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Response by Swedish authorities to the Consultation by the Commission on the review of the Markets in Financial Instruments Directive (MiFID)

The Ministry of Finance, Finansinspektionen (the Swedish Financial Supervisory Authority), and Sveriges riksbank welcome the opportunity to comment on the Consultation on the review of MiFID, and are hereby submitting their common views to the Commission.

1. Introduction

Comments and answers to particular questions are provided with reference to the enumeration and particular subject or question in the Consultation. If a question or topic has not been subject to our comments or answers herein, that shall not be deemed to constitute our approval or dismissal to the proposition.

Capitalised terms and abbreviations used in the Consultation shall have the same meaning when used herein. When used herein the notion "we" shall mean the common view of the Ministry of Finance, Finansinspektionen and Sveriges riksbank.

2. Development in Market Structures

2.2. Organised trading facilities (Questions 2 to 7)

We agree that a new investment service, Organised Trading Facility (OTF), should be introduced. The continuous development of new market practises and trading technology has created a need to regulate organised trading alongside the current regulated trading venues.

We would like to raise the following issues in relation to the proposal:

- The requirements for OTFs should be subject to a proportionality test. The proposal will cover a wide range of trading venues and some of them will have very small operations. It can be expected that the costs for IT-arrangements may be burdensome for small OTFs.

- We see it as likely that orders executed in a crossing system may on an ad-hoc basis be executed against the investment firms own account. This should not mean that the firm is considered, prima facie, to be a systematic internaliser. The SI-regime addresses a different business model.

2.2.3. Trading of standardised OTC derivatives on exchanges or electronic trading platforms where appropriate (Questions 8 to 12)

(8) What is your opinion of the introduction of a requirement that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities satisfying the conditions above? Please explain the reasons for your views.

In accordance with the declaration by the G20 and the report from FSB in October 2010 (OTC Derivatives Working Group), we support a requirement that clearing eligible and sufficiently liquid derivatives should trade on exchanges or electronic trading platforms. However, we would like to stress that such a requirement should both be based on sound economic theory and lead to additional benefits over and above those following from central clearing and reporting to trade repositories.

Any regulation imposing limitations on consenting parties to agree on certain contracts have to be founded on sound economic theory. This is especially important for contract between professional parties where there is no need for consumer protection perspectives. The crisis has shown that there may be negative externalities affecting financial stability in the trading of some derivatives contracts. While recognizing the merits of the statement of the G20/FSB that clearing eligible and sufficiently liquid derivatives should trade on exchanges or electronic trading platforms, it is important to focus on what the purpose of the regulation should be. In our view and with an economic regulatory argument, the negative externalities are likely to be limited if derivatives are centrally cleared and trades reported to trade repositories. With central clearing and trade repositories, the ripple effects of derivatives trading are likely to be limited. It is not obvious what the additional benefits from imposing limitations on the actual *trading* venue for many derivatives would be, as not all derivatives are equally liquid. On the contrary, there is a risk that some derivatives trading may be less efficient if strict limits on where they can be traded are imposed.

If requirements are introduced, on where derivatives can be traded, the economic rationale must be clearly explained. It is also important to note that not all derivatives are identical and that the economic rational may differ between different kinds of derivatives.

We want to stress that any requirement of mandatory trading for derivatives must not harm or disrupt the functioning of the derivatives markets. Derivatives are a very efficient and essential tool for risk management, both for the financial and non-financial sector. Any forthcoming regulation must be designed in such a way that it does not negatively affect companies' ability to hedge certain risks. How this requirement would affect the functioning of the markets, and thus companies' ability to hedge, will to a large extent depend on the chosen criteria for being "sufficiently liquid". Since liquidity is partly determined by how the trading is organized, one cannot base such an assessment solely on the *current* situation. The key issue is whether the instrument will still be "sufficiently liquid" *after* a transfer from OTC trading. That may not be easy to assess in all cases. This calls for caution as there

could be severe consequences for the whole financial system if the criteria for being sufficiently liquid will be chosen so that the functioning of many derivatives is harmed or, in the worst case, disrupted. The market can be negatively affected, if, for example, market makers are not willing to quote prices, i.e., supply liquidity, to the same extent when requiring trading on a platform.

Additional issues of our concern:

- Today a large portion of derivative trading is conducted through a market maker, thus quote-driven or a dealer market. Will trading platforms allow for this market structure or does the trading need to be order-driven?
- If it is required that the trade of a derivative is conducted on a platform, i.e., no OTC-trading, then it implicitly is assumed that there will be at least one platform that allows the derivative to be traded there. Does that mean that if no platform allows trading in a specific contract, no trading is allowed in that contract?

(9) Are the above conditions for an organised trading facility appropriate? Please explain the reasons for your views

The condition that a trading facility provides non-discriminatory multilateral access should be a fundamental requirement. The transaction data reported to trade repositories should be at least the same as reported for similar OTC trading. If the trading facility does not have any dedicated systems or facilities in place for the execution of trades, then the proposed benefit of less systemic risk will be lost.

