Luxembourg, 2\textsuperscript{nd} February 2011

Public consultation: Review of the Markets in Financial Instruments Directive (MiFID)

\textbf{Information about the ABBL:}
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Identity & Organisation \\
Capacity & Industry trade body \\
MS of establishment & Luxembourg \\
Field of activity/industry sector & Banking & other financial services \\
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\section{1. INTRODUCTION}

The ABBL\textsuperscript{1} welcomes the EU Commission’s initiative to seek the views of market actors on the revision of the important MiFID directive. The ABBL wishes that, as in the past, quality prevails over speed of in the design of new rules in addition the consultation is sometimes vague on some consideration and support on high level principles may be undermined by a detailed regulatory proposal.

The ABBL reminds the EU Commission that MiFID was introduced at a particularly difficult time and that conclusions on the quality of the regulation and its effectiveness should not be drawn too quickly. The ABBL is convinced that the MiFID is already today a benchmark in terms of financial regulation and that there may be no need to add more layers of rules.

In this respect, although the ABBL understands the need to regulate areas of the financial markets that were left out of the first MiFID it insists on the fact that the regulation is already very complex, protective and costly. What IFs and clients require now may be a more down-to-

\textsuperscript{1} The Luxembourg Bankers’ Association (ABBL) is the professional organisation representing the majority of banks and other financial intermediaries established in Luxembourg. Its purpose lies in defending and fostering the professional interests of its members. As such, it acts as the voice of the whole sector on various matters in both national and international organisations.

The ABBL counts amongst its members’ universal banks, covered bonds issuing banks, public banks, other professionals of the financial sector (PSF), financial service providers and ancillary service providers to the financial industry.
earth approach to the rules as well as a simplification of rules rather new information and new layers of control. Better informing the clients is of course a task that ABBL members are willing to pursue, but at the same time the association, on the basis of certain questions of this consultation, fears that clients will be swamped by even more information and drown in a sea of data that will be difficult to sort through and understand to the full extent. Today, simpler rules and less, but better tailored information may be what is really needed.

In the context of the MiFID review, the ABBL also hopes that some approaches in the current MiFID will be reviewed. These primarily concern certain market practices (HFT) as well as the definition of complex/non-complex products, where an evolution to a consideration of riskiness would be most welcome. The ABBL also has concerns regarding inducement, where there are very real risks of driving the vast majority of retail clients out of advice. The idea that clients may separately buy advice and securities has been proven wrong by some initiatives. This may be true for wealthy clients, but not for the majority of retail investors. The outcome of pursuing the current approach will be that retail investors are likely to not opt for advice and select financial products based on non-material criteria, thus deserting their long-term saving objectives and risking their pensions. Reporting is another area of major concern. As much as possible, the ABBL would call for the avoidance of multi-reporting of the same information. The ABBL would also hope that reporting will be done with a specific end in mind and not merely because data is available. In this sense, the numerous new requirements discussed in the paper are likely to overwhelm the authorities. The ABBL hopes that they will be ready to handle this mass of data. Finally, the ABBL is finally convinced that the use of a commonly agreed language at EU level is a must, both for IFs and authorities. Hopefully, XBRL will prevail as the language of choice in this context.

Beyond answering each question the ABBL wishes that the strategy used to address the priorities in view of drafting additional rules to the MiFID would rely on the following:

- Is today’s system really structurally inefficient?
- Why is it so?
- What is the concrete objective to be achieved?
- What can be done operationally viable?
- At what cost, and is it reasonable, both at individual level and collectively?

The ABBL is also mindful that the MiFID review comes alongside many other regulatory initiatives and thus invites the EU Commission to assess the mutual impacts of the various regulations that are either reviewed or introduced (MAD, EMIR, Securities Law, UCITS V…) and to try and avoid duplication of efforts, both for IFs and for clients.
2. DEVELOPMENTS IN MARKET STRUCTURES

2.1 Defining admission to trading

(1) What is your opinion on the suggested definition of admission to trading? Please explain the reasons for your views.

*The ABBL notes that there are today many differences in the types of platforms and considers that some form of convergence of definitions of admission to trading will not harm the specificities of the different types of platforms, neither other actors. As a consequence the proposed definition seems to be agreeable.*

2.2 Organised trading facilities

2.2.1 General requirements for all organised trading facilities

(2) What is your opinion on the introduction of, and suggested requirements for, a broad category of organised trading facility to apply to all organised trading functionalities outside the current range of trading venues recognised by MiFID? Please explain the reasons for your views.

(3) What is your opinion on the proposed definition of an organised trading facility? What should be included and excluded?

(4) What is your opinion about creating a separate investment service for operating an organised trading facility? Do you consider that such an operator could passport the facility?

(5) What is your opinion about converting all alternative organised trading facilities to MTFs after reaching a specific threshold? How should this threshold be calculated, e.g. assessing the volume of trading per facility/venue compared with the global volume of trading per asset class/financial instrument? Should the activity outside regulated markets and MTFs be capped globally? Please explain the reasons for your views.

*The ABBL expresses its views regarding shares trading. For other instruments, views may be explicitly stated. Otherwise, the ABBL considers that current market structure is adequate.*

Regarding questions on the harmonisation of trading platform rules (n°2), the ABBL is doubtful as to the necessity to fully harmonise, as proposed by the current document. Indeed, market forces have chosen various routes for trading and supported diversity in the types of platforms. The regulation as proposed would strongly question the need for different types of trading places with the consequence of increasing the market impact of large orders and further reducing the possibility to tailor made products for specific client’ needs (principally professionals, corporates and in some instances retail) and above all it would mark a huge step backward to pre-MiFID area where concentration applied. In the end what would be the differences between 2 trading platforms if all the rules are the same? In the ABBL’s view the
key parameter should be price convergence among platforms, not the way they operate. The ABBL is confident that post-trade reporting is able to deliver that information. As a consequence the ABBL is reserved whereas the opportunity to create a new OTF category. It considers that the current MiFID requirements cover appropriately the different trading practices. Furthermore regarding non-equity instruments (bonds or derivatives) the ABBL is unsure this OTF concept would mark a step in a good direction given their much different markets structures.

This being said, in equity trading, the ABBL does not consider that reporting obligations should differ among platforms. The ABBL views this information (reporting) as a general requirement for the good functioning of the markets in order to set prices.

Regarding question 3, the ABBL does not specifically see the need for a separate investment services status and as a consequence questions the need for a passport. The ABBL considers that access to market places shall be open and that clients shall be free to access these markets from any places (via an intermediary for retail).

Regarding equities or equity-like instruments, the conversion of alternative trading platforms into MTFs may be conceptually interesting, but the question that remains is why do so if the market does not support such a transition? Why penalise an entity and force it to change its business model when successful? Above all, this would mean a complete change of business model solely based on reaching a given threshold, what is debatable. Thus, businesses that develop well are “punished” and forced to opt for another model (that may be not profitable to them anymore). This is an open invitation for regulatory arbitrage. Furthermore, the different types of trading platforms perform different needs for different types of actors. The ABBL has not seen any real market disturbance at this stage and views these alternatives as part of a sane diverse ecosystem. Finally, does this proposal mean that the operator may be forced/have the option to revert back to its previous business model? Consequently, the ABBL does not support this option.

In any cases if trades are reported post-trade, the need for conversion is further put into question. The ABBL, nevertheless, considers that among the criteria referenced in the consultation document the number of trades performed and the number of “clients” of the platforms may be taken into account.

2.2.2 Crossing systems

(6) What is your opinion on the introduction of, and suggested requirements for, a new sub-regime for crossing networks? Please explain the reasons for your views.

(7) What is your opinion on the suggested clarification that if a crossing system is executing its own proprietary share orders against client orders in the system then it would prima facie be treated as being a systematic internaliser and that if more than one firm is able to enter orders into a system it would be prima facie be treated as a MTF? Please explain the reasons for your views.

The ABBL does not support the analysis of the EU Commission in this chapter. It considers this practice as a more marginal business that does not call for a regulation per se (CESR
survey). Furthermore, an extension of the scope from pure shares trading seems inappropriate, market structures are very different across the many types of financial instruments traded; shares markets are not structurally identical to bonds or derivatives, notably the price formation process is fundamentally different. In addition, at least regarding IFs, the information level appears to be appropriate for many non-equity products if not all.

The ABBL would, however, understand if rules on post trade reporting were to be extended to all types of financial instruments, provided that timing is relevant and appropriate for each market structure and financial product and that dual or multiple reporting is avoided to the maximum extent.

The ABBL does not support the transition from crossing network to Systematic Internaliser or MTF. This approach may be justified only if the impact on the market is large enough and that crossing networks appear to be a strong deviance from the other markets, which should be mitigated if crossing networks were also reporting post-trade information. Something that is not demonstrated today.

