

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 22 March 2012

on: (i) a proposal for a directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council; (ii) a proposal for a regulation on markets in financial instruments and amending Regulation (EMIR) on OTC derivatives, central counterparties and trade repositories; (iii) a proposal for a directive on criminal sanctions for insider dealing and market manipulation; and (iv) a proposal for a regulation on insider dealing and market manipulation (market abuse)

(CON/2012/21)

(2012/C 161/03)

Introduction and legal basis

On 25 November 2011, the European Central Bank (ECB) received three requests from the Council of the European Union for an opinion on: (i) a proposal⁽¹⁾ for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (hereinafter the 'proposed MiFID'); (ii) a proposal⁽²⁾ for a regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EMIR)⁽³⁾ on OTC derivatives, central counterparties and trade repositories (hereinafter the 'proposed MiFIR'); (iii) a proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)⁽⁴⁾ (hereinafter the 'proposed MAR'). On 30 November 2011, the ECB received a request from the Council for an opinion on a proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation⁽⁵⁾ (hereinafter the 'proposed MAD').

The ECB's competence to deliver an opinion on the proposed directives and regulations is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union. The proposed directives and regulations contain provisions with a bearing on the integration and integrity of European financial markets and on public confidence in securities and derivatives affecting the European System of Central Banks' (ESCB) contribution to the smooth conduct of policies by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system under Article 127(5) of the Treaty and the promotion of the smooth operation of payment systems. For reasons of efficiency and clarity, the ECB has decided to adopt a single opinion on the four above legislative proposals. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this Opinion.

⁽¹⁾ COM(2011) 656 final.

⁽²⁾ COM(2011) 652 final.

⁽³⁾ See proposal for a regulation on OTC derivatives, central counterparties and trade repositories, September 2010, COM(2010) 484 final.

⁽⁴⁾ COM(2011) 651 final.

⁽⁵⁾ COM(2011) 654 final.

General observations

1. *Objectives and structure of the proposed directives and regulations*
 - 1.1. On 20 October 2011, the Commission adopted the four abovementioned proposals to replace Directives 2004/39/EC ⁽⁶⁾ and 2003/6/EC ⁽⁷⁾, which aim at assuring the efficiency, integrity, resilience and transparency of financial markets. In particular, the proposed MiFID recasts Directive 2004/39/EC with regard to the access to the activity of investment firms, regulated markets and data services providers, their governance and supervisory framework, the carrying out of investment activities and the third-country firms providing investment services via a branch. The proposed MiFIR further enhances Directive 2004/39/EC and introduces new rules for the publication of trade data, transaction reporting, the mandatory trading of derivatives on organised venues, non-discriminatory access to clearing facilities, product intervention and derivative positions management and the provision of services by third-country firms without a branch. The proposed MAR repeals and replaces Directive 2003/6/EC. The proposed MAD, based on Article 83(2) of the Treaty, requires Member States to introduce minimum levels of criminal sanctions for the most serious forms of market abuse.
 - 1.2. The ECB supports the proposed measures to improve the regulation of markets in financial instruments as an important step towards strengthening the protection of investors and creating a sounder and safer financial system in the European Union.
2. *Single European rulebook in the financial sector and ECB's advisory role*
 - 2.1. The proposed framework will lead to increased legal certainty by limiting Member State options and discretion, and will reduce the risks of market distortion and regulatory arbitrage. In particular, increasing harmonisation by two directly applicable regulations and a directive on criminal sanctions is welcome, as it ensures a level playing field and comparable minimum rules for administrative measures, sanctions and fines, as well as for criminal sanctions.
 - 2.2. The ECB strongly supports the development of a single European rulebook for all financial institutions ⁽⁸⁾, as it promotes the smooth functioning of the single market within the Union and facilitates greater financial integration in Europe ⁽⁹⁾. Moreover, as pointed out in previous opinions ⁽¹⁰⁾, the ECB recommends ensuring that only framework principles reflecting basic political choices and substantive matters remain subject to the ordinary legislative procedure and that technical rules should be adopted as delegated or implementing acts in accordance with Articles 290 and 291 of the

⁽⁶⁾ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

⁽⁷⁾ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L 96, 12.4.2003, p. 16).

⁽⁸⁾ See paragraph 20 of the European Council conclusions of 18 and 19 June 2009.

⁽⁹⁾ See, for instance, paragraph 3 of ECB Opinion CON/2011/42 of 4 May 2011 on a proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2009/138/EC in respect of the powers of the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (OJ C 159, 28.5.2011, p. 10). All ECB opinions and documents are published on the ECB's website at: <http://www.ecb.europa.eu>

⁽¹⁰⁾ See, for instance, paragraph 2 of ECB Opinion CON/2009/17 of 5 March 2009 at the request of the Council of the European Union on a proposal for a directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management (OJ C 93, 22.4.2009, p. 3).

Treaty, as appropriate through the prior development of draft regulatory or draft implementing standards by the European Supervisory Authorities (ESAs) ⁽¹¹⁾. In this respect, given the importance of delegated and implementing acts as a substantial component of the single European rulebook, the ECB expects to be consulted as appropriate in due time on these proposed Union acts ⁽¹²⁾.

- 2.3. Additionally, the ECB recommends ensuring cross-sectoral consistency of Union financial services legislation.

3. *Powers of competent authorities, role of ESMA and of macro-prudential authorities*

- 3.1. The ECB welcomes that the proposed framework strengthens and aligns the powers of the authorities supervising investment firms and markets in financial instruments as well as the exercise of their investigatory powers ⁽¹³⁾, putting special emphasis on cross-border cooperation ⁽¹⁴⁾. It is of crucial importance for the orderly functioning of the markets in financial instruments that the competent authorities across the Union build a network of well-equipped and empowered supervisors, able to address undesirable trends, actions or threats in the markets. In this respect, the ECB supports the strong role of the European Securities and Market Authority (ESMA) in the proposed framework and notably with regard to the facilitation and coordination function and the development of technical standards. Furthermore, the duty of the national competent authorities to cooperate and to provide ESMA with all necessary information will foster the consistent application of the proposed regulations and a level playing field in the Union. In this respect, as pointed out in previous opinions ⁽¹⁵⁾, the ECB suggests further improvements in the cooperation and exchange of information within the European System of Financial Supervision and between supervisory authorities and ESCB central banks, including the ECB, when this information is relevant for the performance of their respective tasks ⁽¹⁶⁾.

- 3.2. It is also necessary, as foreseen in the proposed framework, for the competent authorities to cooperate with other authorities in the same Member States ⁽¹⁷⁾. Moreover, to ensure that a macro-prudential perspective is appropriately taken into account, the ECB recommends setting up and enhancing adequate cooperation procedures with macro-prudential authorities where threats to

⁽¹¹⁾ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12), Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48) and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84). These Regulations introduce a procedure for the development by the ESAs of draft technical regulatory and implementing standards prior to their endorsement by the Commission in the form of delegated and implementing acts.

