

**Public Consultation:**

**Review of the Markets in Financial Instruments Directive (MiFID)**

**Opinion of the Czech National Bank**

**1. INTRODUCTION**

**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.**

**CNB opinion:** In the conditions of the Czech Republic, we are not aware of the problem which the Commission suggests to solve but we do not disagree with the proposal as presented here.

**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.**

**CNB opinion:** We generally agree with the Commission's opinion that a general definition of organised trading facility should be introduced but we do not support a possible introduction of a new trading facility. We do not consider it necessary to introduce a new investment service. Organising a regulated market or a MTF is a specific activity itself and can be as such defined independently from investment services. This does not exclude a passport of this activity within the EU.

### 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.**

**CNB opinion:** We do not support defining another type of trading, thus introducing a special regime for crossing networks. We agree with the opinion that if this activity complies with features of systematic internalisation, it should be treated as being a systematic internaliser. This also applies if the activities show features of operating a MTF.

### 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.**

**CNB opinion:** The CNB has previously declared that it did not support the introduction of excessive regulation in this area; we thus do not support the setting of the obligation to accept all eligible derivatives for trading on regulated or similar markets. We believe that this activity should be supported but not ordered directly.

### 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 about co-location facilities needing to be offered on a non-discriminatory basis?
- (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?

**CNB opinion:** We believe that there is not reason to regulate all aspects of trading on financial markets. HF traders only took advantage of progress in IT and adjusted the manner of trading to the current market structure. As regards high frequency trading, we agree with the opinion that high frequency traders should have an adequate risk control system in place, but we believe that this can be derived from the existing prudential rules, without any need to implement special regulation; a recommendation by ESMA will be sufficient if needed. We consider the proposed requiring orders to provide liquidity and to rest on the order book for a minimum period of time to be non-conceptual, as these measures contradict basic principles of the functioning of the HFT system. For the same reason, we do not support the introduction of the mandatory minimum tick size. With regard to the opinion regarding item 2.2.1, there is no reason to introduce other specific requirements (Q14, Q17).

#### 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.

**CNB opinion:** The CNB agrees with the opinion of CESR relevant to questions 21 and 22.

#### 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?**

**CNB opinion:** We agree with aligning relevant requirements which are common for MTFs and regulated markets. As regards the exchange of information about trade disruptions, suspensions and removals of instruments from trading, we agree with the obligation to inform a supervisory authority, while a thorough analysis should be conducted and the technical issue of a practical functioning of this system should be solved before the duty to inform between individual markets is implemented. We are afraid that the technical and cost intensity will exceed real benefits.

## **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?**

**CNB opinion:** We are sceptical about the introduction of a segment for SMEs, as an introduction of a new (segment) market for SMEs with a lower standard of reporting duties or supervision may lead to investor no-confidence and worsen the access of SMEs to capital (the differentiation of the market into those that inform in full and the other SME category). Potential investors will incline to traditional markets, which they know and trust, rather than to the “new” ones with a lower degree of transparency and protection. Given the aforementioned risks, the regulatory shift should be sufficiently justified and any new regulation should show a certain degree of stability, as frequent changes in the reporting duty of issuers and market segments bear considerable costs for market organisers and issuers. The CNB’s previous experience does not suggest any disadvantagedness of SMEs. We also have doubts whether the SMEs themselves want the introduction of new market segments.

As regards the criteria for determining SMEs, it can be objected that harmonisation at the European level may be counterproductive. It may differ depending on the conditions of Member States whether a corporation falls/should fall within the SMEs category. A uniform European definition of SMEs will not be suitable for advanced capital markets or for markets of smaller Member States. Moreover, the size of SMEs may change over time. It cannot be ruled out that maximum harmonisation will mean for some countries that only a small number of issuers will comply with the criteria required in Article 2(1)(f) of the Prospectus Directive, while issuers of listed securities, which were subject to the previous reporting duty, will be subject to a lower reporting standard. The new legal regulation may result in a worse protection of investors in some Member States. The criterion of market capitalisation may seem to be more appropriate than the procedure in line with firmly set criteria of the Prospectus Directive.

We suggest leaving fully on the market’s discretion whether the SME segment will be introduced.

### 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.**

**CNB opinion:** The European Commission's proposals are in line with CESR recommendations and we can thus agree with them. These are not fundamental changes but rather a clarification of rules. The CNB has historically agreed with these proposed changes; it has not identified with the proposed introduction of the minimum order size in the price reference waiver, as it sees no rational reasons in it.

##### 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.**

**CNB opinion:** The CNB supports the aforementioned proposals.

#### 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?**

**CNB opinion:** We agree with the Commission's proposal. However, we do not support the proposal that other products should be included in this category, since we see no rational reasons for it and consider the current transparency regime to be sufficient.