2.2.3 Trading of standardised OTC derivatives on exchanges or electronic trading platforms where appropriate

(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.

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

(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.

(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.

(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.

The ABBL is definitely not supportive of such a bold regulatory move. The market structure of OTC trading is by definition different from a market-based equities trading approach. Products are mostly traded on a bilateral basis and are thus not suited to a market-based mechanism. The fact that they are cleared does not change the approach. Furthermore, not all institutions
may access the clearing facilities (i.e. corporate non-financial institutions). It would again be odd to force derivatives in a direction that has been abandoned for equities (i.e. concentration on a platform for trading). The ABBL is doubtful about the positive impact on systemic risk to force trading on regulated platforms as it is already uncertain of the potential benefits that may under some scenarios be offered by central clearing.

This being said, it is likely that markets will increasingly rely on platform-based trading, but with the caveat that it will not be and could not be identical to equity trading. The market structure is different; trading platforms if introduced must accommodate these differences. OTC trades are mostly done on an ad hoc basis between two consenting counterparties. Moreover, contrary to equities markets where the criterion of anonymity is of paramount importance, this is not the case for bilaterally negotiated products. There may be a clear advantage in knowing who the counterparty is. Thus, the use of the request for quotes (RFQ) system. In addition, the issuing counterparty may not be willing to have its products listed and accessible to the maximum number of investor, this is generally the aim of a shares market, not of an OTC market. Lastly, in the case of RFQs the prices displayed should not be made publicly available as firm quotes because the terms of the trade are designed for a specific counterparty (a side effect of doing so would be an increase of the spreads).

The list of criteria appears complete. However, the criteria of pre-trade transparency may be in practice rather difficult or impossible to apply for a vast number of these OTC derivatives, notably because the counterparty is part of the price definition (counterparty risk component). Contrary to shares, in OTC the trade is on a contract not on an instrument, a material representation of the capital of a company (independent for its valuation of the counterparties). The ABBL further questions the need to report to trade repositories, if trades are executed on a platform. Since they are cleared, they will be known or reported by the clearing-house to the TR, based on the current EMIR text. There may at least be an opening for 3rd party reporting.

(Q10). The criterion of sufficient liquidity is difficult to assess for at least 2 reasons. The first is that the liquidity level may change once the instrument is traded on a platform (investment firms will either be more or less likely to trade). The second reason is that markets have today not chosen the direction of platforms to trade many of these products. Thus, the transition to on platform trading may not be extrapolated from levels seen in the OTC space.

The ABBL thinks that expectations on the concept of on platform trading must be carefully analysed and not set at too high a level. Platform trading may be a part of a solution to solve the issues faced in the previous years, but it is not the one and only solution in itself. In the case of OTC traded products the odds are that it will concentrate the trading further in the hands of a few intermediaries that are able to be linked both to clearing houses and to platforms, in the end reducing the diversity and concentrating risk among a few, or very few institutions.

To conclude, the ABBL considers that EMIR should be the first step in the direction of more platform based trading to avoid unreasonable market shifts in one instance. Success in the infrastructure will be the only one able to support success in the trading layer because, it will bring the required level of standardisation that a handful of platforms will not be able to coordinate in a first instance.
2.3 Automated trading and related issues

(13) Is the definition of automated and high frequency trading provided above appropriate?

(14) What is your opinion of the suggestion that all high frequency traders over a specified minimum quantitative threshold would be required to be authorised?

(15) What is your opinion of the suggestions to require specific risk controls to be put in place by firms engaged in automated trading or by firms who allow their systems to be used by other traders?

(16) What is your opinion of the suggestion for risk controls (such as circuit breakers) to be put in place by trading venues?

(17) What is your opinion of the suggestions to require specific risk controls to be put in place by firms engaged in automated trading or by firms who allow their systems to be used by other traders?

(18) Is it necessary that minimum tick sizes are prescribed? Please explain why.

(19) What is your opinion of the suggestion that high frequency traders might be required to provide liquidity on an ongoing basis where they actively trade in a financial instrument under similar conditions as apply to market makers? Under what conditions should this be required?

(20) What is your opinion about requiring orders to rest on the order book for a minimum period of time? How should the minimum period be prescribed? What is your opinion of the alternative, namely of introducing requirements to limit the ratio of orders to transactions executed by any given participant? What would be the impact on market efficiency of such a requirement?

In the ABBL’s opinion, this is exactly where efforts should be focused. Automated trading has been of great help in slicing large orders to reduce their market impact for other actors. But HFTs have been one of the most disruptive market forces since the inception of MiFID. They create a false sense of liquidity (cancellation of many trades) and do not seem to add value to the markets.

The issue is not about the speed of execution per se, it is technological progress, but about the fact that it is difficult to really trade against these HFT traders. Since they cancel a vast majority of their orders it means that they are concretely unable to execute large orders at the displayed price. Rates of cancellation above abnormal levels, say 50% of orders placed, are unacceptable. In the ABBL’s view, non-MiFID HFT firms are a deviation of otherwise acceptable market practices.

Therefore, the ABBL would support the requirement that HFTs become MiFID regulated in all cases. Risk management and capital buffer proportionate to the size of the HFT company should be applied as it is for any other MiFID firm. Furthermore, the ABBL strongly supports a rule according to which orders placing/intent to trade and cancellation of orders remains in “normal proportion”, independently of the actor on a given market. The cancellation of orders
should be marginal under normal market trading, and undifferentiated among the different market participants. Trading platforms may then be required to set up appropriate control on that aspect.

The ABBL is indifferent whereas the tick size and considers that trading technology or algorithms should not necessarily be disclosed at the outset to the regulator even though they might be accessible upon request under appropriate circumstances. Equally, co-location or sponsored access are not problematic as long as it is not a discriminatory practice or access.

2.4 Systematic internalisers

(21) What is your opinion about clarifying the criteria for determining when a firm is a SI? If you are in favour of quantitative thresholds, how could these be articulated? Please explain the reasons for your views.

(22) What is your opinion about requiring SIs to publish two-sided quotes and about establishing a minimum quote size? Please explain the reasons for your views.

The ABBL’s views are based on the current scope of SI in MiFID. The association may take different views if the definition of scope is modified. The systematic internalisation is a failure of a good intention when the MiFID was created. In an ideal world, SI are investment firms that for their clients offer a competitive access to trading (at the same or better price) than what is offered on a Regulated Market (cutting part or all of post-trade fees, notably).

However, the requirements in the MiFID were so cumbersome that only a few players were willing to act as SI. If revisited and simplified, SI may be an adequate route to trade equity or equity-like products.

The obligations should be limited compared to MTFs or RM, because SIs are already MiFID regulated, and provided that executed trades are reported adequately (post-trade transparency).

As a consequence, the ABBL does not see the need to maintain throughout the day dual quotes for all shares. Instead a rule to require to trade at prices at least equal to the one of the RM or MTF of reference once a trade is proposed to a client may be more appropriate. Again, post-trade reporting is key and the ABBL would support reporting of trades as for any other platforms. In that case post trade reporting will perform two tasks: one is market information and the second is supervisory information.
2.5 Further alignment and reinforcement of organisational and market surveillance requirements for MTFs and regulated markets as well as organised trading facilities

(23) What is your opinion of the suggestions to further align organisational requirements for regulated markets and MTFs? Please explain the reasons for your views.

(24) What is your opinion of the suggestion to require regulated markets, MTFs and organised trading facilities trading the same financial instruments to cooperate in an immediate manner on market surveillance, including informing one another on trade disruptions, suspensions and conduct involving market abuse?

In terms of concept, the ABBL is not supportive of applying the same organisational requirements for all trading platforms unless there is a convergence of status. Market actors have supported the emergence of a diversified structure of platforms to better serve their needs. These platforms have developed specific markets that respond to demand from different types of clients and as a consequence they shall not obey to the same criteria.

Cooperation among platforms may be on paper a good idea, but it is likely to be difficult to implement, because trading platforms are not supervisors and they are located in different Member States and respond to different rules, and, in the end, they are competitors.

2.6 SME markets

(25) What is your opinion of the suggestion to introduce a new definition of SME market and a tailored regime for SME markets under the framework of regulated markets and MTFs? What would be the potential benefits of creating such a regime?

(26) Do you consider that the criteria suggested for differentiating the SME markets (i.e. thresholds, market capitalisation) are adequate and sufficient?

SMEs appear indeed to be one of the market segments that suffered indirectly from the introduction of MiFID.

Their natural entry point to capital markets, the Regulated Markets, were concentrating on preserving market shares in large pan-European issuers and competing with new actors. As a result, liquidity nearly fully dried for smaller issuers.