We have concerns that the requirements of pre- and post-trade transparency as per section 3.4 might harm the functioning of the derivative market (the corresponding discussion we have about trading in bonds and transparency is also applicable to derivatives in the answers to questions 37 to 41). Therefore, we think that a more appropriate condition is that the pre- and post-trade transparency on the trading platforms should be at least the same level as it would have been if traded OTC.

(10) Which criteria could determine whether a derivative is sufficiently liquid to be required to be traded on such systems? Please explain the reasons for your views.

See our answer to question 8 about the concerns we have when deciding the criteria for a contract to be sufficiently liquid to be required to be traded on a trading platform. To reduce the risk that the functioning of the market is harmed when the derivative is moved from OTC to a trading platform, we think that besides the frequency of trades and the average size of transactions the number of (possible) participants, both buyers and sellers, should be used as a criterion to determine if it fulfils the requirements. If there are too few participants, and especially if there are few buyers, then it should not be considered sufficiently liquid. Also the degree of standardisation in the derivatives should be considered, where a high degree of standardisation is necessary to qualify as sufficiently liquid.

(11) Which market features could additionally be taken into account in order to achieve benefits in terms of better transparency, competition, market oversight, and price formation? Please be specific whether this could consider for instance, a high rate of concentration of dealers in a specific financial instruments, a clear need from buy-side institutions for further transparency, or on demonstrable obstacles to effective oversight in a derivative trading OTC, etc.

At this point we do not have any additionally features. However, we once again want stress the importance that a thoroughly study is conducted on the economic rationale and benefits to the wider economy, primarily on the stability of the financial system, of any requirement to force trades to trading platforms, e.g., an organised trading facility, when the derivative is centrally cleared and reported to a trade repository. And this study should also take into consideration how the benefits of increased transparency and better price formation as a consequence of derivatives traded on platforms is affected if some post-trade transparency regime, as proposed in questions 37 to 41, is introduced for OTC markets.

(12) Are there existing OTC derivatives that could be required to be traded on regulated markets, MTFs or organised trading facilities? If yes, please justify. Are there some OTC derivatives for which mandatory trading on a regulated market, MTF, or organised trading facility would be seriously damaging to investors or market participants? Please explain the reasons for your views.

If the trading in a derivative is negatively affected when requiring mandatory trading on a platform, it will damage investors and/or market participants. However, the benefits from that the trading is conducted non-OTC can be larger than the damages. This once again shows that the importance of the purpose, i.e., benefits, of requiring trading on platforms needs to be very clear, and that not all derivatives should be treated in the same manner.

2.3. Automated trading and related issues (Questions 13 to 20)

- We agree that an authorisation requirement for high frequency traders may be necessary, provided that such requirement is only subject to the trader's participation in a RM/MTF.
- We believe that a trading or volume-based threshold would be difficult to monitor and supervise. It is also important to mitigate the risks with unauthorised trading participants at an early stage, not when the high-frequency trader already has caused problems.
- The use of algorithms is part of the normal trading activities of an investment firm. We do not see a need to require a notification for every algorithm that a firm would like to employ. This is information that the competent authority already today has the powers to access.
- The activity of high-frequency trading should not be seen as a market making role. Correspondingly market making obligations should not apply.
- The issue if the time orders should rest on the order book is a question of market abuse rather than something that should be regulated under MiFID. This type of very technical requirement should not be regulated in a directive at level 1 as it may hamper innovation and lead to unintended consequences.

2.5. Further alignment and reinforcement of organisational and market surveillance requirements for MTFs and regulated markets as well as organised trading facilities (Questions 23 and 24)

We agree with the proposals. Market fragmentation is a fact after MiFID and oversight activities must be coordinated at all levels. RM/MTF performs an important role in ensuring market integrity in the trading of financial instruments. It is of utmost

importance that the RM/MTFs that organise trading in the same financial instruments cooperate in their market surveillance. As this, at least in the short term, may be in conflict with the business objectives of competing companies there is a need for regulation in this area.

2.6. SME Markets (Questions 25 and 26)

We are of the opinion that SME Markets can operate and develop within the regulatory framework of RMs and MTFs. There are several existing SME markets in Sweden today, operating both as RM and MTFs. The SME markets operating as MTFs can take advantage of the flexibility that the regulatory framework offers today and tailor their rulebook to the needs of the local market they typically address. We also note that these SME markets, in order to gain investor confidence, have similar rules as the regulated markets on a self-regulatory basis. In conclusion we do not see a need for new rules in this area and are also worried about introducing new rules which imply that less investor protection is acceptable for SME markets that typically include a large number of high-risk companies.

3. Pre- and Post-Trade Transparency

3.4. Non-equity markets (Questions 37 to 41)

(37) What is your opinion on the suggested modification to the MiFID framework directive in terms of scope of instruments and content of overarching transparency requirements?

We agree that the MiFID framework directive could be amended to require transparency in trading with non-equity instruments. However, we believe it would be inappropriate to include the proposed requirements of increased transparency for OTC trading of fixed-income instruments (bonds) in the MiFID framework without carefully considering the specific characteristics of these markets. This as the setup of bond markets in many Member States, Sweden being a case in point, differs fundamentally from how equity markets are organized. This is reflected in fundamental differences in the nature of the instruments and the types/numbers of investors that are involved. On these bond markets only (a few) professional investors are active, and for professional investors market depth and liquidity are key concerns as they trade in huge volumes. In the current market environment in Sweden, they get just that.