### 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?

**CNB opinion:** We agree with the Commission’s proposal. For the SME issue, see the above reply.

### 3.4. Non equity markets

(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.

**CNB opinion:** We agree with the Commission’s proposals.

### 3.5. Over the counter trading

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

**CNB opinion:** It is not clear from the proposal what it is directed at. We believe that the existing Commission Regulation 1287/2006 suggests that post-trade information also contains data on trading venue, thus including the “OTC” identification. See Article 27(1)(c) of Regulation 1287/2006 in connection with Field Identifier 21., Table 1, Annex I. We agree if this concerns adjustments in line with CESR recommendations.

## 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.

**CNB opinion:** We understand the reasons leading the European Commission to the idea of mandatory reporting through APAs. We believe that it is necessary to improve the quality of data published within post-trade transparency, whereas APAs established from the initiative of market participants may represent a suitable instrument. The duty to report information through APAs might be set in the form of ESMA technical standards, only after it is clear that these entities have been established. Until then, the general duty to report the information should apply.

### 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 nonequity markets? Please explain the reasons for your views.

**CNB opinion:** In principle we support the Commission's proposals but we believe that the definition of the term "reasonable price", if necessary, should be left exclusively to the authorities engaged in the protection of competition.

### 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.

**CNB opinion:** We support the option of one or more private organisations based on the market's interest. We reject option A, due mainly to possible initial costs borne by the public sector.

## 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.

**CNB opinion:** The Commission's proposal, which *inter alia* introduces the duty to report positions to supervisory authorities, can be supported. We do not support monitoring the purpose of a derivative, i.e. whether it has been concluded for the purpose of hedging or speculation.

### 5.2. MiFID exemptions for commodity firms

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



**CNB opinion:** In general, we agree with the Commission’s proposal to more narrowly determine trading in commodities and commodity derivatives so that this exemption cannot be applied or abused in a manner circumventing the principles of MiFID.

### 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.**

**CNB opinion:** We agree with the Commission’s proposal.

### 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.**

**CNB opinion:** We are definitely against defining emission allowances as investment instruments. The European Commission itself states that emission allowances can be classified as intangible property or commodity. It cannot be derived from the fact that a commodity is an underlying asset for a derivative that it should be treated as an investment instrument. For completeness we state that derivatives to emission allowances are included in the category of exotic, not commodity derivatives. However, on the other hand, we have no objections that investment firms should be allowed to trade in emission allowances.

Treating emission allowances as investment instruments would be a serious precedent, which will lead to an extension in financial regulation and activities of financial supervisors into an area, which they are not competent to supervise.

## 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 of an obligation for regulated markets, MTFs and other alternative trading venues to report the transactions of nonauthorised 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.**

**CNB opinion:** We agree with the extension of transaction reporting to other investment instruments (Q67-70). We also agree that transaction reports should be sent for the members of the market other than regulated entities and with new requirements for data storage.

## **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.**

**CNB opinion:** We agree with the need to clarify which transaction is subject to transaction reporting. However, we are afraid that the said EC's proposals may lead to different interpretations over time. We perceive as a problem that information about clients will be obligatorily submitted to traders, which will in fact execute the order (e.g. on the regulated market), which will not be perceived positively on the market due to competition. We believe that the effort to identify clients in a uniform way is very problematic, but it can be supported. We can agree in general with the identification of the broker who conducted the transaction but we are concerned about the practical use of this information, especially in cases when more brokers participated in the transaction.

## **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.**

**CNB opinion:** We fundamentally disagree with the introduction of the possibility of transaction reporting to a single mechanism at EU level. The TREM system has been built for several years within CESR and national supervisors have developed their own transaction reporting systems based on this system. We think that a joint European system would thwart the large investment of all the participating parties. The previous experience has shown that the development of such system would require additional large financial and organisational investment. We believe that the issue of various transaction reporting systems, relating to bank groups providing services through branches, can be influenced by a change in the transaction reporting regime of these branches, i.e. rather than sending reports to the host country, branches would send reports to the domestic supervisor in line with its rules.

## **7. INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES**

### **7.1. Scope of the Directive**

#### *7.1.1. Optional exemptions for some investment service 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.**

**CNB opinion:** We are inclined to the full removal of the exemption under Article 3 of MiFID. Further, we recommend that entities still applying the exemption should change to investment firms with a limited scope of investment services and limits to capital in line with Directive 2006/49/EC (Articles 4-9) or to a tied agent, or terminate their activities.

#### *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.**

**CNB opinion:** We support the inclusion of structured deposits among investment instruments if no separate complex regulation is developed for them in the process of adopting PRIPs; so far there has been a danger of regulatory arbitrage for these non-regulated products.