Thus, the ABBL would view favourably measures to activate/promote trading in that segment may help strengthen the EU economy. At the same time, one should bear in mind that SMEs are mostly known in their MS and that investors may naturally be reluctant to invest in lesser-known entities, especially if market liquidity is elusive and that past experiences across the EU have known mixed success.
3. PRE- AND POST-TRADE TRANSPARENCY

3.1 Equity markets

3.1.1 Pre-trade transparency

(27) What is your opinion of the suggested changes to the framework directive to ensure that waivers are applied more consistently?

(28) What is your opinion about providing that actionable indications of interest would be treated as orders and required to be pre-trade transparent? Please explain the reasons for your views.

(29) What is your opinion about the treatment of order stubs? Should they not benefit from the large in scale waiver? Please explain the reasons for your views.

(30) What is your opinion about prohibiting embedding of fees in prices in the price reference waiver? What is your opinion about subjecting the use of the waiver to a minimum order size? If so, please explain why and how the size should be calculated.

(31) What is your opinion about keeping the large in scale waiver thresholds in their current format? Please explain the reasons for your views.

The ABBL has a neutral position on the issue regarding waivers for pre-trade transparency, but would like to point out that compared to the time before the MiFID inception, the size of orders traded has dramatically decreased and that waivers may be accordingly revised downward and my become an ESMA prerogative instead of being casted into the stone of a regulation.

In addition the ABBL would like to warn the EU Commission against an absolute reliance on pre-trade information, indeed market makers are likely to increase the spread they generally propose when markets are experiencing difficulties. Thus full pre-trade information may not always be optimal for the market participants.

3.1.2 Post-trade transparency

(32) What is your opinion about the suggestions for reducing delays in the publication of trade data? Please explain the reasons for your views.

Under normal trading conditions, the ABBL does not expect that shortening of delays will create major issues. The 1-minute delay may be particularly tricky when markets are difficult or when orders have to be manually placed/corrected.

In addition, raising the intra-day transaction threshold seems counter-intuitive as the size of orders has decreased since the end of 2007 (as presented in the CESR survey)
3.2 Equity-like instruments

(33) What is your opinion about extending transparency requirements to depositary receipts, exchange traded funds and certificates issued by companies? Are there any further products (e.g. UCITS) which could be considered? Please explain the reasons for your views.

(34) Can the transparency requirements be articulated along the same system of thresholds used for equities? If not, how could specific thresholds be defined? Can you provide criteria for the definition of these thresholds for each of the categories of instruments mentioned above?

In principle, the ABBL would support that same rules apply for instruments that are listed and traded on exchanges (or other platforms) as long as they share the same characteristics as “regular” equities, i.e. continuous market-based pricing and trading.

This is clearly not the case for a vast majority of UCITS that are negotiated on their daily NAV with primary market features (creation of new shares and deletion in case of redemption) and whose price is not directly subject to the law of offer and demand, as is the case for other instruments.

3.3 Trade transparency regime for shares traded only on MTFs or organised trading facilities

(35) What is your opinion about reinforcing and harmonising the trade transparency requirements for shares traded only on MTFs or organised trading facilities? Please explain the reasons for your views.

(36) What is your opinion about introducing a calibrated approach for SME markets? What should be the specific conditions attached to SME markets?

Following the logic of the response to questions 33 and 34, the ABBL would support the application of a single regime for equity-like instruments as long as they share the same features trading-wise, whatever the platform on which they are traded. It is obvious that these other platforms may apply large sized waivers… and develop niches of trading or trading strategies in the markets or sub-sets of the markets. Regarding equities or equity like instruments, the key is post trade information so that other stakeholders have access to relevant data.

The ABBL would have a lot of sympathy for the development of a SME market segment. The reality, however, is that to increase trading and availability to investors there should be more information, more disclosures and more constraints on these entities than on larger well-known companies in order to increase investors’ confidence, which may be counterproductive cost-wise for these entities.

Hence, if a lighter but protective enough trading space could be created, this clearly would help the EU economy. Unfortunately, except by forcing market makers to animate markets in that
segment and ensure continuously sufficient level of liquidity, this may remain in the realms theory only.

3.4 Non-equity markets

3.4.1 Pre-trade transparency

3.4.2 Post-trade transparency

(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? Please explain the reasons for your views.

(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).

(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? Please indicate what transaction size would be appropriate for the various asset classes.

(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? Please explain the reasons for your views.

(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? Please justify.

One should not underestimate the differences between the various market structures. On the one hand, there is the equity market (or equity-like), which is extremely active and composed of a myriad of actors constantly placing large and small orders. The market for these instruments is a natural facilitator as it helps to set a price on a quantity of equity to negotiate. Furthermore, the equity of an issuer fluctuates in value according to the ups and downs of the law of offer and demand, they are not priced by a formula; the number of shares is defined and only the price is negotiated.

The ABBL is generally not supportive of further forms of pre-trade transparency for non-shares because of the strongly diverging operational market structure. The ABBL considers that the picture is completely different for other instruments. In the case of bonds, the market usually remains at primary level (issuance of a new bond) and the amount negotiated are much higher and scarcer than for equities. This definitely calls into question the need for continuous pre-trade transparency, in most cases because the cost benefit trade-off is largely unsatisfactory.
Furthermore, for bonds it appears that generally the more time elapses since the day of issuance the less the secondary market is active. Be they pension funds or retail investors; the attitude is usually one of “buy and sit” i.e. the income collection of interest is a key feature of the bond. Thus, for bonds a request for quotes may be best suited to the market structure.

Regarding OTC derivatives, the issue may be different, but ends up in the same situation. The pricing today is based on request for quotes and/or is mostly bilateral. In many cases the counterparties have to know with whom they trade to set a final price (for products that are customised and with a continuous flow of cash between parties, for example) and deals are not closed in a few turns. The pre-trade transparency requirements may play against the market and thus entities that seek to cover their positions or hedge their natural business activity as is the case for many corporates.

Finally, one should keep in mind that the more transparent the markets the more difficult it would be to limit their access to all sorts of investors. It may not be wise to let retail investors feel as if it would be good for them to invest in derivative instruments because they are traded on an exchange (or trading platform). The ABBL would also remind what was said earlier regarding pre-trade transparency and warns again the EU Commission against an absolute reliance on pre-trade information, indeed market makers or financial counterparties are likely to increase the spread they generally propose when markets are experiencing difficulties what would be even truer for non-equity instruments. Thus full pre-trade information may not always be optimal for the market participants.

Post-trade information, provided it is disclosed with appropriate delays and warning (i.e. time of last trade), may be relevant although today interested parties have access to this information, the question may then be why add a new layer of regulation?

3.5 **Over the counter trading**

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

This may be useful information, but, on the one hand, the cost of modifying the reporting should not be underestimated and, on the other hand, specifically regarding OTC trades, the flagging may lead to the identification by other market participants of who is behind a given trade. This is likely to lead to “predatory positions” by other traders against the identified one. The ABBL therefore calls for a careful cost-benefit analysis before broadly applying this type of requirement and at least check for synergies with other regulations (in that case EMIR) to limit multi-reporting of the same or nearly the same data. May be another reason to converge to a common language like XBRL.
4. DATA CONSOLIDATION

4.1 Improving the quality of raw data and ensuring it is provided in a consistent format

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

(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.

(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.

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

The ABBL is conceptually supportive of such initiatives. Furthermore, the association thinks that trade data should be offered as close as possible to “at cost” all along the value chain. Indeed part of the data belongs in a way to the parties that trade on the platform and part to the platform itself as the provider of an organised place to meet buyers and sellers and this at least in raw files. Consequently, the data does not fully belong to the trading platform neither other intermediaries in the chain of information. Where some further studies shall take place is on the costs of processing the data and other actors in the chain (i.e. data vendors).

In any case, the details of the regulation may render it very rapidly extremely costly. In any case one of the principal objectives of such rules should be to avoid dual or multi reporting as much as possible. In the end applying such a regime to all markets may be premature if not first tested with equity markets.

4.2 Reducing the cost of post trade data for investors

(47) What is your opinion of the suggestions for reducing the cost of trade data? Please explain the reasons for your views.

(48) In your view, how far data would need to be disaggregated? Please explain the reasons for your views.

(49) In your view, what would constitute a “reasonable” cost for the selling or dissemination of data? Please provide the rationale/criteria for such a cost.

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

Referring to the previous answers, the ABBL thinks that if raw data information is available at the cost of the IT infrastructure that supports the dispersion of data (both negotiation platform and data vendors) this would be a great progress for the industry.
Beyond this point of view, the ABBL is supportive of measures that help to reduce costs for its members and their clients. However it is not entirely sure that unbundling would really help.

Furthermore, the ABBL is doubtful as to what would constitute a reasonable price and how to calculate such a price, if not relying on the “for free concept”. To conclude on these questions, the ABBL is convinced, however, that any measure of this sort should be tailored to each market structure.

4.3 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.

(52) If a post-trade consolidated tape was to be introduced which option (A, B or C) do you consider most appropriate regarding how a consolidated tape should be operated and who should operate it? Please explain the reasons for your view.