Bond markets in Sweden (and in many other Member States) are organized on the basis of market making and OTC trading. Market makers post prices and are willing to use their balance sheets to temporarily bear the risks involved in this commitment. This means that they are willing to buy a huge amount of a particular bond from an end investor. They then hold the bonds while gradually hedging or unwinding their position. Such market making is impossible in a fully transparent market. A market maker that would have to reveal its transactions immediately to other market makers or end investors would see the price move against it. This means that the market maker would not accept to buy (or sell) huge amounts of bonds in the first place. The liquidity and immediacy now on offer to investors would simply disappear. Investors know and understand this. As a result they do not demand full post-trade transparency.

There is also an issuer perspective on this. In particular, a borrower, for example the Swedish government, is highly dependent on that there is a well-functioning secondary market for its debt instruments. This reduces funding costs and risks. A regulatory change that hurts these markets would therefore be harmful also to Swedish public finances, if the borrower (issuer) is the Swedish government. This aspect seems relevant for all Member States.

Similar arguments can be made with regard to the corporate bond markets, including bonds issued by banks and mortgage institutions. For example, to enhance financial stability, financial institutions will have to extend the maturity of their funding. It is then important that they can do so in markets that are capable to absorb and efficiently trade a growing stock of bonds.

Our conclusion is that a regulatory intervention in the transparency structure of the bond markets must carefully consider these aspects. Otherwise we risk disturbing markets that from the outset are essentially well-functioning, offering good services to investors and issuers alike. And from a financial stability perspective, it is of great importance that the bond markets are liquid at all times and offer immediacy for institutions that needs to sell some of their holdings.

We would also want to point out that those problems and concerns discussed above of implementing requirements of transparency for bonds also applies for most derivatives. By introducing trade repositories for derivatives, we think that the largest and most urgent problems are solved in relation to the lack of transparency for these markets. For that reason we think that the consequences of implementing trade repositories should be evaluated before the need to require additional pre- and post-trade transparency is discussed.

(38) What is your opinion about the precise pre-trade information that regulated markets, MTFs and organised trading facilities as per section 2.2.3 above would have to publish on non-equity instruments traded on their system? Please be specific in terms of asset-class and nature of the trading system (e.g. order or quote driven).

We would note, as a general observation, that it is extremely difficult to determine at the legislative level the precise nature of the information that ideally should be made available in any specific market. This would essentially require that thorough analyses of the mechanisms at work are conducted across all instruments, market structures etc. Therefore, this argues for taking a cautious approach to regulation.

(39) What is your opinion about applying requirements to investment firms executing trades OTC to ensure that their quotes are accessible to a large number of investors, reflect a price which is not too far from market value for comparable or identical instrument traded on organised venues, and are binding below a certain transaction size?

We are doubtful whether such a requirement would be very effective. In particular, it seems unavoidable that investment firms will adjust their spreads to compensate for the commitment to quote a binding price.

The requirement that the quoted price does not deviate significantly from pre-trade information “for comparable or identical instruments” on regulated markets appears to be an attempt to counteract this effect. It would act like a limit on the permissible spread. This approach raises several questions, however.

First, what constitutes a “comparable instrument” is not self-evident. Also, it is not likely to be constant over time. For example, not long ago Finnish and Irish governments bond would perhaps have been considered comparable. Applying such a vague rule in practice seems difficult. It would seem necessary to require a link to an identical instrument for this to make sense.

Second, and relevant even if instruments are truly identical, requiring investment firms acting in OTC markets to base their price quotes on information from regulated markets presupposes that this is the proper guide to look at. In fixed-income markets, where the bulk of the trading often takes place OTC, this is not the case. Current price information can then *only* be had from the OTC market, and what happens on the regulated market is a sideshow. In such circumstances, this requirement is impractical as a means to ensure, for example, best execution.

(40) In view of calibrating the exact post-trade transparency obligations for each asset class and type, what is your opinion of the suggested parameters, namely that the regime be transaction-based, and predicated on a set of thresholds by transaction size?

As stressed in our answer to question 37, a key concern as regards transparency rules is the post-trade transparency regime, especially in the bond markets. If OTC trading would be included in such a way that government and mortgage bond markets are affected, it is absolutely essential that the threshold for immediate reporting is set at a sufficiently high level not to interfere with the ability of market makers to provide liquidity in the wholesale segment of the market. For many bonds, the limit proposed by CESR (below EUR 1 million) and end-of-day reporting of other trading data would be acceptable from this point of view. However, these limits (thresholds) have to be calibrated to more factors than the transaction size, see our answer to question 41.

If the post-trade information regime would be transaction based, several complex issues are raised. The standard in many OTC bond markets is that post-trade information only covers turnover and high, low and medium prices per instrument. A complete log of all the transactions published at the end of the trading day would therefore constitute a major change. As any major change it warrants careful deliberation.

One aspect is how this affects market makers’ ability to manage their trade inventories. To the extent that the transaction reporting reveals that a market maker did not manage to unwind a position before the close of trading, the mechanisms discussed under question 37 are at work. Other things equal, it would tend to reduce liquidity in the later part of the trading day. To avoid such an effect, we support CESR’s proposal to limit the end of day information for big bond market transactions to price and not include volume.

