders were executed in the preceding year. It is not entirely clear how "top" is to be assessed – it appears to propose a quantitative rather than a qualitative assessment, which is not wholly consistent with the policy and requirements in paragraph 1 of Article 27. In our view, the regulatory focus should be firmly on quality of execution.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	The CLLS understands the background which has led the Commission to decide that Member States should have flexibility to determine additional criteria for assessing whether municipal and local public authorities may elect for classification as professional customers. The existing criteria are clear that an investment firm may only treat a client as a professional client on request if there is a reasonable assurance that in the light of the transactions or services envisaged the client is capable of making its own investment decisions and understanding the risks involved. It is difficult to see what additional qualitative criteria could be needed. Accordingly it may be appropriate for the amendment to allow for additional or different quantitative criteria beyond those currently specified. In relation to eligible counterparties the application of conduct of business obligations is unnecessary in the context of business transacted between eligible counterparties. The directive permits an eligible counterparty to request higher protection and this is sufficient. If such protections are nevertheless considered appropriate it should be only in the context where investment services are provided to the eligible counterparty and not where counterparties are merely facing each other in market dealings

		i.e. where each of the counterparties are carrying out investment activities but without either treating the other as a client.
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	A number of adjustments are needed. First and foremost it should be made clear whether the bans and restrictions are intended to be permanent or a temporary response to an emergency situation. A ban or restriction that is introduced on a temporary basis by a competent authority under article 32 should be time limited and should only be capable of renewal on the basis of a decision which takes account of a properly conducted cost-benefit exercise and such other procedural protections that apply in a Member State in relation to its legislative process. It is anomalous that the Regulation should in effect confer a legislative power on competent authorities that may entirely by-pass the procedural requirements that would need to be followed in a Member State in the case of legislation imposing permanent restrictions or prohibitions. Article 31 should be amended to make clear that ESMA cannot take action where a competent authority has given notice of its intention to take action or may not do so in such a case without first giving its opinion on the proposed action in line with the procedure in article 32. Otherwise it would appear that ESMA could always take action in advance of a competent authority even if the authority had given notice of its intention to act. It is unclear why under article 31 ESMA should not have to provide a second opinion before taking action in circumstances where a competent authority has itself taken action. Such a requirement should be imposed if ESMA is to second guess the adequacy or appropriateness of action already taken by a

		competent authority (following the adoption of earlier opinion of ESMA in accordance with article 32).
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	We do not propose to respond to this question.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	We do not propose to respond to this question.
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	We do not propose to respond to this question.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	We do not propose to respond to this question.
	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs),	We do not propose to respond to this question.

	Authorised Publication Authorities (APAs)?	
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	We do not propose to respond to this question.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	We do not propose to respond to this question.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	We do not propose to respond to this question.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	1. PRIPs Under the PRIPs initiative, the European Commission is proposing new, horizontal legislation to regulate mandatory pre-contractual product disclosures by the manufacturers of PRIPs, and sales practices by intermediaries and other distributors of PRIPs. The Commission currently proposes defining PRIPs to include: • All investment funds, whether closed ended or open ended. • All structured products, whatever their form (for example, packaged as insurance policies, funds, securities or deposits).

		• Derivative instruments. MiFID therefore potentially overlaps with proposed PRIPs legislation, in the form in which it is currently proposed, since investments caught by the PRIPs definition would also be caught under MiFID as financial instruments. In addition, MiFID regulates the marketing and selling of financial instruments that would include PRIPs products, and PRIPs is seeking to regulate the selling of PRIPs by intermediaries. Under PRIPs, there are circumstances where a distributor may be required to produce a key investor information document (a "KIID"). Under MiFID, a distributor when selling a PRIP may be required to comply with conduct of business obligations, including suitability and appropriateness requirements. There is therefore a risk that MiFID and PRIPs could be inconsistent with respect to these parallel obligations, or require duplication of efforts. For example, given the time and cost of producing a KIID, it would be helpful if the KIID produced by the distributor when complying with its PRIPs obligations could be used by the distributor when complying with its conduct of business obligations under MiFID. Likewise, under PRIPs a distributor may be required to update a KIID, and under MiFID update the suitability of its advice to an investor. It would be helpful if the updated KIID could be used for the purposes of fulfilling the MiFID obligations. We would encourage ESMA to develop consistency with PRIPs

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<td>when drafting the MiFID Level 2 measures.