(53) If you prefer option A please outline which entity you believe would be best placed to operate the consolidated tape (e.g. public authority, new entity or an industry body).

(54) On Options A and B, what would be the conditions to make sure that such an entity would be commercially viable? In order to make operating a European consolidated tape commercially viable and thus attaining the regulatory goal of improving quality and supply of post-trade data, should market participants be obliged to acquire data from the European single entity as it is the case with the US regime?

(55) On Option B, which of the two sub-options discussed for revenue distribution for the data appears more appropriate and would ensure that the single entity described would be commercially viable?

(56) Are there any additional factors that need to be taken into account in deciding who should operate the consolidated tape (e.g. latency, expertise, independence, experience, competition)?

(57) Which timeframe do you envisage as appropriate for establishing a consolidated tape under each of the three options described?

(58) Do you have any views on a consolidated tape for pre-trade transparency data?

(59) What is your opinion about the introduction of a consolidated tape for non-equity trades? Please explain the reasons for your views.

The ABBL is supportive of the concept of a consolidated tape for post trade information on equity trading, since the equity market is structurally and maturity wise the most adapted and in need of such a consolidation.
The idea behind a consolidated tape for the ABBL is to lower the cost of access to information on a consolidated basis throughout the EU and approach the cost of data to “an at cost model” throughout the value chain (platforms and data vendors). The association considers that this service is close to an infrastructure service that should be offered to investors and other users of financial data. Thus, the option of consolidating via a public entity (likely to be ESMA) appears to be the one that may offer the best compromise between low costs, resiliency and efficiency. This position does not rule out the possibility of a private option, but the ABBL does not see the possibility of several actors offering the consolidation service, 10 data consolidation aggregators will not necessarily better serve Markets. What would count, in any circumstances, is that the governance of any option selected incorporates in a decision-making position users of the information (i.e. data vendors like Bloomberg or Reuters, but also IFs that are final users of the information).

The option of a tender offer (option C) may be appealing on paper but raises several issues, among which the length of the mandate, the renewal and the pricing power (and change of pricing) by the selected intermediary. That is why concretely in a first instance, the communication medium and tools (language) should be harmonised at trading level (whatever the platform) so that institutions that seek to be consolidator of data cannot build on a technological advantage or secure a market share once clients have chosen it. With harmonised language replacing or renewing the mandate of a private operator will then be simpler.

Regarding the consolidated tape for pre-trade information in equity markets, it would create a paradigm shift not necessarily welcomed and have as a consequence the evolution of EU markets toward a US based system. This may not be desirable, given the structural differences between the 2 zones (notably that each MS has a Regulated Market and that there is no real need for consolidation at that level). Additionally, this would risk creating even more pressure on smaller issuers and putting them totally out of the market because of a lack of visibility.

Regarding the commercial viability, if it is a public infrastructure the ABBL thinks it is warranted by the public nature of the model. Regarding private options there is indeed a risk of failure to provide the service if the fees generated do not cover the costs, but the model chosen should be cost-recovery based as much as possible, whatever the operator.

5. MEASURES SPECIFIC TO COMMODITY DERIVATIVE MARKETS

5.1 Specific requirements for commodity derivative exchanges

(60) What is your opinion about requiring organised trading venues which admit commodity derivatives to trading to make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity? Please explain the reasons for your views.

(61) What is your opinion about the categorisation of traders by type of regulated entity? Could the different categories of traders be defined in another way (e.g. by trading activity based on the definition of hedge accounting under international accounting
standards, other)? Please explain the reasons for your views.

(62) What is your opinion about extending the disclosure of harmonised position information by type of regulated entity to all OTC commodity derivatives? Please explain the reasons for your views.

(63) What is your opinion about requiring organised commodity derivative trading venues to design contracts in a way that ensures convergence between futures and spot prices? What is your opinion about other possible requirements for such venues, including introducing limits to how much prices can vary in given timeframe? Please explain the reasons for your views.

The ABBL is generally not supportive of the disclosure of names or particular identification of investors or traders, as it is highly concerned about EU data privacy rules as well as national rules that may prevent the disclosure of such information. Furthermore, the identification of traders or investors at market level does not add any value in terms of supervision (as long as there is identification at firm level).

The identification of classes of actors or types of actors risks to create a dual market of "good and bad" traders that is only based on a conceptual, nearly philosophical approach to markets. According to the ABBL there are no inherently good or bad trades, although some practices may be abusive under certain circumstances. For example, short sellers will be identified individually more easily and this adds no market information.

Disclosure mechanisms are usually costly to set up. Details of the requirements should thus be carefully analysed and should be subject to as few changes in the future as possible. In the end, question 63 seems to forget the competitive nature of trading platforms and the fact that as a consequence there may not be a desire to harmonise contracts features.

5.2 MiFID exemption for commodity firms

(64) What is your opinion on the three suggested modifications to the exemptions? Please explain the reasons for your views.

The ABBL does not support the concept of differentiating investors/stakeholders according to their expected purpose. It would thus support one mechanism only and place equally developed trading institutions under the same rules whatever their goals. Concretely, large corporations with trading rooms should for this reason be considered equivalent to other financial institutions that are similarly equipped.

5.3 Definition of other derivative financial instrument

(65) What is your opinion about removing the criterion of whether the contract is cleared by a CCP or subject to margining from the definition of other derivative financial instrument in the framework directive and implementing regulation? Please explain the reasons for your views.

The ABBL has no specific views.
5.4 Emission allowances

(66) What is your opinion on whether to classify emission allowances as financial instruments? Please explain the reasons for your views.

The ABBL has no specific views.

6. TRANSACTION REPORTING

6.1 Scope

(67) What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

(68) What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments the value of which correlates with the value of financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

(69) What is your opinion on the extension of the transaction reporting regime to transactions in depositary receipts that are related to financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

(70) What is your opinion on the extension of the transaction reporting regime to transactions in all commodity derivatives? Please explain the reasons for your views.

(71) Do you consider that the extension of transaction reporting to all correlated instruments and to all commodity derivatives captures all relevant OTC trading? Please explain the reasons for your views.

(72) What is your opinion on an obligation for regulated markets, MTFs and other alternative trading venues to report the transactions of non authorised members or participants under MiFID? Please explain the reasons for your views.

(73) What is your opinion on the introduction of an obligation to store order data? Please explain the reasons for your views.

(74) What is your opinion on requiring greater harmonisation of the storage of order data? Please explain the reasons for your views.

First of all, the ABBL stresses that any change to reporting is extremely costly to implement. Specifically in high frequency reports the risks of errors in reporting and the development costs in frequently old systems is dramatically high. In addition to these considerations, there remains the question of the use of data: How will the data be used? If the aim is only to store it,
then why produce them in the first place? “Vorratsdatenspeicherung” is illegal. Therefore, any modification should be carefully analysed and all details should be duly weighted.

Conceptually, the proposal in 67 may make sense, but as stated in the previous paragraph, the issue with amendments to reporting is that it is very costly moreover if they are issued on a daily basis. The ABBL hopes that the reporting format should at least be harmonised (use of the same language: XBRL may be the option) and the ABBL advises regulators to avoid as much as possible dual or multi reporting for the same issues.

Regarding question 68 and 71, the ABBL insists on the notion of “derived” instead of correlates, on the simple ground that correlation is not causation and that correlation may change in the course of time and as a consequence do not capture the instruments that are expected.

It is not clear to the ABBL why investors or even investor categories should be reported. It is important that data about the investor is available at the level of the investment firm/broker and can be accessed there if necessary. There is thus no necessity to report it. There is also a data protection issue (at EU level and national level) for those who are trading. Access to the market should be as neutral as possible. In addition, there is no guarantee that these reports will not be accessed from outside the EU. The recent examples of Wikileaks or Swift, some years ago, show that data protection should be on the top of priority list a reason to limit the circulation of data that are not directly necessary.

The ABBL does not support the proposal to store order data. Transactions are reported and this is what matters. Orders may be cancelled or retrieved, they may mark an intent to trade, but as long as they are not executed they are not material and thus should not be used. Furthermore, the cost of recording orders compared to recording trades would double the amount of recording and is likely to be rather expensive in a cost benefit analysis.

6.2 Content of reporting

(75) What is your opinion on the suggested specification of what constitutes a transaction for reporting purposes? Please explain the reasons for your views.

(76) How do you consider that the use of client identifiers may best be further harmonised? Please explain the reasons for your views.

(77) What is your opinion on the introduction of an obligation to transmit required details of orders when not subject to a reporting obligation? Please explain the reasons for your views.

(78) What is your opinion on the introduction of a separate trader ID? Please explain the reasons for your views.

(79) What is your opinion on introducing implementing acts on a common European transaction reporting format and content? Please explain the reasons for your views.