Assuming, on the contrary, that transparency rules would be put in place in these markets in such a way that they affect the wholesale segments, it would not reasonable if these rules would be harmonised only on the basis of asset class. Sweden has its own currency, the Swedish krona (SEK). It is therefore incorrect to see a Swedish government krona bond as part of the same asset class as, for example, a German government bond denominated in euro. Similar aspects come into play regarding the volumes available for trading in the market. Given the size of

the economy it will always be more difficult to trade and hedge Swedish bonds than bonds from one of the major euro economies.

This affects many things, including the market makers' ability to use derivative instruments, rather than spot markets, to handle the exposures they incur as a result of their market-making commitments. The consequences of far-reaching transparency requirements for liquidity are therefore likely to be more severe in a smaller market. In the wholesale segment, we therefore consider it essential to differentiate transparency rules (if any) on the basis of a broader set of criteria than asset class. Regard must be taken also of the size of the market and the currency area. A completely harmonised approach is therefore not warranted. However, how a differentiated approach should be set up would require further deliberations.

(41) What is your opinion about factoring in another measure besides transaction size to account for liquidity? What is your opinion about whether a specific additional factor (e.g. issuance size, frequency of trading) could be considered for determining when the regime or a threshold applies?

For the reasons discussed in previous questions, we think that the introduction of transparency should be done after a proper impact assessment has been conducted. Other factors that should be considered besides transaction size are the market structure and the size of the market, for example, the (present as well as potential) number of participants involved in trading on a regular basis, where a specified amount of participants will be required to introduce the pre- and post-trade transparency. Also the (present as well as potential) participants' demand for transparency shall be evaluated for the specific bond or derivative.

Thresholds on delays and the post-trade information published in terms volume and price, should be based on the transaction size. However, these thresholds should not only be based on the asset class, but also consider other factors as for example issuance size, frequency of trading and the number of participants that trade on a regular basis.

3.5. Over the counter trading (Question 42)

(42) Could further identification and flagging of OTC trades be useful? Please explain the reasons.

We support flagging of trades that are OTC in the post-trade transparency reports. However, this flagging cannot motivate the post-transparency regime with transaction reporting discussed in questions 37 to 41. Instead of flagging each trade, this could be solved by reporting at the end of day the share of the trades that have been conducted OTC in relation to the total amount of trades.

4. Data Consolidation

4.1. Improving the quality of raw data and ensuring it is provided in a consistent format.(Questions 43 to 46)

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

We support the requirement that transparency information should be reported through APAs.

(44) What is your opinion of the criteria identified for an APA to be approved by competent authorities? Please explain the reasons for your views.

We find them reasonable and sufficient.

(45) What is your opinion of the suggestions for improving the quality and format of post trade reports? Please explain the reasons for your views.

We welcome the suggested improvements of the quality and format of post trade information.

(46) What is your opinion about applying these suggestions to non-equity markets? Please explain the reasons for your views.

As discussed in our answers to questions 37 to 41, the required post-trade transparency should differ between equity and non-equity markets. For example, for derivatives it would be enough if the trade repository reports the data on a daily basis. But if this is taken into consideration, we think that these suggestions should also apply for non-equity markets.

4.4. A European Consolidated tape

(51) What is your opinion of the suggestion for the introduction of a European Consolidated Tape for post-trade transparency? Please explain the reasons for your views, including the advantages and disadvantages you see in introducing a consolidated tape.

There may be some merit in a European consolidated tape. However, it is important to expose such a business to competition. If established, we think that it should be done after APAs have been established or when those rules that govern APAs have been decided.

5. Measures specific to commodity derivative markets

In the last paragraph of the introduction to section 5, it is stated that each commodity market is different and the magnitude of the challenge varies accordingly. In line with this, we are hesitant if it would be suitable to introduce a general regulatory framework within the MiFID framework applicable to all commodities markets. However, we do see a need to ensure a transparent and efficient market framework for young emerging markets such as the carbon markets. This becomes especially important as of 2013 when auctioning of emission allowances becomes the main allocation method within the EU ETS.

We believe that double reporting or additional reporting requirements should to the extent possible be avoided regarding transactions and positions in commodity derivatives which meet the definition of financial instrument in MiFID and/or EMIR, and which are reported to the competent authorities or to a trade repository under MiFID or EMIR.

5.1. Specific requirements for commodity derivative exchanges (Questions 60 to 63)

See the general remarks to section 5.

5.2. MiFID exemptions for commodity firms (Question 64)

We do not have any firm view in this respect. However, see the general remarks to section 5.

5.3. Definition of other derivative financial instruments(Question 65)

We do not have any firm view in this respect. However, see the general remarks to section 5.

5.4. Emission allowances (Questions 66)

We clearly see a need for an appropriate market framework for the growing market for emission allowances that ensures transparency as well as security for actors on the market. It is also important to take into consideration the variety of actors on the carbon markets, from financial actors to SMEs. However, we agree with the Commission that further studies and public consultations are required to assess the suitability and proportionality of classifying emission allowances as financial instruments.

