Review of the Markets in Financial Instruments Directive

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.

BIPAR is the European Federation of Insurance and Financial Intermediaries. It groups 51 national associations in 32 countries. Through its national associations, BIPAR represents the interests of insurance agents and brokers and financial intermediaries in Europe.

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

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?	The proposed recast of the MiFID affects financial intermediaries and advisers who give investment advice. We are pleased that an optional opt out regime as proposed in Article 3 exists and continues to exist. It is observed that if the full MiFID regime would be applicable to those situations which are currently optionally exempt, many SMEs and micro-type operators would not be able to continue their activities due to the high cost of compliance. Such a situation would exclude many people (in particular the smaller investors) from access to any level of advice or assistance in their search for an adapted investment product. BIPAR recalls that financial advisers which are predominantly SMEs and micro-type operators were brought within the MiFID because of its coverage of investment

		advice. We welcome the choice made by the European Commission to keep the possibility to exempt some investment firms who give advice, under certain conditions, from the full MiFID regulation (Article 3). We kindly ask the European Parliament to bear this limited investment activity in mind when revising MiFID, particularly if it comes to including requirements in relation to Article 3 exemptions. Their proposals will impact on such SMEs and micro-type operators as well as on the larger institutions on which the MiFID is primarily focused. Imposing on such SMEs the same requirements as on larger institutions would go against the general policy of the European Commission and the EP which aims at promoting SMEs. We would very much welcome in the recitals of the proposal for MiFID II a request to the Member States and ESMA to take into consideration the size and specificities of the investment firms when they implement the requirements for the "opt out investment firms". It is important that Level II regulation, ESMA and the Member States bring the necessary adjustments/calibrations to the proposal so that the size and business model of the operators is taken into account. This is in the interest of competition, consumer choice and accessibility to advice and services also for smaller investors. See further below for our detailed comments on Article 3.
Corporate governance	5) What changes, if any, are needed to the new requirements 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?	The management rules in Article 9 make no difference between large and small investment firms and the scope of their activities, except for firms managed by 1 natural person (Article 9.8). The same management requirements have to be fulfilled by very large investment firms, working with a full MiFID passport and providing a wide range of investment services regarding all kinds of financial instruments as well as by SMEs and micro-type operators working as financial intermediaries with only an authorization for their home country on a very limited range of investment services, namely investment advice and reception and transmission of orders. BIPAR believes that applying the same management rules to large firms, AND to small firms, goes against the principle of proportionality. These requirements will

		lead to extra administrative burden and high administrative costs and may in some cases be unrealistic. BIPAR takes note of the possibility for the Member States, by way of derogation, to grant authorization to an investment firm managed by only one natural person and to accept alternative arrangements which ensure sound and prudent management of such a firm. BIPAR believes that this derogation should not only be applied to single management firms, but should be extended to SMEs or micro-type operators and in particular those working on the basis of an Article 3 opt-out authorization. The alternative arrangements should be proportionate with the size of the investment firm. BIPAR requests that only proportional management rules should apply on Article 3 opt-out investment firms.
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?	The requirement in article 24.5 to receive only remuneration paid by the client in case of independent advice, is in our view not needed to protect the client. On the contrary, banning fees or commissions paid or provided by a third party will lead to consumers paying more for services and to deprivation of advice for many consumers. We also regret the choice of the denomination "independent advice". We believe that the wording "independent advice" will trigger many problems due to different translations and perceptions in the Member States: **"Independent Advice" – Ban on commission** Article 24 of the proposal deals with the general principles and information to clients when providing investment services. According to Article 24.3, when investment advice is provided, the investment firm shall specify to the client whether the advice is provided on an independent basis and whether it is based on a broad or on a more restricted analysis of the market. When the investment firm informs the client that investment advice is provided on an independent basis, Article 24.5(i) obliges the investment firm to "*assess a*

		sufficiently large number of financial instruments available on the market". **The Commission proposes to call this broad-based advice "independent advice". BIPAR regrets the choice of this denomination. We believe that the wording "independent advice" will trigger many problems due to different translations and perceptions in the Member States.** BIPAR believes that it is important for the consumer to be informed, on a contract-by-contract basis, whether or not he receives advice based upon a large number of financial instruments available on the market. **BIPAR however does not agree with the restriction on the remuneration when the investment firm informs the client that investment advice is provided on an independent basis.** Banning fees or commissions paid or provided by a third party will lead to consumers paying more for services. Article 24.5(ii). reads in this respect as follows: "*When the investment firm informs the client that investment advice is provided on an independent basis, the firm:…* *(ii) shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients."* We do not see any reasons why advice based on a sufficiently large number of financial instruments, can no longer be remunerated on another basis than by fees by the client. Introducing such a requirement can lead to unintended side effects and would lead to confusion. It would also create an unlevel playing field between intermediaries / advisers and "direct" operators. If a client wants to have advice on a fee-basis, he can easily find an adviser who works on that basis. This should not be regulated. The broad analysis of financial instruments can in our view in no way be harmed or influenced by the nature of the remuneration as long as the nature of the