In the ABBL’s view a transaction goes beyond the negotiation of the price, it goes until the
trade is materialised on either a market, or any type of platform or place of execution.

There is also no necessity to have a unique client identifier or to spread client data throughout the chain of intermediaries. Today, beyond the political difficulty of agreeing on a single identifier, there is no proven case or need for such a unique identifier. MS have developed appropriate system to combat market abuse and according to a recent survey by CESR many MS do not have national system and the report did not point to any major failure. Such a measure is disproportionate compared to data protection rules. It is sufficient that the information on the investor can be retraced at the level of the intermediary/bank/broker who has the final client relation. Recent EU proposals in tax matters work in a similar way (see work of the FISCO group of DG Market). Tracing transactions individually throughout the world does not make sense. Traders or investors would have no guarantee at all of how this information will be used in their MS, in the EU and outside the EU for some trades. Moreover, there is currently no unique way to identify clients across the EU, even if they are EU citizens or based in the EU. Additionally, how then would non-EU clients be treated? A similar issue arises for joint accounts: which number or id would be used and how would one be sure that persons are duly identified in an account? Concretely, one could design a regime for accounts with 2 holders, but what would happen if there are 10, reports will become unmanageable, how to be sure that all the information will be transmitted securely and entirely and in the end what would be done with that information? Identifiers at IF level are the best reasonable alternative and, as illustrated in CESR consultations, it is a practice that is working in many Members States.

Furthermore, it will cost institutions a lot to introduce a new framework to pass orders and secure the data all along the chain. In the end, the addition of this information will make communication more complex and add a huge amount of data to that already needed to execute (bulk) orders.

Regarding trader ID, the ABBL is not supportive of this principle for the reasons expressed in previous paragraphs. Traders act on behalf of their employer, as a consequence, disclosing their ID will be counterproductive and against basic data privacy rules. It will be up to their IF to sue them in case of breach of internal rules. Besides this fact, a trade may be modified before being placed on the market and not necessarily by the trader him/herself.

The ABBL is a great supporter of XBRL and hopes that any harmonisation in the communication or exchange of information (reporting) will be based on this widely used and recognised standard.

6.3 Reporting channels

(80) What is your opinion on the possibility of transaction reporting directly to a reporting mechanism at EU level? Please explain the reasons for your views.

(81) What is your opinion on clarifying that third parties reporting on behalf of investment firms need to be approved by the supervisor as an Approved Reporting Mechanism? Please explain the reasons for your views.

(82) What is your opinion on waiving the MiFID reporting obligation on an investment firm which has already reported an OTC contract to a trade repository or competent authority
under EMIR? Please explain the reasons for your views.

(83) What is your opinion on requiring trade repositories under EMIR to be approved as an ARM under MiFID? Please explain the reasons for your views.

Member states have different levels of data protection rules. Before storing huge amounts of data at EU level, it is time that the Commission first addresses the issue that in some member states everything that is not expressly designated by law to be kept confidential may be accessed by everyone, while in many other member states, the inverse rule applies. This is, in fact, a cultural issue, but within the EU no culture should try to impose its rules on others. As long as this issue is not clarified, such a EU mechanism cannot work, because in some member states such transfers would not be allowed. As long as there remains supervision at national level, the national authority is the privileged point of contact for institutions in that Member State. It is the natural way for a financial institution to have contact with the local authority. The close neighbourhood simplifies contacts and helps to resolve any problems in an efficient and rapid way. Huge databases far away and bureaucratic administration at EU level will be of no help to anyone. That is why the ABBL would favour the recourse to the national level in a first instance. Reporting should be done as today under the TREM mechanism, first at national level then between relevant authorities.

The answer to question 82 is self-evident: there should obviously be a relief of reporting. Under all circumstances double or multiple reporting should be avoided. On 81, the ABBL has no specific views.

Similarly for question 83, it would appear rather strange that these TR would not be MiFID regulated entities even though this would place these entities under 2 legislations.

7. INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES

7.1 Scope of the Directive

7.1.1 Optional exemptions for some investment services providers

(84) What is your opinion about limiting the optional exemptions under Article 3 of MiFID? What is your opinion about obliging Member States to apply to the exempted entities requirements analogous to the MiFID conduct of business rules for the provision of investment advice and fit and proper criteria? Please explain the reasons for your views.

In term of simplicity and investor protection, MiFID should ideally regulate all entities providing financial investment services of the type referred to in MiFID. Typically, no IFA (Independent financial advisors) shall be out of the MiFID scope. MiFID is the benchmark for the provision of financial investment services. This should be the same for all entities doing this activity.
7.1.2 Application of MiFID to structured deposits

(85) What is your opinion on extending MiFID to cover the sale of structured deposits by credit institutions? Do you consider that other categories of products could be covered? Please explain the reasons for your views.

The ABBL considers that deposits, structured or not, are of a different nature than securities or derivatives and thus should not be subject to identical requirements.

Deposits are on the IF balance sheet (banks) and subject to DGS guarantee. They are not financial instruments per se and cannot be exchanged like other securities instruments.

In addition, from an investor transparency perspective, the PRIPS regulation is likely to cover the required information that should be disclosed. The ABBL considers that PRIPS disclosure would be enough.

7.1.3 Direct sale by investment firms and credit institutions

(86) What is your opinion about applying MiFID rules to credit institutions and investment firms when, in the issuance phase, they sell financial instruments they issue, even when advice is not provided? What is your opinion on whether, to this end, the definition of the service of execution of orders would include direct sales of financial instruments by banks and investment firms? Please explain the reasons for your views.

In the ABBL’s view the service referred to in question 86 is mostly a “primary market” operation. In this phase issued securities are generally not bought by individual, but only by institutional investors. The association does not see the need to apply MiFID rules. Remaining cases of sale on secondary market are not known in Luxembourg.

7.2 Conduct of business obligations

7.2.1 “Execution only” services

(87) What is your opinion of the suggested modifications of certain categories of instruments (notably shares, money market instruments, bonds and securitised debt), in the context of so-called "execution only" services? Please explain the reasons for your views.

(88) What is your opinion about the exclusion of the provision of "execution-only" services when the ancillary service of granting credits or loans to the client (Annex I, section B (2) of MiFID) is also provided? Please explain the reasons for your views.

(89) Do you consider that all or some UCITS could be excluded from the list of non-complex financial instruments? In the case of a partial exclusion of certain UCITS, what criteria could be adopted to identify more complex UCITS within the overall population of UCITS? Please explain the reasons for your views.

(90) Do you consider that, in the light of the intrinsic complexity of investment services, the
"execution-only" regime should be abolished? Please explain the reasons for your views.

The ABBL was extremely frustrated in 2004, like many other professional organisations, that the retained criteria was not the level of risk of the "investment" but the perceived complexity. A concept that is relative and that depends on each investor's knowledge, to the contrary of risk or potential risk. Furthermore, it does not differentiate between the complexity of the instrument and the concept, i.e. a product may be "simple to understand" but complex to manage.

The execution only service has its merit for some clients, even among retail clients (the broadest and most diversified category in MiFID), but the foundations on which it is based are weak.

The ABBL shares the view that at least all instruments that are admitted to trading on a EU based platform or equivalent in third countries should be considered as non-complex per se to the exclusion of derivatives and futures that may lead to losses beyond the initial commitment of the investor (so called open interests). It comes from the fact that "to be admitted to trading" has several consequences. First of all, the issue had to be approved by a supervisor. There is widely available information and there is a continuous liquid market and displayed prices. That is why the ABBL would also support the same approach for UCITS or similar funds that shall be available to execution clients only without further requirements (shall be non-complex). Furthermore, the notion of embedded derivative introduced by the MiFID creates situations where many bonds would not be investable by execution only clients, even if the derivatives used are used to protect the bondholder and are not part of a structured investment (i.e. callable/putable bonds).

The ABBL can only invite the EU Commission in its review of MiFID to change the notion of complexity toward riskiness of products, keeping in mind that the risk taken in consideration should be to lose more than what has been invested (i.e. go below 0).

7.2.2 Investment advice

(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.

(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.

(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.

(94) What is your opinion about introducing an obligation for intermediaries providing advice to keep the situation of clients and financial instruments under review in order to confirm
The ABBL finds it difficult to understand the rationale for the proposals in this chapter. There is more than enough paperwork that the Commission is imposing on clients to read and take into consideration, when the reality is that in their large part they even do not want to read.

Regarding question 91, the ABBL is perplex about what is expected from intermediaries, usually advice is given through a discussion process, it may appears odd to say the least to inform the client each time on what basis the advice is given when a relationship has been built on several years. The part 2 of the question is even more counterintuitive, and the ABBL really wonders what is expected by the EU Commission with this question.