2. Undertakings for Collective Investment in Transferable Securities (“UCITS”).

The key point at which MiFID and the UCITS directive overlap concerns the regulation of the sale of UCITS.

MiFID 2, in its current draft, creates a split of UCITS between “complex” and “non-complex”. This contrasts with the UCITS directive under which all UCITS are specifically identified as suitable for retail investment, and are heavily regulated under the UCITS Directive. There is therefore a clear conflict in policy between the MiFID and UCITS directives, with MiFID providing that certain “complex” UCITS cannot be sold to retail, and the UCITS directive, which provides that they can. Consideration should be given as to whether these concerns would be more clearly dealt with by amending the UCITS Directive and not by amending MIFID.

3. European Markets Infrastructure Regulation (“EMIR”)

The main area of interaction between MiFID and EMIR concerns reporting obligations in respect of derivatives transactions and positions.

Whilst the Commission is proposing in the current MiFID 2 text to waive the MiFID reporting obligation on an investment firm that has already reported an OTC contract to a trade repository or competent authority under EMIR, this will only work if data</td>
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		content standards for the two forms of reporting are consistent. If standards of data between the two forms of reporting differ, the efficiencies gained by avoiding duplication of reporting under MiFID and EMIR will be entirely lost. In relation to the current draft of MiFID 2's proposals to require the transaction reporting of commodities derivatives, given that the current transaction reporting fields will not be compatible with commodity derivatives, we think that it would be prudent to postpone introducing a mandatory requirement until the relevant Trade Repository is up and running under EMIR. 4. Regulation on "Energy market integrity and transparency" ("REMIT") REMIT and MiFID interact, since they both apply market monitoring and reporting provisions to wholesale energy products that are financial instruments for the purposes of MiFID. Care should therefore be taken to ensure that these obligations are made consistent and do not duplicate one another. 5. Alternative Investment Fund Managers Directive ("AIFMD") MiFID and the AIFMD interconnect, since they are directives that both address to some extent the regulation of investment management. There are several areas with potential for overlap, with both directives for example, making some provision for the

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<td>following requirements:

• Authorisation obligation for investment managers;
• Capital requirements for investment managers – an own funds requirement plus capital requirements under the CRD;
• Conduct of business and investor protection provisions;
• Outsourcing/delegation requirements;
• Organisational requirements; and
• Third country equivalence provisions.

While an AIFM is outside the scope of MiFID, we anticipate that, as with UCITS, much of the investor management activity of alternative investment funds will in fact take place in investment firms that are covered by MiFID. Alternatively, a manager will manage funds that are caught by both MiFID and the AIFMD, and will therefore have to comply with both directives. There is therefore no sense in making fine distinctions between the two directives.

It is therefore imperative that the directive should take this into account when developing MiFID 2, including:

• To avoid duplication between the 2 directives;
• Where duplication is unavoidable, the provision of clear guidance as to which directive should be followed or will prevail– or a clear indication that the more strict requirements will apply;
• To make direct reference to both UCITS and AIFM Directives where relevant so that the areas of overlap and how they are reconciled is expressly dealt with on the face of</td>
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		the directive. 6. Market Abuse Directive ("MAD") A number of amendments proposed to MAD by the Commission as part of the MiFID review have the objective of making the scope of MAD consistent with the scope of MiFID. The scope of the MAD regime is proposed to be extended to cover all financial instruments covered by MiFID, and traded on an MTF/OTF as well as a regulated market. However, in a few instances, this produces legislation that runs a high risk of being unclear in its application. The MiFID 2 process will include development of the OTF definition. Putting aside any issues as to the appropriate perimeter for this, it should be borne in mind that this will be picked up and used as the perimeter of the market abuse regime. Consideration should therefore be given as to whether the breadth of what is covered by the OTF regime is appropriate for that purpose too. For example, the current draft of the proposed MAD legislation extends the scope of the insider dealing and market manipulation rules to any financial instrument admitted to trading on a MTF or OTF, as defined under MiFID. Given the breadth of the definition of OTF, this has the potential to bring within the scope of the MAD a vast number of trading venues, and an even larger number of instruments traded on those venues. Given that even now it can be difficult for market participants to identify instruments that are traded on regulated markets, this problem