		remuneration is clear to the client. We strongly believe that when investment advice is provided, there should be no prohibition at all to be remunerated by the product manufacturer. Intermediaries should at all times be free to choose their own business remuneration model in transparent dialogue with the parties. We furthermore understand from the text (implicitly) that the adviser can inform the client on a case by case basis whether or not "independent advice" is provided. We would suggest that this concept of a "case by case basis" is explicitly included in the text (see our proposal below). **We therefore propose to change Article 24.3 and Article 24.5 as follows:** Article 24 "General principles and information to clients" *1. Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm acts honestly, fairly and professionally ~~in accordance with the best~~ **taking into account the rights and** [1] interests of its clients and comply, in particular, with the principles set out in this Article and in Article 25.* *2. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.* *3. Appropriate information shall be provided**, on a case-by- case, contract by contract basis**, to clients or potential clients about:* *- the investment firm and its services;~~,~~* *- when investment advice is provided, information shall specify ~~whether the advice is provided on an independent basis and~~ whether ~~it is~~ **the advice** is based on a broad or on a more restricted analysis of the market and shall indicate whether the*

		*investment firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended to clients***,** *- financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,* *- execution venues,* *- costs and associated charges.* *The information referred to in the first subparagraph should be provided in a comprehensible form in such a manner that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.* 4.(...) 5. When the investment firm informs the client, ***on a case-by-case basis***, that investment advice is provided: ***-on a broad analysis of the market, the firm shall:*** (i) ~~***shall***~~ assess a sufficiently large number of financial instruments available on the market. The financial instruments should be diversified with regard to their type and issuers or product providers and should not be limited to financial instruments issued or provided by entities having close links with the investment firm, (ii) ***indicate whether or not fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients will be received or whether the advice will be paid by the client only or a combination of both.*** ***- on a restricted analysis of the market or product or providers range, the firm shall:*** ***(i) indicate what the range of products or firms is from which advice is provided***

		and shall, provide the names of the investment firms with which he may and does conduct business. In the case where advice is provided on the basis of a range of products from one provider, the firm shall explicitly inform the client about this. ***(ii)indicate whether or not fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients will be received or whether the advice will be paid by the client only or a combination of both."*** **Justification to above proposal :** The above approach would create a much clearer picture for the client, would allow for different business models to co-exist, would allow for different remuneration models to co-exist and compete with one another and would guarantee the level playing field between different providers and advisers. We furthermore believe that this activity based model, on a case-by-case, basis guarantees for each operation that the client is clearly informed about the situation and would lead, in combination with the existing rules of investor protection, to the required level of consumer protection. Such an approach would also avoid the possible confusion related to the use of the term "independent advice" in most Member States. As we stated in the introduction, we believe that every intermediary/adviser has the right: • to be fairly remunerated for his services, • to choose his own business remuneration model as long as it is transparent for the client and • to vary this remuneration model on a case-by-case basis in a transparent way. A prohibition of remuneration by providers would create an obstacle to the free market principle of fair remuneration for services rendered. It would become impossible for intermediaries/advisers to require product providers to pay them for the work they do on behalf of these providers (and which is work that is done also in the interest of the client). We develop further on this below.

		✓ **Such a ban would lead to a very sharp reduction in the number of financial intermediaries and their employees and to higher costs for (in particular smaller) investors.** In the *Commission Staff Working Paper Impact Assessment accompanying the document Proposal for a Directive on Markets in financial instruments,* several options regarding the ban on commission and its consequences are described. The following is written in Annex 3 of this impact assessment on page 148 : *Option 7 – Ban inducements in the case of investment advice provided on an independent basis and in the case of portfolio management (Additional to option 2 or 3,4 or 5 and 6)* *This would avoid the risk of conflicts of interest for portfolio managers who are allowed in discretionary portfolio management to make decision without involvement of the client and reinforce the objectivity of the selection of products provided by investment firms in case of independent advice.* ***The drawback of this option is the possible cost for intermediaries, at least at the initial stage, to change the structure of their incomes and of the modalities for the provision of these services. This could lead to increased costs for investors.*** *Nevertheless, these costs might be absorbed in the longer term and would be balanced by a better quality of these two services for which the client may expect the highest degree of independence.* *Option 8 – Ban inducements for all investment services (Alternative to option 7)* *This would aim at ensuring that investment firms are not influenced at all in their product selection by the reward that they can extract on the side from these products.* ***On the other hand, this option would dramatically impact of the current business model of investment firms and could actually result in a reduction in the range of services and products offered to clients and significant increase of costs for clients receiving any investment services.*** The above clearly recognizes the impact that a ban of commission would have both for intermediaries/advisers and for consumers. Therefore our proposal would be