Although it has been common practice for years, MiFID formally introduced the concept of acting fairly, honestly and in the interest of the client, and this seems largely sufficient. Clients usually receive several proposals, selected according to their needs defined under MiFID, and amongst which they may chose: they are not forced to buy a specific product. This does not mean that clients may not lose money. Losses due to market variations are, however, dependent on the risk taken by the customer. It is clear that, as in any other business, the IF has always an interest in selling, but the client has also one in buying: the return.

In this context, the ABBL does not really see the need to confirm in writing ex post to the client the reasons why they have been proposed such a profile or products or why a product that a client would like to buy is not suited for them. IFs are screening the market to propose products to their clients. And clients are not children that must be protected from the “bad uncle”, but are adult persons who are able to take decisions on their own. When clients choose to take a higher risk amongst the products offered, this is not because they are badly advised, but because they want a higher return. Beyond the quantitative criteria like the size of a portfolio and the financial ability to bear losses, there are thus also a lot more personal criteria subject to personal judgement that may make a client apt or not to access a given service or security and these may be identified by the relationship manager in conjunction with the client’s profile. It is commercially difficult to tell a client that he or she is not expected to understand or able to buy this or that product. To take an analogy, what would someone’s feeling be if interested in buying a high-end car, the car seller would tell him that he should better buy an entry level, in writing? Telling him in writing would likely lead to frustration in the best case and may be legal actions from unsatisfied clients, furthermore this also raises the questions of what other intermediaries may do and above all if they differ in their analysis.

In addition, one of the weak points of MiFID is, that the client is not obliged to provide information about his/her risk or other profile. If the client does not provide any information, the IF is prevented from delivering any services. This does not appear to be rational. The client should at least be offered the least risky profile/products.

Regarding question 93 and 94, the EU Commission may be aware that IFs and banks have introduced CRM (customer relationship management) systems a long time ago to help relationship managers deliver good and timely advice to their client once they are in contact.
As a consequence, information relating to the client is always available at client’s request. Forcing IF to assume clients’ decisions may be indeed legally a step too far. Indeed the IF can only act if the client provides some information or if he/she changes his/her attitude toward risk. As a consequence, the ABBL does not see the need to transform this approach into a legal obligation. This would add to costs and legal risk, as it would become a legal requirement (i.e. through audit costs and conformity check). That procedure would further des-incentivises the client to take basic care of its portfolio relying only on the possibility to sue the IF in case he or she loses some money. For these clients that do not want to be involved in their financial dealings the IFs have introduced the concept of discretionary asset management, a service that is paid for.

Lastly the ABBL does not agree with the EU Commission when it implicitly considers long terms investments prevails short term ones, the timing of investment shall be appropriate according to each investor’s needs not based on a conceptual approach and he or she has to react accordingly.

7.2.3 Informing clients on complex products

What is your opinion about obliging intermediaries to provide clients, prior to the transaction, with a risk/gain and valuation profile of the instrument in different market conditions? Please explain the reasons for your views.

What is your opinion about obliging intermediaries also to provide clients with independent quarterly valuations of such complex products? In that case, what criteria should be adopted to ensure the independence and the integrity of the valuations?

What is your opinion about obliging intermediaries also to provide clients with quarterly reporting on the evolution of the underlying assets of structured finance products? Please explain the reasons for your views.

What is your opinion about introducing an obligation to inform clients about any material modification in the situation of the financial instruments held by firms on their behalf? Please explain the reasons for your views.

What is your opinion about applying the information and reporting requirements concerning complex products and material modifications in the situation of financial instruments also to the relationship with eligible counterparties? Please explain the reasons for your views.

What is your opinion of, in the case of products adopting ethical or socially oriented investment criteria, obliging investment firms to inform clients thereof?

The ABBL is convinced that the revision of MiFID and the PRIPs regulation should be implemented at the same time. The information contained in the PRIPs (collectively managed investment products) is likely to respond to many of the issues raised in this chapter.

Furthermore, in addition to a paper document one should not underestimate the fact that the IF has relationship managers to help advise the client and explain the different products…Clients
will not be more protected if they have more documents that they will not read in any case. In that respect, material information in the form of KIID for example should be available all the time to clients (notably via the internet). Yet it may be difficult to provide it at the trading time (i.e. a phone conversation); hence the emphasis on the dual and complementary approach of paper information and oral information (role for advice).

In practical day-to-day life, clients are sometimes only willing to have a financial instrument and obliging to deliver prior to the time of sale the PRIIPs may not in all cases be feasible. Thus, the ABBL supports the option of delivering the information at the latest at the time of transaction and ideally have it available for example on the internet website of the IF so that the client can be referred to it. In Luxembourg, many orders are given via the telephone and it would be impossible in some cases to have a material proof of delivery of the information, if it is not accepted that the client can have an easy access to the relevant files on an electronic durable media.

The ABBL does not support the approach proposed in 96 and 97 because the value of these products as well as the independent pricing are too complex to set up a priori for all products. Regarding pricing, the client can have, when consulting their portfolio, the most recent price for all their positions (depending of course of NAV, net asset value, calculation cycle) or they can find them on markets if they are traded on markets. The independent valuation raises the issue of products that are promoted by one institution only. The independent valuation (done by a competitor) risks to rapidly turn for competing institutions to decry investments from one another.

The ABBL has mixed views on question 98, but, depending on the details and on what constitutes a material change, may support the concept. But first and foremost regulation should also not lose sight of the fact that banks should rely on a client’s information to update the profile or define what are material changes in many instances.

Overall on these 2 previous sets of questions (7.2.2 and 7.2.3), the ABBL is increasingly wondering how IFs would be able to meet their best execution obligation with the many details and procedures that are proposed before the IF can actually execute the client’s order.

The ABBL believes that eligible counterparties are professional and that they are able to care for their interest and ask relevant questions or request third party advice if need be.

Question 100 may raise an interesting debate, but this should be left to market forces at this stage. There is no definition of what constitutes such SRI investments. Furthermore, products that do not have this label are not necessarily trumping SRI philosophy.

7.2.4 Inducements

(101) What is your opinion of the removal of the possibility to provide a summary disclosure concerning inducements? Please explain the reasons for your views.

(102) Do you consider that additional ex-post disclosure of inducements could be required when ex-ante disclosure has been limited to information methods of calculating inducements? Please explain the reasons for your views.
(103) What is your opinion about banning inducements in the case of portfolio management and in the case of advice provided on an independent basis due to the specific nature of these services? Alternatively, what is your opinion about banning them in the case of all investment services? Please explain the reasons for your views.

The ABBL holds the view that the subject of inducement was wrongly approached. Suspecting IFs of acting against their clients’ interest and taking undue fees may not be a good start for such a key subject. Furthermore the debate is still not stabilised, as a reminder CESR published only in spring 2010 advices on good and bad practices, may be an opportunity to first assess the practices across MS.

For many financial products, there are at least 2 steps: one is the manufacturing step and the second is distribution. In many cases the manufacturers of the products have no access to the market for distribution. They have no networks, nor branches, and thus they have to access the network of distributors to be delivered to clients. This cannot be done for free, as in any other business. If one accounts for the setting up of independent distribution networks for asset managers, the ABBL is not convinced that the outcome would be less costly for clients overall.

On the other hand, it is relatively naïve to think that retail clients will all pay for advise, for distribution and for the management of the products and, knowing all these fees, will “shop” among IFs to select each best channel. Experience amply demonstrates that most clients will not do that. Many surveys and even EU Commission or CESR findings have demonstrated that clients are not spending enough time on their financial savings. This situation would be aggravated if more commissions (i.e. more complexity) were added via additional disclosure. The result is likely to be that the low end of the retail clients (concretely the vast majority of EU citizens) will end up with no advice at all and forced to randomly pick products for their nest eggs; a situation that any authority should do its utmost to avoid. The packaging of these fees under the inducement regime maybe not perfect, it is there however to make clients’ lives easier and at the same time pay distributors to access a commercial network that would otherwise have to be developed.

Concretely, there may have been cases where the search for fees has been the priority, but the ABBL considers that with the introduction of MiFID in 2007 and the coming PRIIPS regime, clients will have better and sufficient information to allow them to choose between 2 or more products with similar structure.

Regarding question 101, the ABBL is convinced that in many cases only the summary disclosure is available. A reason among many is that clients, once decided, want to have their product delivered immediately, with little care for any accompanying information. In addition, one should not forget that the aim of the information provided by the regime is to help clients choose among various projects or intermediaries, something that a summary form (i.e. a range of %) of disclosure is largely able to deliver.

The ABBL feels that the regime is satisfactory as it is today and would not opt for any more paperwork or constraints on disclosure than what is currently required. The disclosure of information is only worthwhile if it is read. The ABBL members are also delivering information ex post or on client demand when available.
7.2.5 Provision of services to non-retail clients and classification of clients

(104) What is your opinion about retaining the current client classification regime in its general approach involving three categories of clients (eligible counterparties, professional and retail clients)? Please explain the reasons for your views.