6. Transaction Reporting

We agree that it is necessary to make certain that the requirements in MiFID capture the entire scope of the Market Abuse Directive (MAD). We mainly support the amendments regarding the extensions outlined in section 6.1. We have the following additional comments:

- Further clarification is required with regard to the content of reporting and the proposal to amend the framework directive to require transaction reports to include information to identify the person who has made the investment decision.
- A distinction in Article 13(4) of Regulation 1287/2006 to identify the clients on whose behalf the investment firm has executed the transaction from who has actually made the investment decision in the reporting is necessary.
- The question if transaction reports should contain information on both the beneficial owner (proxy holder) and the end client (owner) should be further analysed. This could indeed facilitate the chances to detect marked abuse but legal privileges could be an obstacle. The Commission should take into consideration what possibilities the person responsible for the transaction reports has to identify the person who has made the investment decision through a chain of transactions. The question is also if the merits of such a system match up to the costs.
- Where the investment decision is made by an automated system (algorithm) a new trading capacity or several new capacities could be introduced instead of introducing a separate trader ID as suggested.

- An investment firm which has already reported an OTC contract to a trade repository under EMIR does not automatically fulfil the reporting requirements under MiFID. The reporting must be consistent. We support the preferred solution for organisation of position and transaction reports on OTC derivates by ESMA (ref: CESR/10-1254).

7. Investor Protection and Provision of Investment Services

We agree that MiFID requires amendments in the area of investor protection and provision of investment services. However, we are of the opinion that such amendments should be of clarifying nature rather than extending the scope or the material contents of the regulation.

- We advocate that the proposals should aim at making the rules clearer. As regards the proposed changes in relation to the conduct of business rules, we are not convinced that all modifications suggested in the Consultation are required. As an example, extensive information requirements should be considered in the light of problems related to “information overload” and the risk that it may make it more difficult for clients to raise claims against firms that have not acted in the client’s best interest. To prevent that, it is more important that, where needed, the provisions regarding the information are made more clear. In some situations it may even be relevant to discuss if it would be better to require short, clear and summarised information.
- We emphasise the importance of assessing the consequences and effects of each substantial amendment of MiFID in relation to PRIPs, IMD and UCITS IV. For example, it is important that the scope of each of these more or less interlinked regulatory frameworks is clear so that there will be no ambiguity whether the directives are overlapping or whether they are applicable only to a specific type of regulated entity, e.g. an investment firm, an insurance intermediary or a UCITS management company.

7.1. Scope of the Directive

7.1.1. Optional exemptions for some investment service providers (Question 84)

We agree with the proposal to introduce common requirements for the relevant investment service providers in order to achieve the same level of investor protection in all Member States.

The client will always have difficulty to know the level of protection that is connected to a certain type of service provider. It is therefore important that MiFID’s code of conduct rules offer investors equal level of protection, irrespective of whether the firm falls under the optional exemption or not.

7.1.2. Application of MiFID to structured deposits (Question 85)

We agree with the proposal.

7.1.3. Direct sales by investment firms and credit institutions (Question 86)

We agree that clarification may be necessary. However, we are of the opinion that in situations where the firm or credit institution acts as an issuer, distributor or

underwriter, an investment service is initiated in accordance with MiFID when an investor decides to invest in the financial instrument, i.e. by the time a subscription form is received by the firm or credit institution.

7.2. Conduct of business obligations

7.2.1. "Execution only" services (Questions 87 to 90)

We advocate a clarification in accordance with Option A. We are of the opinion that UCITS in principle should be considered as non-complex instruments. However, at this stage we do not have any strong position as to what instruments should be covered under this regime.

We are of the opinion that the "execution only" regime should be retained. We do not believe that "execution only" services (sales) would entail such risks for investors that would give rise to abolishment of the "execution only" regime, as long as the information to clients is clear and the investment firm fulfils the requirements for managing the conflicts of interest.

We have the following comments relating to the details of the proposal in Option A:

- The determining factors for when a financial instrument shall be deemed to be complex should exclusively relate to the composition or structure of the instrument.
- Credit and loans should only be regarded as increasing complexity if they are offered and/or marketed in connection with the financial instrument or if the instrument is structured as a leveraged product.
- According to our understanding, the suggested modifications under Option A indicate a more narrow scope of application of non-complex instruments. We do not see any objections for such approach. However, the reference to "the client's difficulty to understand the risk involved" could be interpreted as aiming at the particular clients knowledge or experience rather than the character or composition of the instrument. This implies that the same instrument could be complex or non-complex depending on the particular client's understanding.

7.2.2. Investment advice (Questions 91 to 94)

We are of the opinion that many of the proposed changes are already set out in the current framework. There is a considerable risk that the clients receive an overload of information and are not capable or willing to understand the contents of it. It can even be argued that an increased obligation to provide information could protect the investment firms rather than the clients. Therefore, any such new requirement's impact on investor protection should be carefully assessed before implementing actions are taken. More important are also, where necessary, changes to clarify the requirements when providing investment advice. Further, we are of the opinion that it may be inappropriate to introduce detailed requirements for how investment advice may or may not be carried out.