⁽¹²⁾ See, for instance, ECB Opinions CON/2010/23 of 18 March 2010 on a proposal for a directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (OJ C 87, 1.4.2010, p. 1), paragraph 1.3; CON/2011/42, paragraph 4; CON/2011/44 of 19 May 2011 on the proposal for a regulation of the European Parliament and of the Council on the European system of national and regional accounts in the European Union (OJ C 203, 9.7.2011, p. 3), paragraph 8; and recently CON/2012/5 of 25 January 2012 on a proposal for a directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and a proposal for a regulation on prudential requirements for credit institutions and investment firms (OJ C 105, 11.4.2012, p. 1), paragraph 4.

⁽¹³⁾ Articles 70 and 71 of the proposed MiFID and Article 17 of the proposed MAR.

⁽¹⁴⁾ Articles 83 and 84 of the proposed MiFID and Article 19 of the proposed MAR.

⁽¹⁵⁾ See, for instance, paragraphs 13 to 15 of Opinion CON/2009/17, paragraphs 4 to 6 of Opinion CON/2010/5, paragraph 2.2 of Opinion CON/2010/23, paragraph 5 of Opinion CON/2011/42, and, recently, paragraph 11.1 of Opinion CON/2012/5.

⁽¹⁶⁾ See Amendment 11 in the Annex to this Opinion.

⁽¹⁷⁾ See Article 70 of the proposed MiFID and Article 17 of the proposed MAR.

the stability of financial system have to be assessed⁽¹⁸⁾. This might imply cooperation between competent authorities and the national macro-prudential authorities⁽¹⁹⁾, or, in other instances, cooperation by ESMA with the European Systemic Risk Board (ESRB)⁽²⁰⁾. In this regard, it might be appropriate to provide for such cooperation when reviewing Regulation (EU) No 1095/2010⁽²¹⁾.

- 3.3. The proposal to strengthen the administrative sanctions regime by providing competent authorities with a set minimum level of administrative measures, sanctions and fines is an appropriate way to ensure common standards across the Union, while leaving it to the discretion of the national legislators to provide competent authorities with additional sanctioning powers and notably to provide for higher levels of administrative pecuniary sanctions⁽²²⁾. Moreover, to ensure transparency and consistency of the administrative sanctions adopted within the Union, Member States should notify the Commission and ESMA of the applicable national rules and any subsequent amendments to them⁽²³⁾.

Specific observations

A. Review of Directive 2004/39/EC

4. *Developments in market structure*

The ECB supports the Commission's proposals aimed at upgrading the market structure framework in the light of financial innovation and the latest technological developments, and notably the introduction of regulatory proposals on a new trading platform, i.e. the organised trading facility (OTF), which would extend the scope of the Union regulatory framework. The ECB notes that the proposed MiFID and MiFIR should ensure a level playing field for all regulated trading venues subjecting them to the same organisational requirements and transparency rules with appropriate calibration, thus avoiding any incentive for regulatory arbitrage.

5. *Transparency requirements and data consolidation*

- 5.1. The ECB supports the proposed extension of the scope of pre- and post-trade transparency requirements beyond equity instruments, to include bond, structured products and derivatives admitted to trading or traded on a regulated market, a multilateral trading facility (MTF) or an OTF, as well as derivatives considered eligible for central clearing, as it would enhance the price formation and support the evaluation process of such instruments.

- 5.2. The proposed MiFID⁽²⁴⁾ and the proposed MiFIR⁽²⁵⁾ introduce provisions aiming to enhance the data consolidation for transparency information. According to these provisions, 'consolidated tape providers' (CTPs) will collect information from trading venues and, for the trades executed outside trading venues, from investment firms via approved publication arrangements. In the Commission's view, the proposed provisions set the conditions for the emergence of CTPs⁽²⁶⁾. Despite the possible development of these commercial solutions, the ECB considers that proper transparency can only be appropriately ensured with the establishment of one single CTP. In this respect, the ECB notes that the Commission will report on the functioning of the consolidated tape in practice, and if considered appropriate, put forward a legislative proposal for the establishment of a single entity consolidating

⁽¹⁸⁾ See, for instance, Articles 31, 32, and 35 of the proposed MiFIR, where the product intervention powers of ESMA and of competent authorities may address also a threat to the orderly functioning of financial markets or the stability of the whole or part of the financial system.

⁽¹⁹⁾ See, for instance, Article 70 of the proposed MiFID and Amendment 11 in the Annex to this Opinion.

⁽²⁰⁾ See, for instance, Articles 31, 33, and 34 of the proposed MiFIR that set the conditions for ESMA's intervention powers and coordination and facilitation role.

⁽²¹⁾ Article 81 of Regulation (EU) No 1095/2010.

⁽²²⁾ See Article 26 of the proposed MAR.

⁽²³⁾ This provision is already in Article 24 of the proposed MAR. A similar obligation should be also introduced in the proposed MiFID.

⁽²⁴⁾ See Articles 61 to 68 of the proposed MiFID.

⁽²⁵⁾ See Articles 11 to 12 of the proposed MiFIR.

⁽²⁶⁾ See recital 78 and paragraph 3.4.12 of the explanatory memorandum of the proposed MiFID.

post-trade information⁽²⁷⁾. However, the ECB considers that experience since the transposition of Directive 2004/39/EC has shown a market failure in data consolidation that would justify legislative proposals already at this stage to address these issues.

6. *Transaction reporting*

As regards transaction reporting, the ECB supports the proposal to include information on the client on behalf of which the investment firm executed a transaction and highlights the importance of introducing a reference to the use of a unique identifier for the investment firms and/or client of a transaction. The ECB also notes that investment firms executing transactions in financial instruments, on their own account or on behalf of their clients, will report the details to the national competent authorities and also store data in a manner accessible to supervisors for at least five years. Given that such information will be used by competent authorities also to monitor market abuse and manipulation, the ECB stresses the importance of ensuring that transaction reporting information can be easily accessed in a single system at European level appointed by ESMA, as soon as possible rather than following a possible review of the proposed MiFIR within two years of its entry into force⁽²⁸⁾.

7. *Exemptions for central bank transactions from disclosure and reporting obligations*

7.1. The above transparency and reporting framework does not provide for an exemption with regard to transactions to which an ESCB central bank is a counterparty⁽²⁹⁾.

7.2. The ECB notes in this respect that, whilst the disclosure of transactions performed by central banks as part of their respective statutory objectives and tasks would not achieve greater transparency for the market, the effectiveness of these operations, namely in the field of monetary policy or foreign exchange operations, and thereby the performance by central banks of these tasks, which relies on timeliness and confidentiality, could be severely compromised by disclosure of information on such transactions, whether on a real-time basis or with a time lag. Moreover, transparency of specific types of trades and the size of those trades at certain times could allow market participants to identify almost immediately ESCB central banks' transactions as such, even without the release of their name. Therefore, the ECB would strongly recommend exempting ESCB central banks transactions from the transparency requirements⁽³⁰⁾.

7.3. As regards reporting obligations, requiring the counterparties to transactions, to which a member of the ESCB is a party, to report all related details to competent authorities may also interfere with the confidentiality regimes of the ECB and national central banks and defeat the purpose of the immunities granted to the ECB granted under the Treaty, in particular the inviolability of the ECB's archives and official communications⁽³¹⁾, especially since the reporting process to the competent authorities may occur also through other entities such as trading venues, approved reporting mechanisms or trading repositories. For those reasons, transactions where an ESCB central bank is a counterparty should be exempt also from reporting obligations⁽³²⁾.

