

## MIFID II: EuropeanIssuers' Comments

15 December 2011

### Key Messages

1. Companies welcome the extension of transparency requirements to all financial instruments traded on organised venues with proper calibration depending on markets specificities and asset classes.

However, companies remain concerned about the possible lack of transparency in two areas: the size of the business evading pre-trade transparency; the quality of post-trade transparency.

It is unclear whether the new OTF category will achieve a significant reduction in the size of the business eluding pre-trade transparency.

In addition, there is potentially a wide effect of the new waivers mechanism, which might defeat the objective of tightening its scope of application.

Regarding post-trade transparency, there is a need to verify that the proposed process with which data can be consolidated, will actually deliver comprehensive, consistent and affordable post-trade data.

If market forces do not resolve this within a predetermined period, recourse to alternative options, including a mandatory tape, should be contemplated.

2. OTC – We consider that room should be left for derivatives used by non-financial companies.

We would like to see these derivatives which are traded on organised venues exempted from the transparency obligations on account of their not representing a systemic risk and/or their being used for hedging purposes as acknowledged by EMIR (commercial, investing and financing transactions).

For all practical purposes, we consider that the exemption from the trading obligation should also apply to bespoke derivatives applied by non-financials for hedging purposes although they are exceeding the clearing threshold imposed by EMIR. Disclosing pre- and post-trade data of these instruments agreed on a case by case basis would raise confidentiality problems and increase the costs of corporate risk mitigation strategies.

3. SMEs – While we welcome the European Commission's intention to improve the access of SMEs to capital markets, we do not think that the extension of some obligations already applicable to issuers traded on regulated markets to SMEs traded on MTFs is helpful and can improve their raising of capital.

In addition we would like to see the issue set in a broader framework and a working group established by the Commission with a view to identifying the problems facing smaller companies and to considering possible solutions.

4. HFT – companies consider that the scope of application of the proposed supervisory and organisational regime, which applies to RM, should be extended to all organised trading venues.

Furthermore, the proposed scheme should be complemented by a series of measures aimed at reducing on the one hand the importance of cancelled orders and at containing on the other hand disorderly market conditions.

5. Corporate Governance - We are concerned that the proposed definitions and measures relating to the governance of investment firms impinge on existing corporate governance and national corporate law principles. We are in particular worried that the Commission without reason only refers to the one-tier management system to the exclusion of the two-tier management system, which runs counter to corporate law requirements in several Member states.

We are also concerned that the Commission proposals do not sufficiently distinguish between the respective roles of Management body and of senior management. In particular, it is the senior management or, in a two tier model, the Management Board, and not the Board<sup>1</sup>, that takes on prime responsibility in respect of risk policy, risk management and decision-making. The Board monitors whether risk policies are properly applied (overall monitoring).

We would also like to see that ESMA, when preparing delegated acts, does not interfere with well established corporate governance and corporate law principles (e.g. by defining general concepts such as diversity, independence, etc.).

6. Investor protection - Conflicts of interest: smaller issuers should be given the possibility to make investment research which they have commissioned themselves available to investors, which is currently not the case.
7. Investor protection - We consider that professional clients rather than investment firms should be left with the option to obtain a variation of the terms of their agreement in order to secure a higher degree of protection for these clients, upon their request, regarding specific services, transactions or products.
8. As for best execution, there is a need of more substantive information to enable clients to effectively understand how their orders are executed and at which venue. It is far from being certain that the Commission proposals will achieve this.

In view of the uncertainties about implementation of the best execution principle, a more extensive use of the option provided by MiFID<sup>2</sup> could be made. This option provides for an exception to the best execution requirement in order to facilitate execution of e.g. issuer buy-back programmes.

9. Emission allowances: we take the view that parts of the legislation applicable to financial

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<sup>1</sup> Board of Directors or, in a two tier model, Supervisory Board

<sup>2</sup> Article 21.1 Directive 2004/39, MiFID - Article 27.1, Proposal of a Directive amending directive 2004/39

instruments are not suitable for emission allowances, given their specific objective - reduce greenhouse gas emissions - and characteristics.

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EuropeanIssuers' ultimate goal is to achieve well functioning European financial markets which serve the interests of their users, together with good corporate governance and responsible share ownership. More information can be found at [www.europeanissuers.eu](http://www.europeanissuers.eu).