(91) What is your opinion of the suggestion that intermediaries providing investment advice should: 1) inform the client, prior to the provision of the service, about the basis on which advice is provided; 2) in the case of advice based on a fair analysis of

the market, consider a sufficiently large number of financial instruments from different providers? Please explain the reasons for your views.

Yes, we agree that intermediaries should be required to inform the client about the basis on which advice is provided. It is far from clear that the existing requirement on what would constitute an suitable investment recommendation would imply an obligation for an investment firm to assess a sufficiently large number of products and product providers.

(92) What is your opinion about obliging intermediaries to provide advice to specify in writing to the client the underlying reasons for the advice provided, including the explanation on how the advice meets the client's profile? Please explain the reasons for your views.

We agree that there should be a more explicit obligation for investment firms providing advice to specify in writing to the client the underlying reasons for its advice, we consider that such an obligation is a natural prerequisite for the investment firm’s acting in client’s best interests.

(93) What is your opinion about obliging intermediaries to inform the clients about any relevant modifications in the situation of the financial instruments pertaining to them? Please explain the reasons for your views.

Investment firms should have an obligation to inform the client about any relevant modifications in the situation of the financial instruments pertaining to them. This should be subject to the type of advisory service offered in each case and what has been agreed with respect to the monitoring of clients’ positions in financial instruments.

We are in favour of the proposal regarding an obligation to request clients to at least annually update information regarding personal circumstances, provided that there is a reason to do so, i.e. that an investment service is offered to or requested by the client and the information is more than one year old. However, an obligation to annually update data for all clients seems to be an unnecessary administrative burden for investment firms rather than having an actual desired effect on investor protection.

7.2.3. Informing clients on complex products (Questions 95 to 100)

We do not agree with the proposals.

- To the extent a complex product is not covered by PRIPs we see no compelling reasons to require additional information requirements that may benefit a few investors that seek exposure in relation to such complex products.
- Regarding the proposed extension of the application of information obligations also to the relationship with eligible counterparties, question 99, we would like to refer to our answer in relation to questions 104 to 106.
- The ethical status of financial instruments relates to marketing and sales aspects, rather than to investor protection. Accordingly, we think that such issues should be kept separate from MiFID’s code of conduct rules.

7.2.4. Inducements (Questions 101 to 103)

We welcome a discussion on inducements and their impact on investment advice overall.

- We agree that the introduction of ban on third party inducements in case of discretionary portfolio management services is reasonable.
- We agree that investment advice cannot be deemed to be provided on an independent basis if inducements are received in connection therewith.
- We agree that there may be difficulties in applying the "enhancement criteria" in relation to third party inducements, i.e. that the investment firm must motivate the use of inducements.
- We are of the opinion that the possibility to provide ex-ante information on inducements in a summary should be kept. Ex-post information should only be required to be provided upon demand of the client. We welcome that the rules clarify more exactly what the contents of such information should be in order to increase transparency and the clients' understanding of how inducement can have an influence on the services.

7.2.5. Provision of investment services to non-retail clients and classification of clients (Questions104 to 106)

We agree that a framework principle to act honestly, fairly and professionally and to be fair, clear and not misleading should apply in relation to eligible counterparties. No other changes should be made to the classification rules.

- The framework principle should not be interpreted in a way that would deviate from the general approach, according to which the level of protection shall vary depending on the client categorisation, i.e. it is important to safeguard the overall purpose of treating categories of clients differently.
- We are of the opinion that the retail clients should enjoy the highest level of protection, whereas clients belonging to other categories are capable of safeguarding their own interests.
- As regards municipalities, MiFID rules already include a sufficient protection by providing a possibility for eligible counterparties and professional clients to require re-categorisation to professional clients or non-professional clients.

With regard to the Commission's proposal on the scope of application of eligible counterparties and professional clients, we recommend that it should be assessed together with the other ongoing legislative initiatives on level 1 in order to ensure a harmonised cross sector approach of client categories.

7.2.6. Liability of firms providing services (Questions 107 and 108)

We do not agree with the proposal in the Consultation.

- As we understand, the proposal seeks to introduce a civil liability of firms towards clients in cases where infringement of MiFID causes damage. This proposal would accordingly be an entirely new element in MiFID.
- It is unclear from the proposal whether the civil liability is meant to be strict or instead be based on negligence. Further, a description on prerequisites on investment firm's liability and how such liability could be avoided is missing.

- We are furthermore not sure how such liability is meant to be established in cases where the investment firm has infringed both MiFID rules in the harmonised area, if a harmonised liability regime would cover only specific areas of MiFID rules, or where the investment firm has infringed both MiFID rules and other rules, or only other rules than MiFID rules, which cause damage for a client. Should such cases be solved partially in accordance with MiFID's civil liability and equivalent national provisions? We are not sure whether the above mentioned situation could be possible and how it should be managed.
- Based on the above, the proposal rather indicates a partial harmonisation and there are still many aspects that need to be carefully assessed. Therefore, we doubt whether such harmonisation would be realistic or an appropriate approach.