8. *Small and medium-sized enterprise markets*

The proposed MiFID⁽³³⁾ allows the operator of a MTF to apply to its home competent authorities to register the MTF as a small and medium-sized enterprise (SME) growth market⁽³⁴⁾. Given the difficulties recently encountered by many SMEs in accessing finance, and assuming that such difficulties will arise again at times of market stress, the establishment of a trading venue specialising

⁽²⁷⁾ See Article 96(1)(f) of the proposed MiFID.

⁽²⁸⁾ See Amendment 13 in the Annex to this Opinion.

⁽²⁹⁾ Article 2(1)(g) of the proposed MiFID only provides a subjective exemption for the ESCB central banks. The proposed MiFIR does not contain exemptions. In any case, investment firms which are counterparty of ESCB central banks' transactions are not clearly exempt from the transparency and reporting obligations provided by Articles 19, 20 and 23 of the proposed MiFIR.

⁽³⁰⁾ See Amendment 12 in the Annex to this Opinion.

⁽³¹⁾ See Article 343 of the Treaty and Article 39 of the Statute of the European System of Central Banks and of the European Central Bank as well as Articles 2, 5 and 22 of the Protocol on the Privileges and Immunities of the European Union.

⁽³²⁾ See footnote 30.

⁽³³⁾ See Article 35 of the proposed MiFID.

⁽³⁴⁾ According to Article 4(1)(11) of the proposed MiFID, 'SME growth market' means a MTF that is registered as an SME growth market in accordance with Article 35.

in SME issues is certainly timely. It will not only provide financing to SMEs, especially at difficult times, but also improve price formation and price discovery for issues made by these firms. Since the MTF will specialise in such issues, it is likely that prices will better reflect the pricing of factors more relevant for SMEs.

9. *Trading of standardised OTC derivatives*

9.1. The Eurosystem has already noted ⁽³⁵⁾ the urgency of taking action to implement in the Union the G20 commitment reached in September 2009 that 'all standardised OTC derivative contracts should be traded on exchanges or electronic trading platform, where appropriate, and cleared through central counterparties by end-2012 at the latest', aiming at improving transparency in the OTC derivatives markets, mitigating systemic risk and protecting against market abuse.

9.2. In this context, the ECB supports the provisions ⁽³⁶⁾ underpinning the requirement that eligible OTC derivatives should be traded on regulated markets, MTFs and OTFs and entrusting ESMA with the identification of the precise scope of such trading obligation taking into account the liquidity ⁽³⁷⁾. The ECB notes however that such an approach may need to be complemented to address the Financial Stability Board recommendation that 'authorities should develop incentives and, where appropriate, regulation, to increase the use of standardised products and standardised processes' ⁽³⁸⁾. Against this background, the ECB is of the view that regular monitoring of the trading of non-standardised contracts outside a regulated market, an MTF or OTF should be carried out at Union level.

10. *Enhanced requirements for algorithmic trading, including high-frequency trading*

10.1. Algorithmic trading (AT), including high-frequency trading (HFT), may cause risks for the liquidity and efficiency of financial markets, especially in times of stress. Therefore, the ECB welcomes the proposed amendments to Directive 2004/39/EC introducing appropriate organisational safeguards for trading venues, e.g. in terms of trading capacity, establishment of circuit-breakers, offering market access to high-frequency traders and investment firms providing direct electronic access to trading venues. The proposed provisions will also facilitate the oversight and monitoring of HFT and AT by competent authorities.

10.2. However, the ECB is of the view that the regulatory framework should clarify that all entities engaged in AT on a professional basis should be considered within the definition of investment firms and thus fall under the scope of the MiFID and be subject to supervision and monitoring of their activities by competent authorities ⁽³⁹⁾. Ensuring a comprehensive coverage of all entities professionally involved in HFT and AT would limit potential circumvention of the proposed rules.

10.3. The ECB welcomes the proposed MiFIR provisions related to transaction reporting details, which will include a designation to identify the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction ⁽⁴⁰⁾. To facilitate cross-market surveillance and to prevent and detect market abuse, the ECB is of the view that such unique identifiers should be developed for the identification of trades generated by any AT within and across trading platforms.

⁽³⁵⁾ See p. 2 of the 'European Commission's public consultation on the review of the MiFID — Eurosystem contribution', February 2011 (hereinafter the '2011 Eurosystem contribution').

⁽³⁶⁾ Article 24 of the proposed MiFIR.

⁽³⁷⁾ See the 2011 Eurosystem contribution, p. 2.

⁽³⁸⁾ Implementing OTC derivatives market reforms — report of the OTC Derivatives Working Group, 10 October 2010, 'authorities should examine new market activity on a regular basis to monitor the extent to which market participants may be trading non-standardised contracts solely for the purpose of avoiding central clearing and trading requirements and take steps to address such behaviour'. Available on the Financial Stability Board's website at: <http://www.financialstabilityboard.org>

⁽³⁹⁾ See Amendments to recital 47, Articles 2(1) and 17(2) of the proposed MiFID in the Annex to this Opinion.

⁽⁴⁰⁾ See Article 23(3) of the proposed MiFIR.

- 10.4. Lastly, the proposed requirements for a regulated market⁽⁴¹⁾ to have in place effective systems, procedures and arrangements should ensure that AT systems cannot create or contribute to disorderly trading conditions on the market. In this regard, the ECB welcomes: (i) the establishment of conditions under which trading should be halted if there is a significant price movement in a financial instrument on that market; and (ii) the establishment of a maximum ratio of unexecuted orders to transactions and minimum tick sizes⁽⁴²⁾. Whilst the ECB considers that the Commission should be empowered to set a maximum ratio of unexecuted orders to transactions, the ECB is of the view that the setting of a minimum ratio of unexecuted orders to transactions is not necessary⁽⁴³⁾.
11. *Position limits and reporting on commodity derivatives*
- 11.1. The proposed MiFID provides that Member States must ensure that regulated markets, operators of MTFs and OTFs which admit to trading commodity derivatives apply appropriate limits, or arrangements with equivalent effect, to support liquidity, prevent market abuse and support orderly pricing and settlement conditions for physically delivered commodities⁽⁴⁴⁾. According to the proposed MiFID, such limits may be harmonised by Commission delegated acts⁽⁴⁵⁾ and competent authorities would also be empowered to set *ex ante* position limits for commodity derivatives⁽⁴⁶⁾ over a specified period of time, while the ESMA will be granted with a coordination role of such measures as well as specific direct powers in this area⁽⁴⁷⁾. The ECB welcomes these provisions.
- 11.2. However, with regard to limits on commodity derivatives, the ECB stresses the importance of properly addressing the risk of regulatory arbitrage and distortion of competition not only across Member States but also vis-à-vis other major financial centres. Reaching a common approach in this area is therefore of paramount importance. This may be achieved by providing a role for ESMA both in the elaboration of common principles at Union level and in the coordination of the measures taken by national competent authorities.
- 11.3. In addition, while the ECB supports the adoption of limits to position taking⁽⁴⁸⁾, there are some aspects which require further clarification. This applies in particular to the definition of an appropriate threshold, the period over which these limits should be applied and the use by market participants of the derivative contracts⁽⁴⁹⁾. Moreover, the ECB is of the view that the arguments that limits to position taking would contribute to enhancing market liquidity would require further explanation.
- 11.4. The proposed MiFID provides⁽⁵⁰⁾ for the disclosure of positions held by various types of traders. In addition, it will require regulated markets, MTFs or OTFs where commodity or emission derivatives are traded to publish a weekly report on such positions. Data on long and short positions, as well as on open interest, would be adequate to assess the behaviour of market participants, especially with respect to monitoring the concentration of market participants' positions.