		will be exacerbated by the extension of the regime to MTFs and OTFs. Market participants will have little certainty as to whether the MAD regime applies to them in their daily dealings in diverse instruments. A further example is the use of the definition of "algorithmic trading" from MiFID to provide examples in the MAD regime of behaviour that manipulates the market. When developing this definition as part of the MIFID 2 process, consideration should be given to its use in the proposed MAD legislation. 7. Securities Law Directive ("SLD") The interaction between the Securities Law Directive ("SLD") and MiFID relate to the provisions in the SLD proposals that seek to regulate securities account providers. The SLD proposals provide for account providers to be brought within the scope of MiFID by making the service of providing and maintaining securities accounts a core investment service under MiFID (currently it is regulated as an "ancillary service" under MiFID, which means that it can be provided without authorisation provided that the provider is not providing a core investment service regulated under MiFID in connection with the service). The MiFID 2 draft legislation provides for the service of providing and maintaining securities accounts to be a core investment service. However, currently there are concerns whether all account providers in the EU will be brought within the scope of MiFID without exception. It is unclear which provisions of MiFID will

		apply to account providers, since not all MiFID requirements will be appropriate. The Commission should ensure that it provides some clarity on these issues. 8. PD/Codified Listing Directive An interaction between the PD and MiFID is the use of MiFID definitions to define the scope of the PD. For example, the application of the main PD obligation not to make an offer of transferable securities to the public unless an approved prospectus has been made available to the public before the offer is made, partly depends on the MiFID defined term "transferable securities". Likewise, the PD prohibition on requesting admission to trading on a regulated market before a prospectus has been made refers to the MiFID definition of "regulated market". A consistency issue for MiFID across other EU directives, including PD, MAD and REMIT, relates to the definitions and use of terms "admission to trading" and "admission to official list". This is a work stream that was identified by ESME in 2007, where it identified as an issue the importance of bringing clarity on how the notions of admission to official listing on a stock exchange, admission to trading on a regulated market and trading on an MTF relate to each other. The Commission's draft MiFID 2 legislative proposals makes reference to admission to official stock exchange listing. Likewise, a number of MiFID obligations refer to admission to trading- e.g. client limit order rule, appropriateness regime etc.

		Although this workstream does not appear as yet to have been progressed, the use of these terms must be consistent with their use in other directives such as the PD, MAD and REMIT. 9. Capital Requirements Directive ("CRD") The CRD applies to firms by reference to activities that are defined in MiFID. For example, a key interaction between MiFID and the CRD relates to the capital treatment of certain commodities firms. Commodities firms whose activities consist exclusively of the provision of investment services or activities in relation to financial instruments set out in C5, 6, 7, 9 and 10 of Annex 1 of MiFID are subject to MiFID, but enjoy an exemption from the capital requirements in the CRD (although are subject to certain risk management and systems and controls requirements). The Commission announced in July 2011 that it will report to the Parliament and Council by 31 December 2014 on an appropriate prudential regime for such firms. No publicly available progress on this work stream has been made to date. The draft MiFID 2 legislation narrows the scope of exemptions for certain commodities firms, specifically firms that deal on own account in financial instruments or provide investment services in commodity derivatives on an ancillary basis as part of their main business and when they are not subsidiaries of financial groups (article 2 1(i) and (k) of MiFID).
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	1. US - Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") Dodd-Frank and MiFID cover the same ground where they are

		implementing the same G20 derived principles. As a starting point, MiFID should be consistent with the relevant G20 principles. The equivalent US legislation should also be taken into account when developing MiFID, to avoid making the compliance burden for global firms greater, and also to prevent opportunities for regulatory arbitrage. For example, MiFID provides for pre and post trade transparency requirements in respect of equities, and the MiFID 2 proposals propose expanding these out to a number of non-equities and derivatives. Dodd-Frank establishes only post-trade transparency obligations for the derivatives market. The unintended consequences of making the MiFID transparency obligations so much broader than those in the US should therefore be considered. The MiFID 2 proposals require that trading venues trading MiFID financial instruments meeting the definition of "organised trading facility" ("OTF") become authorised under MiFID, and are subject to organisational and investor protection-driven requirements, including pre-trade transparency requirements. However, neither Dodd-Frank nor other US legislation requires registered "dark pools" to disclose their pre-trade bid and offer information to consolidated data feeds. This could give rise to opportunities for regulatory arbitrage. Both Dodd-Frank and MiFID 2 contain similar requirements requiring OTC derivatives to be traded on exchange, originating from the G20 requirements. The MiFID 2 proposals provide that the on-market obligation will apply to all derivatives identified

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<tr><td></td><td></td><td>by ESMA as subject to the trading obligation, and shall be eligible for trading on any trading venue on a non-exclusive basis. Dodd-Frank, on the other hand, provides that a mandatory trading obligation only applies if a swap execution facility, stock exchange or designated contract market makes it available to trade.