		much more proportional and fair also for the SME model and the consumers. ✓ Prohibition of remuneration by providers would *de facto* mean a prohibition of commissions and would lead to a pure fee-based market. Such a ban would, in our opinion, deprive many consumers (in particular small investors or savers) from any form of advice. Already in the preparatory phase of MiFID I, BIPAR strongly opposed to the use of the term "inducement" as it implies the exercising of undue influence. Commissions as a remuneration for work should not be considered as "inducement". This distinction is unfortunately not made in the current MiFID inducement rules. ✓ The introduction of a ban on commissions would ignore the unique position an intermediary has and the added value he offers in any transaction. An intermediary can render services to both the product "manufacturer" and the client. A prohibition to be remunerated by the product "manufacturer" (by way of commission or otherwise), would mean that it becomes impossible for the intermediary to do work for such "manufacturer" and be paid fairly for it. It also denies the manufacturer the opportunity to outsource certain activities (or to remunerate an intermediary for work done that otherwise would be done by the manufacturer in the chain of the process). ✓ We wonder what a ban would mean in terms of freedom of contract and the "freedom to conduct a business" in Europe as explicitly recognized in Article 16 of the Charter of Fundamental Rights of the European Union. BIPAR is an organization that calls for consumer protection and we believe that it is in Europe's and the consumers' interest that business can continue to do business and that business people can continue and develop their own business models. If the fee based system is a system in the interest of the consumer, then such a system will develop "naturally" because there are intermediaries and advisers who work on fee basis and every consumer has currently the possibility to find such an intermediary but the contractual parties should have the freedom of contract so they can decide for themselves about the way the other party is

		Portfolio management: According to Article 24.6, when an investment firm provides portfolio management, it shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to the clients. Banning commissions for portfolio management will increase cost for consumers. Transparency is a better alternative. BIPAR therefore kindly requests the deletion of article 24.6.
Detailed comments on specific articles of the draft Directive		
Article number	**Comments**	
Article 3.1	**Requirements which are "at least" analogous to the MiFID-requirements.** According to Article 3.1, n*ational regimes should submit those persons to requirements which are <u>at least</u> analogous to the following requirements under the present directive…* Bipar believes that the word "at least" can create confusion. "Analogous" in itself expresses the intention. BIPAR therefore kindly requests to delete the word "*at least*".	
Article 3.1 second indent:	**Reception and transmission of orders as a separate service** Article 3.1, second indent of the proposal deals with the kind of investments services an opt-out investment firm can provide to its client. According to this article an exempted firm *is not allowed to provide any investment service except the provision of investment advice, with or without the reception and transmission of orders in transferable securities and units in collective investment undertakings,...* We understand that this article leaves no room for an opt-out investment firm to provide to its client the investment service of reception and transmission of orders, as a stand-alone service, without providing investment advice. As there is no reference in Article 3.1 under (ii) to Article 25.2 or 25.3, dealing with other investment services than investment advice (or portfolio management), investment advice, possibly in combination with receiving and transmitting orders, is the only service an opt-out firm	

	can provide to its client. Under the current Directive it is possible to provide investment advice and to receive and transmit orders, as two separate services – this is more in line with reality. BIPAR strongly opposes to the narrowing of the scope of the investment services. Opt-out investment firms should be allowed to receive and transmit orders without providing investment advice. We believe that every consumer should have the possibility to buy an investment product without receiving investment advice. The consumer should be informed in such cases. BIPAR therefore kindly requests that Article 3.1, second indent is written as follows: - *are not allowed to provide any investment service except the provision of investment advice and/or the reception and transmission of orders in transferable securities and units in collective investment undertakings,...*
Article 3.1 in fine:	**Adherence to an investor compensation scheme** Article 3.1 in fine (last sentence) of the proposal, obliges Article 3-exempted investment firms to be covered under an investors-compensation scheme or under a system ensuring an equivalent protection for their clients. Operators providing investment services under the Article 3 "National Regime" are not allowed to hold money or to hold, administer or manage financial instruments on their clients' behalf. The risk for the client for not getting back his money from an opt-out firm, working within its authorisation, is in our view non existent. It is therefore unclear when exactly an investor compensation scheme will provide coverage for clients of an opt-firm working within its authorisation. Nevertheless, we understand that it is appropriate for reasons of consumer protection and confidence in the financial system to oblige all investment firms, including the opt-out investment firms which only give investment advice and do not handle clients money, to contribute to a compensation scheme or to have an equivalent protection for their clients However, this limited authorisation of opt-out firms should be reflected in the level of their contribution. We support the view of the Council of the European Union on the Proposal for a Directive on investor compensation schemes that investment firms not authorized to hold clients' monies or financial instrument should only contribute with an annual fixed contribution (and not, in addition, an annual variable contribution, as full MiFID-authorized investment firms are obliged to pay).We therefore propose to add to Article 3.1 in fine that, if opt-out firms should contribute, they should only contribute with an annual fixed contribution or have an equivalent proportional protection for their clients.
Article 3.1 (ii) and its	**Reports on the service provided** Article 3.1(ii) includes a reference to Article 25(5) and its respective implementing measures in Directive 2006/73/EC implementing