⁽⁴¹⁾ See Article 51(3) of the proposed MiFID.

⁽⁴²⁾ Such an approach is consistent with the Final report on regulatory issues raised by the impact of technological changes on market integrity and efficiency, October 2011, available on the website of the International Organisation of Securities Commissions at: <http://www.iosco.org>

⁽⁴³⁾ See Amendment 10 to Article 51(7)(c) of the proposed MiFID in the Annex to this Opinion.

⁽⁴⁴⁾ See Article 59 of the proposed MiFID.

⁽⁴⁵⁾ See Article 59(3) of the proposed MiFID.

⁽⁴⁶⁾ See Article 72(1)(g) of the proposed MiFID.

⁽⁴⁷⁾ See Article 59(4) of the proposed MiFID and Articles 34 and 35 of the proposed MiFIR.

⁽⁴⁸⁾ As referred to in Article 72(1)(g) of the proposed MiFID.

⁽⁴⁹⁾ See OICV-IOSCO, Principles for the regulation and supervision of commodity derivatives markets, Final report, September 2011, where 'the imposition of fixed position limits is viewed primarily as a tool that seeks to prevent market concentration in advance by establishing set limits of non-commercial involvement in a contract at various months of the contract's trading cycle', available on the website of the International Organisation of Securities Commissions at: <http://www.iosco.org>

⁽⁵⁰⁾ See Article 60 of the proposed MiFID.

12. *Investor protection and supervisory framework*

12.1. The ECB welcomes the empowerment of ESMA to temporarily prohibit or restrict the marketing, distribution or sale of certain financial instruments or a type of financial activity or practice⁽⁵¹⁾. In this respect, considering that ESMA's action may address also a threat to the orderly functioning of financial markets or the stability of whole or part of the financial system⁽⁵²⁾, the ECB recommends ensuring proper coordination with the ESRB on these aspects⁽⁵³⁾.

12.2. A consistent regulatory approach is needed for the distribution to retail investors of different financial products which satisfy similar investor needs and raise comparable investor protection challenges⁽⁵⁴⁾. Against this background, the ECB notes that the proposed MiFID extends requirements, and particularly conduct of business and conflicts of interest rules, to credit institutions selling or advising structured deposits. In this respect, the ECB underlines the necessity of: (i) clarifying the definition of 'structured deposits'; (ii) specifying the consumer protection regime applicable to the financial products; and (iii) ensuring a consistent approach across the different Union legislative initiatives, such as the review of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes⁽⁵⁵⁾ and the ongoing work on packaged retail investment products on those aspects. Moreover, to ensure a consistent approach across financial service sectors, the ECB highlights the importance of designing and implementing to the extent possible in close cooperation among the ESAs the regulatory and supervisory frameworks related to investor protection, in the area, for instance, of cross-selling practices⁽⁵⁶⁾.

12.3. The ECB also welcomes the Commission's proposals on investment advice. While this is a step in the right direction, the ECB encourages the Commission to consider further measures to strengthen the protection of retail investors, such as enhancing financial literacy⁽⁵⁷⁾.

12.4. The proposed MiFID⁽⁵⁸⁾ entitles Member States to adopt specific criteria to assess the expertise and knowledge of municipalities and local public authorities requesting to be treated as professional clients. This approach takes into account that the ability of these entities to evaluate the consequences of financial commitments varies significantly throughout Europe. Public finances in the Member States may be seriously affected by erroneous decisions by public entities, with a potentially negative impact on financial stability at European level. Moreover, it might be also appropriate to request Member States to establish criteria clarifying which categories of entities could be eligible for treatment as professional clients. ESMA could also be invited to provide guidance in this field.

13. *Third country firms*

13.1. The ECB broadly welcomes the proposed harmonised framework for the services provided by third country firms within the Union, and allowing firms establishing branches in a Member State to provide services in other Member States without establishing further branches. A harmonised access regime for third country firms will reduce fragmentation, enhance the level playing field among the Member States and increase legal certainty for all market participants, as the conditions

⁽⁵¹⁾ Article 31 of the proposed MiFIR. See also recital 12 and Article 9(5) of Regulation (EU) No 1095/2010.

⁽⁵²⁾ See Article 31(2)(a) of the proposed MiFIR.

⁽⁵³⁾ See also more in general paragraph 3.

⁽⁵⁴⁾ See in this respect the supporting views expressed by the Commission in connection with packaged retail investment products, paragraph 3.4.2 of the explanatory memorandum of the proposed MiFID.

⁽⁵⁵⁾ OJ L 135, 31.5.1994, p. 5. See COM(2010) 368 final, recasting Directive 94/19/EC.

⁽⁵⁶⁾ See Amendment 6 to the second paragraph of Article 24(7) of the proposed MiFID in the Annex to this Opinion.

⁽⁵⁷⁾ See also Article 9(1)(b) of Regulation (EU) No 1095/2010.

⁽⁵⁸⁾ See Annex II (II.1) of the proposed MiFID.

for market access would become more predictable. The ECB notes that ensuring an equal level of investors' protection and equal regulatory standards for the activities of third country firms compared to EU/EEA firms is of crucial relevance and necessary to avoid any market distortion.

- 13.2. The differentiated approach proposed distinguishes between the mandatory establishment of a branch if investment services or activities are to be provided to retail clients, and the possible provision of such services without the establishment of a branch in other cases. This reflects the need to enhance the level of protection for retail clients, which is addressed in the proposed MiFID notably by: (i) a Commission decision on the equivalence of the prudential framework of the third country; (ii) subjecting the branch to some of the obligations in the MiFID; and (iii) providing for the supervision of the competent authority in the Member State where the branch has been granted authorisation⁽⁵⁹⁾. However, the ECB notes that, to ensure that retail investors would effectively receive the same degree of protection, the cooperation arrangements with the third country should ensure that the requirement for sufficient initial capital would effectively protect investors, given that only the third country firm, and not the branch, is the bearer of rights and obligations and this is ultimately responsible vis-à-vis the investors. Moreover, it might notably be detrimental for investors if disputes have to be settled in accordance with the law and subject to the jurisdiction of the third country.