2. Third country rules

In relation to the MiFID 2 proposals in respect of third country recognition, we would urge a practical approach to be adopted in relation to establishing the conditions for an equivalence regime, and unnecessary burdens and obstacles should not be imposed. The scope for a waiver from the authorisation requirements in MiFID should be available where a third country firm is complying with overlapping, and equivalent local rules, and not just dealing with eligible counterparties, but also per se professional clients.

3. Committee on Payment and Settlement Systems (“CPSS”) and International Organisation Securities Commissioners (“IOSCO”)

The Financial Stability Board and the G-20 have recently endorsed the following joint CPSS- IOSCO or IOSCO reports/consultation that the Commission should take into account when developing MiFID, including:

• Principles for financial markets infrastructure ;
• Report on trading of OTC derivatives markets ;</td></tr>
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		• Principles for the regulation and supervision of the commodity derivatives markets •
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	1. Proportionate The final sentence of Article 74 (publication of sanctions) is of key importance here: "Where the publication would cause disproportionate damage to the parties involved, competent authorities shall publish the sanctions on an anonymous basis." However, we would strongly encourage the following to be addressed in further instructive detail at Level 2 stage: • The intended meaning of "disproportionate damage". An illustrative, albeit non-exhaustive, list of examples would be very helpful - both to provide practical guidance to competent authorities on their utilisation of this provision; and also, importantly, to facilitate the adoption of a consistent approach across member states. • The intended meaning of "any sanction or measure" [that has been imposed for breaches] (as used in Article 74) Without further elaboration, this phrase is capable of a very (and, potentially, unduly) broad construction – for example, it might be interpreted to apply to a very small measure taken by a firm in response to a minor technical breach, upon the simple request of its regulator. We would therefore suggest that the prima facie disclosure obligation applies only where the sanction or measure

		results from a formal administrative procedure, rather than anything else (and less significant). Further, we are of the view that private (but 'formal') regulatory warnings should fall outside of the prima facie publication obligation. In the UK, for example, private warnings are commonly (and effectively) utilised by the FSA as a means of reprimanding firms, but in circumstances where a public censure would represent a disproportionate sanction. These regimes work effectively and serve a useful purpose – accordingly, it would in our view be most unfortunate if the practical utilisation of such a proportionate and effective sanction is jeopardised (or, most likely, rendered obsolete) by an attendant publication requirement. As a fundamental matter of principle and natural justice, we believe that due process must have been followed, to a final non-appealable conclusion, before any such publication is required. We note that Article 76 (effective application of sanctions) is also important in the context of proportionality and therefore support its inclusion. However, some further consideration might usefully be given to specifying some additional "relevant circumstances", such as: whether the breach was pre-meditated, deliberate or amounted to a repeat of an earlier transgression. Sub-paragraph a) (or, alternatively perhaps, e)) might also helpfully refer to the degree to which the breach posed a material risk to clients. 2. Effective

		It is difficult (if not impossible), at this stage, to opine on whether the sanctions regime is effective. We believe that this question will most meaningfully be answered once the regime has been implemented and had a reasonable opportunity to 'bed down'. We would also observe that, in practice, the effectiveness of the sanctions regime is also likely to depend, to an extent, on member states' general approach to their Article 77 (reporting of breaches) obligations. 3. Dissuasive We would like to think that, over time, the administrative sanctions and measures prescribed in Article 75(2) – and, in particular, the financial sanctions referred to in sub-paragraphs (e) and (f) – will serve to have the desired dissuasive effect. We would of course also expect the publication of sanctions (as envisaged under Article 74) to act as a further practical deterrent.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	This is essentially a policy issue on which we do not ordinarily comment at such a general level. However, we have, in certain of our other responses, addressed this question, as appropriate on a case by case basis.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**

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