

Review of the Markets in Financial Instruments Directive
Response by Fédération CFDT des Banques et des Assurances
Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu by **13 January 2012**.

Response by CFDT des Banques et des Assurances.

47 avenue Simon Bolivar

75 950 Paris Cedex 19

Tel : 01 56 41 54 50

www.fba.cfdt.fr

Contact : Ute Meyenberg

umeyenberg@fba.cfdt.fr

CFDT Banques et Assurances is a major trade union in the financial sector in France. We represent 27% of the votes in bank's works councils and 42% of votes in the insurance sector and account for 30 000 members.

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Theme	Question	Answers
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	Article 1 a) exempts insurance undertakings. In France, life insurance is one of the preferred investment tool for French households and is sold by banks and investment firms as well. French life insurance almost always includes MIFID eligible products amongst the investment vehicles (life insurance is a package which gives tax advantages, but the investment products in the package may be bonds or shares). Client relationship officers in banks usually make a suitability test when selling life insurance products. However, the applicability of the MIFID provisions for life insurance products in general needs clarification for client relationship officers.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	
Corporate	5) What changes, if any, are needed to the new requirements	Article 9 and 48 b): “possess adequate collective knowledge”

governance	on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	<p>– the question is as to whether collective knowledge is sufficient and how it is defined. It should be insured here that at least several members of management know the activities in detail and to possess if possible work experience in the domain.</p> <p>There is no mentioning of employees representatives and direct flow of information in the corporate governance scheme as provided in article 9 and article 48. However, employee representatives and direct flow of information such as whistle blowing provisions (depending on the country/business culture) are important channels of information about corporate functioning and disfunctioning. Bottom-up communication, especially via employees representatives and social dialogue, is a vital aspect for a good functioning of a firm.</p> <p>In regard to the management body, a reference should be made to remuneration schemes which should reward risk related behaviour and integrity and not only achievement of objectives of return.</p>
	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	

	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	For SME's, barriers of access are the main problem. Many SME's do not have the possibility to make extensive accounting (or are not willing to do so because of privacy considerations). The regulator should envisage the re-development of local markets for financing of SME's.
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	

	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	<p>Exact provisions for conflicts of interest have been dealt with in the implementing directive 2006/73/EC. The exact wording of Article 26 of the implementing directive, which refers to article 19 (new article 24) of the Level 1 directive has been transposed in France into the AMF (financial market supervisor) general rules. However, the commissions which are perceived by client relationship officers are not taken into account: nothing obliges investment firms to disclose commissions in relation to selling products by the current wording in the AMF general rules. The wording in the new directive is not improving this state of business.</p> <p>This means that conflict of interest provisions are not always implemented effectively. The current Level 1 directive states that employees should always act in the interest of the clients. With continuous problems of misselling and inappropriate sales practices, it is clear that these provisions have not been properly implemented as the use of sales targets and incentive structures does not seem compatible to us with this provision.</p>

		<p>Sales and personal targets should be covered by the definition of inducements. All inducement and sales target policy should be disclosed.</p> <p>At present, employees are often caught in a catch 22 situation: apply the rules and not meeting targets or risking employer sanctions or meet targets and not applying the rules (i.e. selling products they know inappropriate).</p>
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	This depends on the implementing directive developed by ESMA (section 7). However, for a retail client, even when having a simplified explanation they may not understand which risks are involved (i.e. products with a floor return such as ETF's).
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	Annex II: the definition of "Locals" should be given. Regional governments and entities managing public money should not necessarily be considered as professional clients.
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes	/

	are needed and why?	
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	
	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and	

	that competent authorities receive the right data?	
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	The Insurance mediation directive, PRIPS and UCITS directives should be considered for possible interaction with the MIFID directive.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	Article 73: Sanctions should not apply to natural persons, but to the legal persons. Too often, responsibility is pushed down to the lowest level of the hierarchy. Presently, this can be translated by disciplinary sanctions in case of non-application of internal procedures. However, procedures are often very heavy and sales pressure makes it impossible to apply all and every rule. Indeed, if the employee does not respect all the internal rules which result of MIFID (with MIFID, but also other EU regulation, internal requirements have been adjusted and in the internal rules there is often a statement saying that

		<p>“all internal rules have to be known and respected”. This is a provision stemming from penal law “Nemo censetur ignorare legem” but is impossible to respect.). Non respect may lead to disciplinary actions.</p> <p>The new text should make clear that the sanctions will apply to the institutions and/or management and not to the individual employee.</p>
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	<p>The ESA level (in this case ESMA) should implement technical standards. The current implementing directive (2006/73/EC) still gives many general guidelines which should also be submitted to a proper and democratic debate. In addition, the resource level of the ESA’s should be significantly improved in order to give them the means to face the enormous work plan they have.</p>
Detailed comments on specific articles of the draft Directive		
Article number	Comments	
Article 23 (old 18) and 24 (old 19) :	<p>Conflicts of interest and General principles of information to clients : Most banks have incentive systems and variable remuneration schemes. These incentive systems are not disclosed to clients. They are often very detailed and complex, but constitute definitely incentives to sell products even if they are not totally adapted to clients.</p> <p>In general, high sales objectives are a pressure to sell products by all means, and are detrimental to good advice. Some employees are therefore inclined to sell products although they know that they do not fit the client’s needs.</p>	
Article 25... :	<p>The article demands that it shall be ensured that clients or potential clients provide information about their knowledge and experience. However, it often happens that clients do not see the necessity or are reluctant to submit themselves to a procedure which they don’t understand. In this case, client relationship officers fill in the questionnaire themselves – which is a breach of regulation!</p>	

	The additional requirements of reporting are increasing the workload substantially. In terms of conditions of work, there are major inconsistencies between the persistent and even increasing pressure to sell, but at the same time the additional requirements to report and to administer questionnaires of suitability, and no increase of staff !!
General comment 1	Often, employees indicate not having received sufficient training. A profound advisory service requires time for employees to give proper and competent advice. It must therefore be insured that sales targets, in terms of numbers of clients in the portfolio of each employee, should be adjusted accordingly. The number of clients should reflect the amount of time and effort spent on each client. Continuous reporting is time-consuming – additional reporting and follow-up obligations should translate to an increase in employment.
General comment 2	Product prohibition: CFDT Banques et Assurances supports the proposal for national authorities and the European Supervisory Authorities to have the power to ban products which risk creating serious systemic risk.