B. Review of Directive 2003/6/EC

14. General provisions

- 14.1. The scope⁽⁶⁰⁾ of the market abuse regime is broadened by including new markets, notably new trading venues such as MTFs and OTFs, and by covering OTC financial instruments, including derivatives. Furthermore, any behaviour or transactions relating to a financial instrument falling under the scope of the proposed MAR is itself covered, even if such behaviour or transaction takes place outside the regulated market, MTF or OTF. The ECB supports the Commission's proposal to expand the scope of the market abuse framework insofar as it would foster the effectiveness of the market abuse regime by adapting it to financial innovation and the latest technological developments.
- 14.2. The prohibitions and requirements in the proposed MAR will also apply to actions carried out outside the Union⁽⁶¹⁾, to hinder circumvention by moving activities outside the Union. For the effective control and sanctioning of such actions, the ECB considers cooperation agreements with third countries essential. In this respect, the ECB welcomes that the proposed MAR addresses this and also provides for ESMA to coordinate and facilitate this process through templates⁽⁶²⁾. Against this background, the ECB recommends extending the exclusion regime to monetary and public debt management activities in some cases also beyond the Union.
- 14.3. The ECB welcomes that the proposed MAR illustrates specific cases of market manipulation⁽⁶³⁾, referring to new trading techniques such as algorithmic trading including high-frequency trading. As mentioned above, although algorithmic trading practices may have legitimate purposes, they may also present a considerable risk, as they may disturb the normal functioning of the market and increase volatility, which would not serve the public interest. The ECB therefore welcomes strict monitoring of such trading techniques to protect the orderly functioning of the market and the public interest.
- 14.4. The proposed MAR⁽⁶⁴⁾ implicitly identifies trading at the close of the market as market manipulation or an attempt to engage in market manipulation. However, many markets see higher trading volumes at the end and the beginning of the business day, when positions are settled, overnight information is

⁽⁵⁹⁾ Article 43(2) of the proposed MiFID.

⁽⁶⁰⁾ See Article 2 of the proposed MAR.

⁽⁶¹⁾ Article 2(4) of the proposed MAR.

⁽⁶²⁾ Article 20 of the proposed MAR.

⁽⁶³⁾ See Article 8(3) of the proposed MAR and related Amendment 16 in the Annex to this Opinion.

⁽⁶⁴⁾ See Article 8(3)(b) of the proposed MAR.

processed or specific news items can be released to markets. In this respect, the ECB would recommend a more detailed analysis or improvement of this definition of market manipulation.

15. *Definition of inside information*

The ECB welcomes the scope of the definition of inside information⁽⁶⁵⁾. However, the reference to the commodity⁽⁶⁶⁾ suggests that the spot market of a given commodity can be used to manipulate the derivatives market for the same commodity or other commodities and vice versa. It is also reported⁽⁶⁷⁾ that the scope of the proposed MAR should not be extended to behaviour that does not involve financial instruments, for example trading in spot commodity contracts that only affect the spot market. In this respect, a clearer definition should be provided, since, as the proposed MAR⁽⁶⁸⁾ implicitly assumes, the spot and derivatives markets are interconnected both across commodities and borders and as such it is difficult to understand what type of spot trading will be able to affect only the spot market.

16. *Disclosure of inside information of systemic importance*

16.1. The proposed MAR requires an issuer of financial instruments to inform the public as soon as possible of inside information which directly concerns the issuer⁽⁶⁹⁾. At the same time, the proposed MAR maintains the provision of Directive 2003/6/EC allowing an issuer to delay public disclosure where: (i) the omission would not be likely to mislead the public; and (ii) the confidentiality of the information may be ensured. Where this possibility of delayed disclosure is used, the issuer needs to inform the competent authority immediately after the disclosure to allow for the *ex post* control of the specific conditions for the delay⁽⁷⁰⁾. Moreover, the proposed MAR provides, as a new element of the disclosure regime, that a competent authority may *ex ante* permit the delay of the public disclosure by the issuer where: (i) the information is of systemic importance; (ii) it is in the public interest to delay its publication; and (iii) the confidentiality of information may be ensured⁽⁷¹⁾.

16.2. As stated in a previous Opinion⁽⁷²⁾, the ECB supports further enhancement of the legal framework for delayed disclosure under the proposed MAR. The general interest in such public disclosure may need to be balanced against the need to preserve confidentiality at least for a limited period, either in the interest of the issuer or the public. Delay of public disclosure may occur in two situations, either: (i) in the interest and under the own responsibility of the issuer⁽⁷³⁾; or (ii) in the public interest and following permission by the competent authority⁽⁷⁴⁾. The ECB welcomes this public interest exemption which is combined with the condition that the information needs to be of systemic importance, thereby allowing to take into account financial stability considerations, as they may notably arise in case of emergency liquidity assistance received by the issuer.

16.3. In the case of financial institutions, the assessment of whether the information is of systemic importance, and whether a delay of disclosure is in the public interest, should be made in close cooperation with the national central bank and the national supervisory authority, and — if different from the central bank or supervisor — with the macro-prudential authority. Appropriate and efficient procedures to ensure timely involvement of these authorities should be put in place at national level, underpinned by a set of principles at Union level. Where justified by systemic importance and public

⁽⁶⁵⁾ See Article 6(1)(b) of the proposed MAR.

⁽⁶⁶⁾ See recital 15 and Article 2(3) of the proposed MAR.

⁽⁶⁷⁾ See paragraph 3.4.1.2. of the explanatory memorandum and recital 15 of the proposed MAR.

⁽⁶⁸⁾ See recital 15 of the proposed MAR.

⁽⁶⁹⁾ See Article 12(1) of the proposed MAR.

⁽⁷⁰⁾ See Article 12(4) of the proposed MAR; see point 3.4.3.2 of the explanatory memorandum to the proposed MAR and Article 6(2) of Directive 2003/6/EC.

⁽⁷¹⁾ See Article 12(5) of the proposed MAR.

⁽⁷²⁾ See paragraph 2 of ECB Opinion CON/2010/6 of 11 January 2010 on a proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2004/109/EC (OJ C 19, 26.1.2010, p. 1).

⁽⁷³⁾ Article 12(4) of the proposed MAR.

⁽⁷⁴⁾ See footnote 71.

interest, the competent authority should be empowered to order the delay of publication. Notably information on central bank lending or other liquidity facilities provided to a particular credit institution, including emergency liquidity assistance, may need to be kept confidential to contribute to the stability of the financial system as a whole and maintain public confidence in a crisis ⁽⁷⁵⁾.

17. *Criminal sanctions for insider dealing and market manipulation*

17.1. The ECB welcomes the proposed MAD provisions defining minimum rules for criminal sanctions for the most serious market abuse offences. These rules are essential to ensure the effectiveness and success of the legislative framework and thereby the effective implementation of Union policy on fighting market abuse. Moreover, equal, strong and deterrent sanctions regimes against financial crimes and their consistent and effective enforcement are crucial components of the rule of law, as conducive to safeguarding financial stability.

17.2. The ECB welcomes that the proposed MAD ⁽⁷⁶⁾ addresses the liability of legal persons, as such liability at corporate level is able to set the right incentives towards stricter internal monitoring and controls, thereby fostering good corporate governance and market discipline. However, the successful implementation of these provisions and the achievement of the intended policy result will require careful consideration of national legal specificities, since the concept of criminal liability of legal persons does not exist in all Member States.

Where the ECB recommends that the proposed MiFID, MiFIR, MAD or MAR are amended, specific drafting proposals are set out in the Annex accompanied by explanatory text to this effect.