7.2.7. Execution quality and best execution (Questions 109 and 110)

We agree with the proposals seeking to improve the means for more effective supervision of investment firms' compliance with best execution rules**.** There is a risk that lack of adequate means for *ex post* assessment of investment firms' compliance with code of conduct rules will result in ineffective rules, which do not have the desired impact on investor protection.

Moreover, we believe that monitoring of compliance with best execution requirements is necessary in a market where trading is split into several trading venues.

7.3. Authorisation and organisational requirements

7.3.1. Fit and proper criteria (Question 113)

We agree with the proposal.

7.3.2. Compliance, risk management and internal audit functions (Question 114)

We agree with the proposal to strengthen the involvement of board members in the functioning of the three support functions. These functions should have free access to the board for risk, internal audit and compliance matters. In addition, we are of the opinion that both the selection and dismissal of the head officers should be decided by the board.

Client complaints are a natural part of business operations and should not burden the compliance function as an obligatory day-to-day task. The regulation should, however, not impose any explicit prohibition in this respect. Some space for flexibility needs to be left; such managing of client complaints might be regarded as appropriate with respect of smaller investment firms.

We welcome proposals aiming to emphasize the importance of the compliance function's control of investment firm's managing of the client complaint process. Such controls can be helpful for investment firms in identifying the main risk areas of their business operations.

7.3.3. Organisational requirements for the launch of products, operations and services (Questions 115 and 116)

The proposals in this respect draw up the concrete measures that investment firms must take in order to comply with the organisational requirements under MiFID. We think that such provisions can already be read from the current set of rules under MiFID.

Further, as argued above in our general comments, we are not sure whether more detailed rules would be an appropriate approach. We believe that such an approach should be subject to a thorough consequence and impact analysis before any legislative action is taken. Procedures for such new products and services could already today be derived from the general organisational requirements and the general principle of the exercise of the investor protection

7.3.4. Specific organisational requirements for the provision of the service of portfolio management (Question 117)

With regard to the proposal in this respect, we would like to refer to our general opinion in the issue above, section 7.3.3.

7.3.5. Conflicts of interest and sales processes (Question 118)

We agree with the proposal and consider that this issue has been assessed sufficiently by CESR.

7.3.6. Segregation of client assets (Questions 119 to 123)

Our reflection is that these proposals should be assessed together with the other ongoing legislative initiatives on level 1 in order to ensure a harmonised cross sector approach in this respect.

8. Further Convergence of the regulatory Framework and of Supervisory Practices

8.1. Options and discretions

8.1.1. Tied agents (Questions 125 to 128)

We think that the option for Member States not to allow the use of tied agents should be retained.

We also believe that the prohibition for tied agents to handle clients' assets should be retained. Furthermore, in our opinion there is a need to clarify to what extent investment firms are allowed to engage tied agents. Such clarification could, as CESR suggests, be implemented at level 2. Our experience is that these rules currently vary between Member States, which may have complicated impacts on engaging tied agents with cross-border operations.

8.1.2. Telephone and electronic recording (Questions 129 to 132)

To maintain telephone recording and electronic communication is expensive for investment firms. These requirements should be harmonised in order to provide a level playing field for investment firms across the Member States.

However, we wonder if there is any actual need for such extensions as suggested and what purpose they would have. We are generally of the opinion that the requirements should be proportionate with the desired effect.

8.2. Supervisory powers and sanctions (Questions 134 to 137)

It is important that competent authorities are equipped with the supervisory and investigatory powers that are necessary for the exercise of their functions. We are however not convinced that the additional powers discussed in section 8.2.1, the right to enter private premises and to seize documents, are necessary to obtain these objectives. The powers set out in Article 50 of MiFID are already quite substantial and it is not clear what the discussed powers in substance would add to the existing provisions in Article 50(2)(a) and 50(2)(c) of MiFID. Moreover it seems appropriate that powers dedicated to the competent authorities have to be sufficiently consistent horizontally across different financial sectors.

We believe that it is important that competent authorities have access to a variety of different kind of sanctions in order to enable that the appropriate level of measure is used which is proportionate to the gravity of the infringement. It's also important that sanctions are applied in a sufficiently consistent way horizontally across the financial markets and also across the union in order to avoid regulatory arbitrage.

We support that the appropriate administrative measure should at least have the effect of putting an end to a breach of the provision of the national measure implementing MiFID and/or eliminating its effect. We also support the notion that appropriate administrative sanctions would mean decisions which have the effect of acting as a deterrent against the breach of the provisions of the national measure implementing MiFID. Apart from withdrawal of authorisation, administrative fines and periodic penalty payments seem to be appropriate examples of such administrative sanctions. Administrative fines have to be sufficiently high to accomplish the desirable deterrent effect. But also other forms of administrative sanctions could be considered, such as public warnings or reprimands combined or not with administrative fines. It's important however that the principle discussed does not limit the possibility to impose different kind of appropriate administrative measures/sanctions in relation to the severity of the infringement.

Article 51 of MiFID, which lays down the fundamental principles for a Member State to implement appropriate administrative measures and administrative sanctions, is without prejudice to the right of a Member State to impose criminal sanctions. We do not believe that it is necessary to change this and criminalise certain infringements on EU-level.