(105) What are your suggestions for modification in the following areas:

a) Introduce, for eligible counterparties, the high level principle to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading when informing the client;

b) Introduce some limitations in the eligible counterparties regime. Limitations may refer to entities covered (such as non-financial undertakings and/or certain financial institutions) or financial instruments traded (such as asset backed securities and nonstandard OTC derivatives); and/or

c) Clarify the list of eligible counterparties and professional clients per se in order to exclude local public authorities/municipalities? Please explain the reasons for your views.

(106) Do you consider that the current presumption covering the professional clients’ knowledge and experience, for the purpose of the appropriateness and suitability test, could be retained? Please explain the reasons for your views.

The ABBL considers that the categories of eligible and professional clients are efficiently delivering their objectives.

Regarding question 105 and 106, the ABBL does not see the need for these precisions, eligible counterparties are supposed to be at least qualified enough to seek advice on products or services they may not understand. In a way they know where they lack knowledge and are qualified enough to ask for advice or ask for to opt-out of their status to be regarded as retail clients.

On the other hand, applying current article 19.1 (act fairly and honestly) to all clients may make sense, but not necessarily all the accompanying level 2 measures as these would make the life of institutions more complex and burdensome where it is not necessarily required. Thus a new structure of article 19 and its level 2 may be needed.

For non-retail, it should be presumed that knowledge is sufficient in any cases. The MiFID already foresees the possibility of opting out of eligible status with a wide scope of options (specific or general).

7.2.6 Liability of firms providing services

(107) What is your opinion on introducing a principle of civil liability applicable to investment firms? Please explain the reasons for your views.
(108) What is your opinion of the following list of areas to be covered: information and reporting to clients, suitability and appropriateness test, best execution, and client order handling? Please explain the reasons for your views.

The first question that comes to mind in this respect is what would in practise be the event that would trigger the civil law liability. A market loss? Does the Commission really find it appropriate to make the number of civil law suits dependent on the evolution of the stock exchange. When prices are going up, nobody would care about any potential negligence with respect to the criteria set up in question 108. But when prices are going down, Courts would have a hard time to cope with all the complaints. Customers who cannot support losses should not invest in high return, but risky, products. But people do not think like this. They see the potential return, but not the risk. This is an educational problem or even a wrong evolution of the society. But the responsibility for this evolution cannot be put on the back of banks only. This is also and mainly a Government problem. The ABBL further thinks that despite the good intent of the EU Commission, this field is left to Member State sovereignty and would concretely be difficult to force in any direction.

7.2.7 Execution quality and best execution

(109) What is your opinion about requesting execution venues to publish data on execution quality concerning financial instruments they trade? What kind of information would be useful for firms executing client orders in order to facilitate compliance with best execution obligations? Please explain the reasons for your views.

(110) What is your opinion of the requirements concerning the content of execution policies and usability of information given to clients should be strengthened? Please explain the reasons for your views.

As mentioned in the CESR feedback statement or comments from the EBF (European Banking Federation), there is on the ABBL side little enthusiasm for such an obligation of publication.

As for many documents produced, the problem is not really the publication of the document, but the fact that in most cases clients do not read them. More information and more documents would only aggravate that state of play.

7.2.8 Dealing on own account and execution of client orders

(111) What is your opinion on modifying the exemption regime in order to clarify that firms dealing on own account with clients are fully subject to MiFID requirements? Please explain the reasons for your views.

(112) What is your opinion on treating matched principal trades both as execution of client orders and as dealing on own account? Do you agree that this should not affect the treatment of such trading under the Capital Adequacy Directive? How should such trading be treated for the purposes of the systematic internaliser regime? Please explain the reasons for your views.
The ABBL would agree with 111. Regarding 112, the proposal does not appear to make the lives of IFs or regulators easier. The regime should not be optional but “forced”

7.3 Authorisation and organisational requirements

7.3.1 Fit and proper criteria

(113) What is your opinion on possible MiFID modifications leading to the further strengthening of the fit and proper criteria, the role of directors and the role of supervisors? Please explain the reasons for your view.

The ABBL has no strong view on this issue, except that fit and proper should principally refer to persons with a relevant and demonstrable expertise in their respective field. The fit and proper criteria shall not be solely based on a diploma or certain type of education. Expertise and past experience as well as sufficient time available may be enough.

7.3.2 Compliance, risk management and internal audit functions

(114) What is your opinion on possible MiFID modifications leading to the reinforcing of the requirements attached to the compliance, the risk management and the internal audit function? Please explain the reasons for your view.

As much as possible, the ABBL would plead both for the independence of these 3 functions from the commercial activities and their close links with the top of the organisation. The ABBL considers that MiFID has already designed a rather comprehensive but proportionate framework that is fully appropriate. Putting more tasks on these 3 functions is likely to result in a real challenge to the efficiently to perform the basic activity of the IF (responding to clients) and risks over-stretching the capacities of many of these functions.

In addition, the implementation and effectiveness of MiFID coincided with the start of a financial stress period, so that one should not draw hasty conclusions on the failure or remedy to perceived problems.

7.3.3 Organisational requirements for the launch of products, operations and services

(115) Do you consider that organisational requirements in the implementing directive could be further detailed in order to specifically cover and address the launch of new products, operations and services? Please explain the reasons for your views.

(116) Do you consider that this would imply modifying the general organisational requirements, the duties of the compliance function, the management of risks, the role of governing body members, the reporting to senior management and possibly to supervisors?

The ABBL considers that today’s options and current rules are largely efficient to comply with these objectives without adding further constraints that would only end up adding costs with few or no benefits for clients individually or as a group.
7.3.4 Specific organisational requirements for the provision of the service of portfolio management

(117) Do you consider that specific organisational requirements could address the provision of the service of portfolio management? Please explain the reasons for your views.

The ABBL thinks that today’s regulatory options are largely sufficient and that the proposal does not sufficiently balance costs and benefits. Indeed measures as proposed would only provide marginal benefits but would cost a lot to the industry to set up. Overall the issue is not about being against some principles but rather against the fact that these become rigid law, which would be based on abnormal market conditions since end 2007.

7.3.5 Conflicts of interest and sale process

(118) Do you consider that implementing measures are required for a more uniform application of the principles on conflicts of interest?

Incentivising people in organisations is a component of any business activity today. Finance is not a case apart, even in retail branches.

This being said, the ABBL believes that current MiFID principles are comprehensive enough to manage conflicts of interests in its two steps approach: one avoid, two disclose. Furthermore, the ABBL generally considers that the conflict management at retail/branches sales level are well in place and that few cases have turned against the investors. The market evolution, coming from market/client pressure and MiFID, towards multi-party platforms (i.e. to the offer of products from different providers, not only internal products) also largely reduces the risk of conflicts of interest.

7.3.6 Segregation of client assets

(119) What is your opinion of the prohibition of title transfer collateral arrangements involving retail clients’ assets? Please explain the reasons for your views.

(120) What is your opinion about Member States be granted the option to extend the prohibition above to the relationship between investment firms and their non-retail clients? Please explain the reasons for your views.

(121) Do you consider that specific requirements could be introduced to protect retail clients in the case of securities financing transaction involving their financial instruments? Please explain the reasons for your views.

(122) Do you consider that information requirements concerning the use of client financial instruments could be extended to any category of clients?

(123) What is your opinion about the need to specify due diligence obligations in the choice of entities for the deposit of client funds?
Prima facie, the ABBL considers that clients’ securities shall be bankruptcy remote so that segregation of assets is a must. But this should be confronted to the capital market structures, where assets are not segregated along the entire chain of custodians. It is likely to be unfeasible to segregate assets of clients X along the chain up to the issuer CSD. One obvious reason being that the investor may have holdings outside the EU subject to a different regime. The issue is tackled in a separate EU Commission proposal on securities law and the ABBL would propose that this remains so, and that MiFID only stays at “basic principles” of segregation.

Furthermore, the EU Commission is surely aware that between professionals assets are held in bulk via “omnibus” accounts (i.e. bank A has an account at bank B for all its securities, not one account per client). The proposal from the EU Commission goes against this principle of custody/sub-custody, which would put markets many years behind if an alternative solution had to be found (i.e. nobody will then be able to invest in the US).

The ABBL would also plead to try to simplify complex things. Thus, the ABBL is not highly supportive of creating additional legal material to the attention of the retail investor, explaining that assets are held in whatever form with whatever institution. The MiFID already requires that the IFs mention that assets may be held in custody by a third party. This level of details is enough for the lambda investor. If an investor wants to know more, the information may be made available. Furthermore, adding too much detail is also of competitive nature vis-à-vis other IFs that would then be able to compare and take advantage of others.

Regarding Q123, the deposit of money translates in a credit obligation for the bank vis-à-vis its clients. There may not be a possibility to sub-deposit money at another institution, therefore the requirement for due diligence appears illogical in that respect.