Done at Frankfurt am Main, 22 March 2012.

The President of the ECB
Mario DRAGHI

⁽⁷⁵⁾ See Amendments 14, 15 and 17 in the Annex to this Opinion.

⁽⁷⁶⁾ See Article 7 of the proposed MAD.

ANNEX

Drafting proposals of the proposed MiFID

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
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Amendment 1

Recital 47 of the proposed MiFID

<p>'(47) These potential risks from increased use of technology are best mitigated by a combination of specific risk controls directed at firms who engage in algorithmic or high frequency trading and other measures directed at operators of trading venues that are accessed by such firms. It is desirable to ensure that all high frequency trading firms be authorised when they are a direct member of a trading venue. This should ensure they are subject to organisational requirements under the Directive and are properly supervised.'</p>	<p>'(47) These potential risks from increased use of technology are best mitigated by a combination of specific risk controls directed at firms who engage in algorithmic or high frequency trading and other measures directed at operators of trading venues that are accessed by such firms. It is desirable to ensure that algorithmic and high frequency trading firms is authorised considered as investment services or activities including when they are conducted on own account a direct member of a trading venue. This should ensure they that firms providing these activities are authorised as investment firms and subject to organisational requirements under the Directive and are properly supervised.'</p>
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Explanation

Consistency should be ensured between the above recital and Article 17 of the proposed MiFID concerning not only HFT but also AT and to clarify that the authorisation of the firms is required since these activities are considered investment services. Indeed, AT conducted through indirect access to the trading venues does not pose fewer risks to financial markets and stability than AT operated by a direct member of a trading venue. See also Amendment to Article 2 of the proposed MiFID.

Amendment 2

Recital 108 of the proposed MiFID

<p>'(108) Technical standards in financial services should ensure consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.'</p>	<p>'(108) Technical standards in financial services should ensure consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission. To ensure consistent investor and consumer protection across financial services sectors, ESMA should carry out its tasks, to the extent possible, in close cooperation with the other two ESAs within the framework of the Joint Committee.</p>
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Explanation

To ensure consistent investor and consumer protection across financial services sectors, ESMA should to the extent possible cooperate closely with the other two ESAs within the framework of the Joint Committee.

Amendment 3

Article 2 of the proposed MiFID

<p>'1. This Directive shall not apply to: [...] (d) persons who do not provide any investment services or activities other than dealing on own account unless they: (i) are market makers</p>	<p>'1. This Directive shall not apply to: [...] (d) persons who do not provide any investment services or activities other than dealing on own account unless they: (i) are market makers;</p>
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Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
<p>(ii) are a member of or a participant in a regulated market or MTF; or</p> <p>(iii) deal on own account by executing client orders;</p> <p>This exemption does not apply to persons exempt under Article 2(1)(i) who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof;</p> <p>[...]</p>	<p>(ii) are a member of or a participant in a regulated market or MTF; or</p> <p>(iii) engage in algorithmic trading; or</p> <p>(ivii) deal on own account by executing client orders;</p> <p>This exemption does not apply to persons exempt under Article 2(1)(i) who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof;</p> <p>[...]</p>

Explanation

The requirements applicable to AT and HFT firms should be established irrespective of whether they trade on behalf of clients or on their own account, since dealing on own account does not relieve the concerns underlying the need to regulate and supervise AT, taking into account the complexity, sensitivity and seriousness of the risks and issues raised by this kind of dealing activity.

Amendment 4

Article 9(6) of the proposed MiFID

<p>'(c) define, approve and oversee a policy as to services, activities, products and operations offered or provided by the firm, in accordance with the risk tolerance of the firm and the characteristics and needs of the clients to whom they will be offered or provided, including carrying out appropriate stress testing, where appropriate;'</p>	<p>'(c) define, approve and oversee a policy as to services, activities, products and operations offered or provided by the firm, in accordance with the risk tolerance of the firm and the characteristics and needs of the clients to whom they will be offered or provided, including carrying out appropriate stress testing, where appropriate;</p> <p>(ca) define, approve and oversee the firm's remuneration of sales staff which should be designed to encourage responsible business conduct, fair treatment of consumers and to avoid conflicts of interest. The remuneration structure should be disclosed to customers where appropriate, such as where potential conflicts of interest cannot be managed or avoided;'</p>
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Explanation

The principle contained in the proposed MiFID ⁽²⁾, regarding the management body's responsibilities for the remuneration of sales staff, should be emphasised. The proposed amendment aims at fostering sound corporate governance arrangements for the remuneration policies of the institutions that do not solely carry out banking activities. The specificity of their activities and the potential harmful effects stemming from inappropriate remuneration schemes to consumers, call for common requirements in this area to apply to all investment firms with a view to responsible business conduct, fair treatment of consumers and to avoid conflict of interests, in a manner which would be coherent with the proposal for a directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms ⁽³⁾ and in line with the OECD principles ⁽⁴⁾.

Amendment 5

Article 17(2) of the proposed MiFID

<p>'2. An investment firm that engages in algorithmic trading shall at least annually provide to its home Competent Authority a description of the nature of its algorithmic trading strategies, details of the trading parameters or limits to which the system is subject, the key compliance and risk controls that it has in place to ensure the conditions in paragraph 1 are satisfied and details of the testing of its systems. A competent authority may at any time request further information from an investment firm about its algorithmic trading and the systems used for that trading.'</p>	<p>'2. An investment firm that engages in algorithmic trading shall at least annually provide to its home Competent Authority a description of the nature of its algorithmic trading strategies, details of the trading parameters or limits to which the system is subject, the key compliance and risk controls that it has in place to ensure the conditions in paragraph 1 are satisfied and details of the testing of its systems. An investment firm shall, at the request of a competent authority, submit may at any time request further information from an investment firm about its algorithmic trading and the systems used for that trading.'</p>
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Text proposed by the Commission	Amendments proposed by the ECB (1)
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Explanation

Article 17(2) of the proposed MiFID should ensure that the investment firm provides the competent authority with any further information requested.

Amendment 6

Article 24(7) of the proposed MiFID

<p>'7. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component.</p> <p>ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations in paragraph 1.'</p>	<p>'7. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component.</p> <p>ESMA, in cooperation with EBA and EIOPA, through the Joint Committee, shall develop by [] at the latest, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations in paragraph 1.'</p>
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Explanation

Cooperation among all three ESAs in developing guidelines is of high relevance to cross-selling, since in this situation there is clear involvement of different financial sectors such as insurance and banking.

Amendment 7

Second paragraph of Article 36(8) of the proposed MiFID

<p>'ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2016].'</p>	<p>'ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 20163].'</p>
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Explanation

ESMA should submit the standards to the Commission prior to TARGET2-Securities (T2S) launch date on June 2015 and definitely before 31 December 2016. The same drafting suggestion is proposed as an amendment to Article 36(9) and Article 37(11) and (12) of the proposed MiFID. These Articles request ESMA to develop technical standards for the support of the processes required to ensure the freedom of investment firms to provide cross-border investment services and activities and to establish a branch. This is an important condition for competition and financial market integration and may positively influence cross-border settlement efficiency and volumes in T2S.