#### *7.1.3. Direct sales 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.**

**CNB opinion:** We consider it useful to remove doubts surrounding the interpretation of this issue. Nevertheless, the “request for quote” relationship should be certainly removed from the MiFID protection regime where the transaction was provably induced by the client.

## **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.**

**CNB opinion:** We regard the “execution only” regime as useful and practical, as it allows investment firms to provide investment services relating to the broadest possible set of investment instruments; therefore we disagree with its abolition. We support the narrowing of the definition of "non-complex products" to exclude products with an embedded derivative, as well as the elimination of the “execution only” regime for services associated with the provision of credits or loans. However, we disagree with full or partial exclusion of UCITS securities from the list of “non-complex products”. UCITS funds are a strongly regulated segment of collective investment where it is assumed that it will be offered to retail clients.

### *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 continued suitability of the investments? Do you consider this obligation be limited to longer term investments? Do you consider this could be applied to all**

**situations where advice has been provided or could the intermediary maintain the possibility not to offer this additional service? Please explain the reasons for your views.**

**CNB opinion:** We support the extension of the definition of investment advice, as the client should be informed about the range of products from which the advisor selected, where this is relevant to the advice. We also consider a basic justification of the factors underlying the advice to be useful. For the sake of greater flexibility, however, we recommend not to insist on written form but on capability of proof (e.g. by a sound recording of information provided by telephone). We have reservations about imposing additional information duties on advisors; we would prefer that it be left to the advisor's agreement with the client what additional information duties they stipulate in the contract. Every additional obligation imposed on the advisor leads to costs, which will be borne by the client. If investment advisors were obliged to monitor the evolution of client portfolios, the difference between providing investment advice and individual portfolio management would be virtually eliminated. As regards the provision of advice via the Internet, the existing definition already includes it beyond any doubt.

### *7.2.3. Informing clients on complex products*

**(95) 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.**

**(96) 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?**

**(97) 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.**

**(98) 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.**

**(99) 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.**

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

**CNB opinion:** We refuse imposition of additional information duties on investment firms. We recommend that it be left to the agreement with the client what additional information duties they stipulate in the contract (every obligation imposed on an investment firm lead to costs, which will be borne by the client). Our supervisory activities do not indicate that clients demand additional information from investment firms or that they are harmed by a lack thereof.

### *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.**

**CNB opinion:** We regard the changes proposed to specify the basic conditions of inducements as beneficial, therefore we support them. We consider "summary disclosure" to be unclear and impractical, therefore we agree with its removal. We believe that the independence of portfolio management and investment advice (based on the analysis of a broad range of products according to 7.2.2) may be weakened significantly by inducements from third parties; in both cases we support banning inducements. On the other hand, certain forms of investment advice are also provided under ordinary product distribution, where banning inducements could result in circumventing or disrupting distribution.

#### *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.**

**CNB opinion:** The Czech implementation of MiFID equated professional customers with eligible counterparties. We recommend that the distinction between professional and non-professional clients be retained. We agree that the duty to act honestly, fairly and professionally should apply when dealing with either type of client. We agree with the proposal to exclude institutions such as municipalities and smaller non-financial corporations from the group of counterparties eligible by law. We do not agree with restricting the recognition of institutions as eligible counterparties in the case of "complex products"; similarly, we do not deem appropriate the removal of the knowledge presumption for eligible counterparties. Both our objections are motivated by the need to retain a clear difference between professional and non-professional clients. Moreover, dividing clients into "super eligible counterparties", other professional clients and non-professional clients would be a source of complication.

### 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, client order handling? Please explain the reasons for your views.**

**CNB opinion:** Czech civil law enables clients to achieve compensation for all types of violation of MiFID rules that concern them; introducing special European civil law liability would therefore be superfluous in the Czech Republic and it would contribute to the complexity of the law.

### 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.**

**CNB opinion:** We support an adjustment of the information duties of execution venues in a manner that can also be used by investment firms. The costs consequently incurred by execution venues will be offset above all by a reduction in costs on the part of investment firms. In our opinion, execution venues in the Czech Republic already provide their participants with all the necessary information. As regards foreign execution venues, room for improvement can be seen, in particular, in the provision of information on market depth.

### 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.**

**CNB opinion:** On the basis of our practical supervisory experience, we see no reason to abolish the existing exemptions for entities dealing in investment instruments on own account.

### 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.**

**CNB opinion:** We believe that the fit and proper requirements should concern both the executive and supervisory branches of management. However, on the basis of its supervisory practice, the CNB does not consider prior approval of the supervisory branch of management to be necessary. Fit and proper requirements should be harmonised by ESMA recommendations; there is no reason to make changes at the MiFID directive level.