Regulation concerning whistleblowing and the setting up of some sort of leniency programs raise serious issues on how such rules would fit with existing national legal frameworks. Whether such rules are suitable or not can only be determined on the basis of an assessment if (and how) such rules would fit into the national legal framework of each Member State. At first sight it seems difficult to reconcile rules on whistleblowing with the Swedish legal framework.

9. Reinforcement of supervisory powers in key areas

9.1. Ban on specific activities, products or practices (Questions 142 to 144)

(142) What is your opinion on the possibility to ban products, practices or operations that raise significant investor protection concerns, generate market disorder or create serious systemic risk? Please explain the reasons for your views.

We are against that the possibility to ban products, practices or operations is included in MiFID. Such a possibility would give the Commission, the national competent authorities and to a certain extent ESMA quite substantial discretionary powers. We are not convinced that such powers are necessary and we think there are other more efficient ways to deal with products and operations that may generate market disorder or create systemic risk than issuing an outright ban. By, for example, appropriate risk management procedures, adequate capital requirements and the introduction of clearing obligation, the systematic risks of these products can be reduced.

However, if this possibility to issue bans would be introduced it’s important to bring them together with detailed and meticulous rules and procedures for when and how such powers could be exercised. Among other things it seems appropriate that they at least are restricted to “emergency situations” and that they are temporary, compare for example Article 9(5) of the ESMA Regulation (Regulation (EU) No 1095/2010). If such bans are considered necessary, we therefore think it is appropriate to regulate them separately, and not in MiFID.

(143) For example, could trading in OTC derivatives which competent authorities determine should be cleared on systemic risk grounds, but which no CCP offers to clear, be banned pending a CCP offering clearing in the instrument? Please explain the reasons for your views.

We are strongly against a complete ban of OTC derivatives which are required to be cleared, but which no CCP offers to clear. The reason why no CCP offers to clear could, for example, be that the outstanding volume is too small due to that the derivatives are tailor-made for some limited amount of investors. But for those investors these derivatives can be of great importance to conduct efficient risk management.

Instead of banning these derivatives risk mitigating arrangements could be introduced for counterparties that enter into a derivative contract which no CCP offers to clear. This could be done through agreements between the counterparties, for example an appropriate exchange of collateral, in order to handle the systemic and credit risk. It shall also be noted that this question on how to deal with these OTC derivatives is highly related to the ongoing negotiations regarding EMIR (see for example the requirements on risk mitigating techniques in EMIR (Article 8)). For that reason it is highly questionable if it is necessary to take any measures in MiFID that go beyond the requirements in EMIR and CRD regarding derivative instruments which are not cleared by a CCP.

(144) Are there other specific products which could face greater regulatory scrutiny? Please explain the reasons for your views.

In our opinion, there are no products that should face greater regulatory scrutiny.

9.2. Stronger oversight of positions in derivatives, including commodity derivatives

(145) If regulators are given harmonised and effective powers to intervene during the life of any derivative contract in the MiFID framework directive do you consider that they could be given the powers to adopt hard position limits for some or all types of derivative contracts whether they are traded on exchange or OTC? Please explain the reasons for your views.

We do not support the introduction of hard position limits for any derivative contracts in MiFID independent of where they are traded. If hard position limits are introduced, it could be more problematic to hedge risks. In addition, those firms that are regulated on EU level and under supervision, e.g., credit institutions, insurance companies, UCITS etc., already have limits for their exposures and if it is necessary to have tougher limits, it should be regulated in the relevant sector directives. Moreover, the regulations for these firms are harmonised just to ensure a level playing field. For those firms that are not under supervision, position limits might be justified in MiFID when the derivative contracts are used for speculation and not for hedging. However, by the introduction of clearing obligation for derivatives, or appropriate risk management procedures when not cleared by a CCP, these problems are taken care of.

(146) What is your opinion of using position limits as an efficient tool for some or all types of derivative contracts in view of any or all of the following objectives: (i) to combat market manipulation; (ii) to reduce systemic risk; (iii) to prevent disorderly markets and developments detrimental to investors; (iv) to safeguard the stability and delivery and settlement arrangements of physical commodity markets. Please explain the reasons for your views.

We do not think that using position limits for derivatives is an efficient tool for any of the listed objectives. The Market Abuse Directive (MAD) should be applied instead of these limits to combat market manipulation. If it is necessary to introduce some restriction on derivatives exposures because of some systemic risk or that it is considered a threat to the stability for firms under supervision, then there are other directives and regulations applicable to those firms that are better suited for any additional provisions introduced in order to handle these risks.

(147) Are there some types of derivatives or market conditions which are more prone to market manipulation and/or disorderly markets? If yes, please justify and provide evidence to support your argument.

We have no opinion on this issue.

(148) How could the above position limits be applied by regulators: (a) To certain categories of market participants (e.g. some or all types of financial participants or investment vehicles)? (b) To some types of activities (e.g. hedging versus non-hedging)?(c) To the aggregate open interest/notional amount of a market?

As discussed in the answers to questions 145 to 147 some kind of position limits can only be justified for firms that are not under the supervision of a competent authority and when the activity is non-hedging. If such limits would be decided from a stability perspective, the firm’s total holdings of derivative contracts and the risk exposure that follows are of larger concerns than the position in a specific derivative.

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