Amendment 8

Second paragraph of Article 39(2) of the proposed MiFID

<p>'This assessment of the competent authority of the regulated market shall be without prejudice to the competencies of the national central banks as overseers of settlement systems or other supervisory authorities on such systems. The competent authority shall take into account the oversight/supervision already exercised by those institutions in order to avoid undue duplication of control.'</p>	<p>'This assessment of the competent authority of the regulated market shall be without prejudice to the competencies of the national relevant central banks as overseers of settlement systems or other supervisory authorities on such systems. The competent authority shall take into account the oversight/supervision already exercised by those institutions in order to avoid undue duplication of control.'</p>
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Explanation

The central banks overseeing the clearing and settlement systems may also be the ECB and not only a national central bank.

This same drafting suggestion should be considered also as an amendment to the second paragraph of Article 40(2) and the second paragraph of Article 57(2) of the proposed MiFID.

Text proposed by the Commission	Amendments proposed by the ECB (1)
Amendment 9	
Article 41(1)(g) of the proposed MiFID	
<p>'(g) the firm has requested membership of an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on Investor-Compensation Schemes.'</p>	<p>'(g) the firm belongs to has requested membership of an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes, at the time of authorisation.'</p>
<i>Explanation</i>	
<p><i>To provide effective protection of retail clients, membership and not a mere request should be the precondition to authorisation, according to the provision concerning investment firms established in the Union (see Article 14 of the proposed MiFID and Article 2(1) of Directive 97/9/EC referred to therein). Moreover, the ECB underlines the need to ensure the consistency of this regime under the proposed MiFID with Article 11 of Directive 97/9/EC which provides Member States with the discretion to evaluate the equivalence between Union cover and the cover provided in the third country where the branch has its head office.</i></p>	
Amendment 10	
Article 51(7) of the proposed MiFID	
<p>'7. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning the requirements laid down in this Article, and in particular:</p> <p>[...]</p> <p>(c) to set out the maximum and minimum ratio of unexecuted orders to transactions that may be adopted by regulated markets and minimum tick sizes that should be adopted;</p>	<p>'7. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning the requirements laid down in this Article, and in particular:</p> <p>[...]</p> <p>(c) to set out the maximum and minimum ratio of unexecuted orders to transactions that may be adopted by regulated markets and minimum tick sizes that should be adopted;</p>
<i>Explanation</i>	
<p><i>There is no obvious economic rationale for minimum ratios of unexecuted orders to transactions.</i></p>	
Amendment 11	
Article 91 of the proposed MiFID	
<p>'Article 91</p> <p>Cooperation and exchange of information with ESMA</p> <p>1. The competent authorities shall cooperate with ESMA for the purposes of this Directive, in accordance with Regulation (EU) No 1095/2010.</p> <p>2. The competent authorities shall, without delay, provide ESMA with all information necessary to carry out its duties under this Directive and in accordance with Article 35 of Regulation (EU) No 1095/2010.'</p>	<p>'Article 91</p> <p>Cooperation and exchange of information with ESMA, within the European System of Financial Supervision (ESFS), and with the European System of Central Banks (ESCB)</p> <p>1. Competent authorities, as parties to the ESFS, shall cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and other parties to the ESFS in accordance with the principle of sincere cooperation pursuant to Article 4(3) of the Treaty on European Union.</p> <p>± 2. The competent authorities shall cooperate with ESMA for the purposes of this Directive, in accordance with Regulation (EU) No 1095/2010.</p> <p>± 3. The competent authorities shall, without delay, provide ESMA with all information necessary to carry out its duties under this Directive and in accordance with Article 35 of Regulation (EU) No 1095/2010 and, as appropriate, provide the ESCB central banks with all information relevant for the performance of their respective tasks.'</p>

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
<i>Explanation</i>	
<p><i>For the sake of clarity and legal certainty, the proposed MiFID should reflect the principle of cooperation set out in the context of the recent reform of European financial supervision. Moreover, information sharing arrangements should be improved for the ESCB central banks, including the ECB. The ECB recommends introducing similar amendments in other relevant financial sector directives as appropriate — see also Amendment 3 to Article 7 of the proposed directive in ECB Opinion CON/2012/5.</i></p>	
<p>⁽¹⁾ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.</p>	
<p>⁽²⁾ See recital 39 of the MiFID.</p>	
<p>⁽³⁾ See COM(2011) 453 final.</p>	
<p>⁽⁴⁾ See the OECD G20 high-level principles on financial consumer protection (15 October 2011), according to which 'the firm's remuneration of sales staff which should be designed to encourage responsible business conduct, fair treatment of consumers and to avoid conflicts of interest. The remuneration structure should be disclosed to customers where appropriate, such as when potential conflicts of interest cannot be managed or avoided'.</p>	

Drafting proposals of the proposed MiFIR

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
Amendment 12	
Article 1(5) (new) of the proposed MiFIR	
No text	<p>'5. The post-trade disclosure of transactions referred to in Articles 19 and 20, and the obligation to report transactions laid down in Article 23, do not apply to transactions to which an ESCB central bank is counter-party.'</p>

Explanation

See paragraph 7 of this opinion.

Amendment 13

Article 23 of the proposed MiFIR

<p>'2. The obligation laid down in paragraph 1 shall not apply to financial instruments which are not admitted to trading or traded on an MTF or an OTF, to financial instruments whose value does not depend on that of a financial instrument admitted to trading or traded on an MTF or an OTF, nor to financial instruments which do not or are not likely to have an effect on a financial instrument admitted to trading or traded on an MTF or an OTF.</p>	<p>'2. The obligation laid down in paragraph 1 shall not apply to financial instruments which are not admitted to trading on a regulated market or traded on an MTF or an OTF, to financial instruments whose value does not depend on that of a financial instrument admitted to trading on a regulated market or traded on an MTF or an OTF, nor to financial instruments which do not or are not likely to have an effect on a financial instrument admitted to trading on a regulated market or traded on an MTF or an OTF.</p>
[...]	[...]
<p>7. When, in accordance with Article 37(8) of Directive [new MiFID], reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do not want to receive this information.</p>	<p>7. When, in accordance with Article 37(8) of Directive [new MiFID], reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit this information to the competent authorities of the home Member State of the investment firm, unless they decide that they do not want to receive this information.</p>
	<p>The competent authorities shall transmit all the information received pursuant to this Article to a single system, appointed by ESMA, for transaction reporting at Union level. The single system shall allow relevant competent authorities access to all the information reported pursuant to this Article.</p>
<p>8. ESMA shall develop draft regulatory technical standards to determine:</p>	<p>8. ESMA shall develop draft regulatory technical standards to determine:</p>
[...]	[...]