#### 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.**

**CNB opinion:** We agree with the Commission's proposals in this area.

#### 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?**

**CNB opinion:** We believe that the obligation to evaluate new products, services and operations from the perspective of client needs and compliance can also be inferred from the current wording of the MiFID directive; we regard only the increased requirements for risk management as an extension of obligations. We ask the European Commission to consider whether applying these requirements to all investment firms will not represent an excessive burden. In our opinion, these requirements should be restricted by the appropriateness principle. Furthermore, we recommend that the requirements be compared with those placed on investment firms in the CRD directive to avoid duplication or unwelcome inconsistencies.

#### 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.**

**CNB opinion:** In general, we agree with the Commission's proposal, although it is not specific enough. We recommend that the obligations of an investment firm in managing



client assets be laid down in a similar way to the obligations of management companies in managing UCITS assets.

#### *7.3.5. Conflicts of interest and sales process*

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

**CNB opinion:** In our opinion, application of rules on conflict of interest is not a question of changes to regulation but a question of practical application of the rules in the performance of supervision, which can be improved by cooperation between supervisory authorities within ESMA. Therefore we believe that a change in regulation by means of a directive is not needed.

#### *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?**

**CNB opinion:** We agree with the Commission's proposals to strengthen the protection of client assets; the Czech Republic did not apply any exemption from MiFID implementation in this area.

#### *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.**

**CNB opinion:** We do not think that it is necessary to specify in more detail the process of underwriting and placing investment instruments, with the exception of requirements concerning conflict of interest, especially within the provision of investment services relating to the management of client assets and provision of investment advice.

## 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.**

**CNB opinion:** We agree with the Commission's proposals regarding tied agents. We believe they will help further development in this area, which can also be an inspiration for other financial market segments.

#### 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.**

**CNB opinion:** We agree with the Commission's proposals regarding telephone and electronic communication. Furthermore, we believe it is necessary that they are the minimum standard and MiFID continues to allow setting further requirements at the national level (practical from the supervisory perspective).

#### 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.**

**CNB opinion:** We believe that Member States should continue to have the option to lay down obligations beyond the MiFID Directive in exceptional cases, as under existing Article 4 of the implementing directive. If over the effect period of the directive this provision has turned out to be difficult to apply, as stated by the Commission, we agree with the

Commission's proposal to rephrase it. We believe that it would be appropriate to specify which type of changes should be sent to the Commission on an ongoing basis. We see no reason to send purely technical legislative changes to the Commission; if that should be the case, we believe that the Commission could be overloaded with minor changes in rules that do not affect the stipulation of rights and obligations as such.

## **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 whistleblowing 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.**

**CNB opinion:** We strongly disagree with addressing these issues in the MiFID Review, given that the Commission has only recently published for consultation its intentions in the area of sanctioning regimes.<sup>1</sup> Any changes in this area must be done after the evaluation of responses to the consultation document; therefore, any proposals are entirely premature at this stage.

In general, we deem the current sanctioning mechanism set for the CNB in legislation based on MiFID sufficiently effective and deterrent. We do not consider further changes to be necessary; above all, we disagree with creating a minimum threshold for imposed sanctions. We refuse whistleblowing and leniency programmes; it is not apparent how broad and intensive the use of such practices is in Member States, and therefore we would regard any formal steps from the EU as premature. At this juncture, we believe that reviewing the experience in using these tools in Member States through the ESAs is sufficient. As regards leniency programmes, we must also direct attention to the fact that if they should result in moderation of punishment for a criminal offence, the decision must be taken by a court of law, not the CNB. Where sanctions for administrative offences are involved, taking the relevant circumstances into account when deciding on the imposition and extent of sanction is already a right and obligation of the CNB.

## **8.3. Access of third country firms to EU markets**

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Reinforcing sanctioning regimes in the financial services sector

**(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)**

**CNB opinion:** We observe no problems in the current state of the approach to third countries under MiFID. In our opinion, changes in regulation would be meaningful only if they were connected with restricting the requirements placed on professional care on the part of investment firms from EU Member States that execute instructions in third countries via investment firms from third countries (especially being allowed to rely on professional care exercised by the third country investment firm in exercising client orders under the best conditions and on measures in the area of client asset protection).

## **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.**

**CNB opinion:** We regard the current powers of supervisory authorities under MiFID as sufficient. Therefore we believe that further changes are not necessary. In particular, we strongly disagree with further transfer of powers to the ESMA, especially where it would even go beyond the regulation governing the ESMA. We strongly oppose a ban on trading in eligible OTC derivatives where no CCP has been determined yet to settle trades.

### **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?**

**CNB opinion:** We strongly disagree with creating regulatory instruments whereby European or national supervisory authorities would replace business decision-making (and the associated accountability). We believe that supervisory authorities already have powers enabling them to take action against a financial institution in cases of excessive risk-taking (for example also in the area of commodity derivatives). Market manipulation must be regulated in the MAD directive, not in the MiFID Directive.