7.3.7 Underwriting and placing

(124) Do you consider that some aspects of the provision of underwriting and placing could be specified in the implementing legislation? Do you consider that the areas mentioned above (conflicts of interest, general organisational requirements, requirements concerning the allotment process) are the appropriate ones? Please explain the reasons for your views.

No, the MiFID shall not deal with primary markets.
8. FURTHER CONVERGENCE OF THE REGULATORY FRAMEWORK AND OF SUPERVISORY PRACTICES

8.1 Options and discretions

8.1.1 Tied agents

(125) What is your opinion of Member States retaining the option not to allow the use of tied agents?

(126) What is your opinion in relation to the prohibition for tied agents to handle clients’ assets?

(127) What is your opinion of the suggested clarifications and improvements of the requirements concerning the provision of services in other Member States through tied agents?

(128) Do you consider that the tied agents regime require any major regulatory modifications? Please explain the reasons for your views.

Tied agents are not very common in Luxembourg. Conceptually, however, the regime should not be subject to MS options, but harmonised. The ABBL is not opposed to the tied agent regime per se, as long as protective measures for retail investors are in place.

The ABBL understands that the tied agents act as intermediaries for a larger institution by for example running a branch. In that case it seems obvious that the accounts are open with the relevant IF, moneys and securities are held by the IF as well. Only the management of the branch and selective accompanying offers from third parties may be offered in agreement with the IF.

8.1.2 Telephone and electronic recording

(129) Do you consider that a common regulatory framework for telephone and electronic recording, which should comply with EU data protection legal provisions, could be introduced at EU level? Please explain the reasons for your views.

(130) If it is introduced do you consider that it could cover at least the services of reception and transmission of orders, execution of orders and dealing on own account? Please explain the reasons for your views.

(131) Do you consider that the obligation could apply to all forms of telephone conversation and electronic communications? Please explain the reasons for your views.

(132) Do you consider that the relevant records could be kept at least for 3 years? Please explain the reasons for your views
Regarding trading/dealing rooms the ABBL considers recording of conversations to be one of the basics of sound functioning.

This is absolutely not the case for contacts with retail investors. The ABBL is per se not opposed to recording according to an EU framework, but it shall be ideally an IF choice or a Member State option. Thus if one does, it shall fit in the same framework.

In that there are no competitive issues across firms based in different MS with or without recording, the major issues with recording of conversations relate to the fact that to be protective entire phone conversations should be recorded. Just recording the order adds hardly any value because there are no explanations on what justified the execution, which is one of the debatable issues. Given that clients and the IF may discuss various issues among which the execution of an order, all phone conversations should be recorded, whatever the subject and whoever initiated it. Furthermore, recording is subject to data protection rules that are both national and EU regulated. Thus, designing a general framework may be neither ideal nor relevant to verify cases of market abuses.

The cost of recording may have decreased but recording tools and supervisory/recovery tools in branches may be outrageously expensive to implement compared to the overall benefits. Furthermore, data protection rules may make this practice even more costly or nearly impossible or close to commercial suicide in some jurisdictions. Regarding the use of records for market abuse the ABBL is doubtful that this would help if only the order is recorded and at present time this has never be a problem not to have such records. That is why it should be an IF option. The additional risk is that it will force all IFs to have the same structure (i.e. introduce call centres) to the detriment of the personal relation that clients may have with their relationship manager.

This said the ABBL might support a general EU framework applicable in case an IF wants to apply recording. The ABBL thinks that it is up to the IF or alternatively to the MS to decide which type of conversations (via which medium) is recorded. The impact on cost is not neutral depending on which instrument is required.

The length of retention as proposed is too long, 6 months is a must. The ABBL does of course not contest the right of client to contests one order, but at the same time the client shall also reasonably take care of his/her interests and acting beyond a reasonable delay is not taking good care or acting to protect one’s interests, thus 3 years delay is a tool long delay to solve market issues. In addition, a problem that could have been solved easily, may end up costing a lot more if the delay is too long, without the IF having – intentionally - committed a mistake. What may be required, however, is an ex post memo explaining the complaints and what has been undertaken in summary form.

8.1.3 Additional requirements on investment firms in exceptional cases

(133) What is your opinion on the abolition of Article 4 of the MiFID implementing directive and the introduction of an on-going obligation for Member States to communicate to the Commission any addition or modification in national provisions in the field covered by MiFID? Please explain the reasons for your views.
The ABBL understands that some MS want to complement the MiFID regime to better tailor it to their market structure. However, conceptually, the introduction of a possibility of so-called gold-plating seems contrary to principles of EU legislation.

8.2 Supervisory powers and sanctions

8.2.1 Powers of Competent Authorities

8.2.2 Sanctions (definition, amounts, publication)

(134) Do you consider that appropriate administrative measures should have at least the effect of putting an end to a breach of the provisions of the national measures implementing MiFID and/or eliminating its effect? How the deterrent effect of administrative fines and periodic penalty payments can be enhanced? Please explain the reasons for your views.

(135) What is your opinion on the deterrent effects of effective, proportionate and dissuasive criminal sanctions for the most serious infringements? Please explain the reasons for your views.

(136) What are the benefits of the possible introduction of whistle blowing programs? Please explain the reasons for your views.

(137) Do you think that the competent authorities should be obliged to disclose to the public every measure or sanction that would be imposed for infringement of the provisions adopted in the implementation of MiFID? Please explain the reasons for your views.

In the long run, one can envisage that sanctions or other administrative measures will converge, but this is a prerogative of MS and there may concretely be little to be done at EU level. The ABBL encourages ESMA to conduct reviews, as CESR did, to help MS converge.

Deterrence of malpractice starts with good supervision. Penalties or criminal sanctions will likely not prevent a criminally-minded individual or organisation of acting in a deceptive way. Much research points to the ineffectiveness of sanctions in many cases. Furthermore, what would be an appropriate level of penalties? Can an IF be fined several thousand Euros for a failure that cost investors one or two cents?

Whistle blowing programs may be an alternative, although they should be carefully designed. Yet, they may also have side effects of “fake reporting” for whatever reason.

8.3 Access of third country firms to EU markets

(138) In your opinion, is it necessary to introduce a third country regime in MiFID based on the principle of exemptive relief for equivalent jurisdictions? What is your opinion on the suggested equivalence mechanism?

(139) In your opinion, which conditions and parameters in terms of applicable regulation and
enforcement in a third country should inform the assessment of equivalence? Please be specific.

(140) What is your opinion concerning the access to investment firms and market operators only for non-retail business?

(141)

Regarding EU retail clients, the ABBL answer is clearly no.

Regarding non-retail business, except for institutions (eligible counterparties) the ABBL is not a fan of letting third countries access the EU without full guaranteed reciprocity clauses. The MiFID regime is designed for the EU markets, those who want to participate have to comply, fully (including supervision). This is of competitive nature were firms from third countries may access the EU market at lower costs this is totally unthinkable.

This of course is not the same for access to capital markets (i.e. buying US, Japanese, etc. securities). Clients may access these markets/trading screens. But the ABBL view is that in that case, it is closer to information services than performance of investment services, notably because an intermediary will intervene in the execution of the order.

9. REINFORCEMENT OF SUPERVISORY POWERS IN KEY AREAS

9.1 Ban on specific activities, products or practices

(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.

(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.

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

First of all, the ABBL thinks that the notion of causing risk shall be defined. A product may be appropriate for one person but not for another, present an unacceptable risk profile for one yet being merely risky for another. Thus, the ABBL is not supportive of outright bans of products or services. The MiFID, with the introduction of client classification, complex products regime, conflicts of interests management, licensing of activities and so on, is already promoting a safer business environment.

Although recent events in the markets have made a huge – negative – impression, one should not take a myopic attitude toward regulation and banning of products. There may be some merit in developing further reporting, so that supervisors better understand the different businesses and their size, but these appear to be enough.
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.

(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.

(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.

(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?

No. Providing an answer before seeing detailed measures is nearly impossible. This depends on products envisaged, economic and market cycles, popularity of products and their driving factors.

The ABBL considers that derivative instruments are neither intrinsically good nor bad and thus it is against the principle of drafting broad lists of products based on the market conditions of today. Markets evolve and change. Products were first and foremost developed to respond to stakeholders’ needs. Market limits may nevertheless be envisaged if they aim to protect the market as a whole by preventing cornering or ownership of one asset class (commodity or other) by a sole individual or IF.

10 CONCLUSION

In its answers to the present consultation, the ABBL has tried to clarify its views on the consultation. The major issue is that new regulation and amendments of MiFID should seek to simplify the procedures of an already very complex legislation. It should also bear in mind that MiFID was introduced at a very difficult time and that the negative experience that may have emerged largely results from causes prior to MiFID.

The ABBL is ready and willing to further pursue the discussion to help improve the regulation.