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
<p>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.</p> <p>9. Two years after entry into force of this Regulation, ESMA shall report to the Commission on the functioning of this Article, including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article 21. The Commission may take steps to propose any changes, including providing for transactions to be transmitted to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article.'</p>	<p>(d) the processing of the single system referred to in paragraph 7 and the procedures for the exchange of information between this system and the competent authorities.</p> <p>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.</p> <p>9. Two years after entry into force of this Regulation, ESMA shall report to the Commission on the functioning of this Article, including whether the content and format of transaction reports received and exchanged between the single system referred to in paragraph 7 and competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article 21. The Commission may take steps to propose any changes, including providing for transactions to be transmitted only to a the single system referred to in paragraph 7 appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article.'</p>

Explanation

Transaction reporting information should be easily accessible in one single system at European level appointed by ESMA as soon as possible rather than only as an eventual result of a review clause operating two years following entry into force of the proposed MiFIR. Moreover, ESMA should develop draft regulatory technical standards to determine the mechanism to ensure an efficient exchange of information between this system and competent authorities.

A reference to regulated markets in Article 23(2), alongside the reference to MTF and OTF, clarifies that the wording 'admitted to trading' refers, as elsewhere in the proposed MiFIR, to financial instruments that are traded on regulated markets.

(1) Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Drafting proposals of the proposed MAR

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
Amendment 14	
Recital 25 of the proposed MAR	
<p>'(25) At times, where a financial institution is receiving emergency lending assistance, it may be in the best interest of financial stability for the disclosure of inside information to be delayed when the information is of systemic importance. It should therefore be possible for the competent authority to authorise a delay in the disclosure of inside information.'</p>	<p>'(25) At times, where a financial institution is receiving emergency lending assistance, it may be in the best interest of financial stability for the disclosure of inside information to be delayed when the information is of systemic importance. It should therefore be possible for the competent authority to authorise decide a delay in the disclosure of inside information.</p> <p>(25a) In respect to financial institutions, notably where they are receiving central bank lending including emergency liquidity assistance, the assessment of whether the information is of systemic importance and whether a delay of disclosure is in the public interest should be made in close cooperation with the relevant central bank, the competent authority supervising the issuer and, as appropriate, the national macro-prudential authority.'</p>

Text proposed by the Commission	Amendments proposed by the ECB (1)
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Explanation

The competent authority needs to be entitled not only to permit but also to decide on its own initiative to delay the disclosure of inside information of systemic importance. For issuers that are financial institutions, the receipt of the emergency liquidity assistance is an important, but not exclusive, example of a possible case of information of systemic importance. Moreover, the assessment of systemic importance for such issuers should be made in cooperation with the relevant central bank, the supervisory authority and the national macro-prudential authority (2) in view of financial stability concerns. This amendment is related to Amendment 17 below.

Amendment 15

Article 5(1) (new) of the proposed MAR

No text

(20) “Financial institution” means an entity authorised to carry on any of the activities listed in Directive xx/xx/EU of the European Parliament and of the Council of [date] on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (*), Regulation (EU) No xx/xx of the European Parliament and of the Council of [date] on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (), Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) (***), Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (****), Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (*****), as well as Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (*****).**

(*) OJ L [...].

(**) OJ L [...].

(***) OJ L 335, 17.12.2009, p. 1.

(****) OJ L 302, 17.11.2009, p. 32.

(*****) OJ L 235, 23.9.2003, p. 10.

(*****') OJ L 174, 1.7.2011, p. 1.'

Explanation

The ESCB central banks should be involved in the decision to delay disclosure of systemic information as far as financial institutions are concerned (see Amendment 17). Consequently, a definition of ‘financial institution’ needs to be introduced in the proposed MAR.

Amendment 16

Article 8(3)(c) of the proposed MAR

(c) the sending of orders to a trading venue by means of algorithmic trading, including high-frequency trading, without an intention to trade but for the purpose of:

(c) the sending of orders to a trading venue by means of algorithmic trading, including high-frequency trading, ~~without an intention to trade but~~ for the purpose of:

Text proposed by the Commission	Amendments proposed by the ECB (1)
<ul style="list-style-type: none"> — disrupting or delaying the functioning of the trading system of the trading venue, — making it more difficult for other persons to identify genuine orders on the trading system of the trading venue, or — creating a false or misleading impression about the supply of or demand for a financial instrument.' 	<ul style="list-style-type: none"> — disrupting or delaying the functioning of the trading system of the trading venue, — making it more difficult for other persons to identify genuine orders on the trading system of the trading venue, or — creating a false or misleading impression about the supply of or demand for a financial instrument.'

Explanation

Algorithmic trading practices may present a considerable risk for the public interest and have to be considered as market manipulation if conducted for one of the malicious purposes specified above, even if there is also a real intention to trade. The ECB suggests in this regard deleting the reference to the absence of an intention to trade.

Amendment 17

Article 12(5) of the proposed MAR

<p>'5. A competent authority may permit the delay by an issuer of a financial instrument of the public disclosure of inside information provided that the following conditions are satisfied:</p> <ul style="list-style-type: none"> — the information is of systemic importance; — it is in the public interest to delay its publication; — the confidentiality of that information can be ensured. <p>That permission shall be in writing. The competent authority shall ensure that the delay is only for such period as is necessary in the public interest.</p> <p>The competent authority shall at least once every week review whether the delay continues to be appropriate and shall revoke the authorisation immediately if any of the conditions in points (a), (b) or (c) are no longer satisfied.'</p>	<p>'5. A competent authority may decide may permit the delay by that an issuer of a financial instrument should delay public disclosure of inside information provided that when the following conditions are satisfied:</p> <ul style="list-style-type: none"> — the information is of systemic importance; — it is in the public interest to delay its publication; — the confidentiality of that information can be ensured. <p>The competent authority shall adopt the decision on its own initiative or on request from an issuer of financial instruments, and, with respect to financial institutions issuing financial instruments also on request of the relevant ESCB central bank, the authority supervising the issuer of financial instruments, or of the national macro-prudential authority.</p> <p>That permission decision shall be in writing. The competent authority shall ensure that the delay is only for such period as is necessary in the public interest.</p> <p>The competent authority shall at least once every week review whether the delay continues to be appropriate and shall revoke the authorisation its decision immediately if any of the conditions in points (a), (b) or (c) are no longer satisfied.</p> <p>With respect to financial institutions issuing financial instruments, the competent authority shall assess the fulfilment of the conditions in points (a), (b) or (c) in close cooperation with the relevant ESCB central bank, the authority supervising the issuer of financial instruments and, as appropriate, the national macro-prudential authority.'</p>
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Explanation

The delay of disclosure due to the systemic importance of the inside information is in both the issuer's interest and in the public interest in maintaining financial stability. Therefore, the competent authority should oblige, rather than merely entitle, the issuer to delay the disclosure. This should be possible either on the request of the issuer or as a result of the competent authority acting on its own initiative. Moreover, if the issuer is a financial institution, the ESCB central bank, the supervisory authority and the macro-prudential authority should have the right to request the competent authority to delay the disclosure of inside information and should be

Text proposed by the Commission	Amendments proposed by the ECB ⁽¹⁾
<i>involved in the assessment of conditions for such delay. Such involvement of the ESCB central bank, of the supervisory authority and, as appropriate, the macro-prudential authority, will allow financial stability concerns to be adequately addressed, in particular where the issuer is receiving emergency liquidity assistance.</i>	
<p>(¹) Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.</p> <p>(²) See in this respect ESRB Recommendation ESRB/2011/3 of 22 December 2011 on the macro-prudential mandate of national authorities, available on the ESRB's website at http://www.esrb.europa.eu</p>	