reference to Article 25(5)	Directive 2004/39/EC. Article 25(5) deals with the obligation of the investment firm to provide the client with an adequate report on the service provided to its client. These reports shall include periodic communications to clients, taking into account the type and the complexity of financial instruments involved and the nature of the service provided to the client and shall include, where applicable the costs associated with the transactions and services undertaken on behalf of the client. This obligation to report periodically to clients should not apply to investment firms falling under the Article 3-exemption. BIPAR believes that imposing this requirement on all transactions does not respect the principle of proportionality. The administrative burden (and cost) can be relatively too high for certain operations or operators or clients to be cost-efficient. BIPAR is of the opinion that investment firms, when providing investment advice and/or receiving and transmitting orders, should be free to agree or not on this additional service. The investment firm, falling under Article 3-exemption, and the client should both be free to deliver or ask for this additional service at an additional cost. BIPAR therefore kindly requests the deletion of the reference in Article 3.1 to Article 25(5) of the proposal.
Article 7.2	**Programme of operations** Article 7.2: *The investment firm shall provide all information, including a programme of operations setting out inter alia the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the investment firm has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Chapter.* BIPAR kindly requests to include the concept of proportionality in this provision.
Article 7.3	**Authorisation** Article 7.3: *An applicant shall be informed, within six months of the submission of a complete application, whether or not authorisation has been granted.* BIPAR kindly requests to change this article as follows: *An applicant shall be informed, within a reasonable period commensurate to the complexity of the application, and at the maximum within 3 months of the submission of a complete application, whether or not authorisation has been granted. The applicant shall be informed in a reasonable time and within a maximum of 2 weeks, if the application is not complete.*

	It should be possible to grant authorization to smaller operations, with a limited scope of business within a period that is shorter than 6 months. If the dossier of the applicant is not complete he should be informed about that within a reasonable period so that he can correct the situation. Unreasonable waiting periods can be considered as source of administrative burden.
Article 8a	**Withdrawal of authorisation** According to Article 8a, the authorisation is withdrawn when an investment firm has provided no investment services for the preceding six months. BIPAR kindly requests to add to Article 8a: **If there are specific circumstances beyond the control of the investment firm which justify the situation, in particular in cases where the non-activity is beyond the control of the firm, the authorities can decide that the authorisation remains valid.** There can be situations where the authorities, the consumers (existing clients) or trade partners have an interest that the authorisation remains valid for longer than 6 months even if no investment services are provided. (for example the time necessary to hand over the firm, illness of key personnel in smaller firms). Specific situations should be considered in order to avoid legal uncertainty. The indirect (legal) consequences of withdrawal of authorisation should be considered.
Article 9	**Management requirements** See above under Question 5 for our comments on this article.
Article 15	**Indirect application of Capital Requirements Directive** Article 15 of the proposal deals with the initial capital endowment. According to this Article, investment firms should have initial capital in accordance with the requirements of Directive 2006/49/EC on the capital adequacy of investments firms and credit institutions. As there is no reference to Article 15 in Article 3.1 regarding the specific requirements to be fulfilled in order to obtain exemption, it seems to be correct to conclude that investment firms falling under the opt-out national regime, are not obliged to have initial capital. However, Article 3.1 regarding the specific requirements to be fulfilled in order to obtain exemption, includes a reference to Article 21. Article 21 requires that an investment firm complies at all times with the conditions for initial authorization established in Chapter I of Title II. Article 15 falls under Chapter I, so indirectly capital requirements could apply to Article-3 exempted firms. BIPAR kindly requests that it is clarified that Article 15 of the proposal does not apply to investment firms falling under the scope

	of Article 3 of the proposal.
Article 22.2	**Ongoing supervision** In the proposal, Article 22.2 has been deleted. The deleted part of this article stated : *In the case of investment firms which provide only investment advice, Member States may allow the competent authority to delegate administrative, preparatory or ancillary tasks related to the regular monitoring of operational requirements, in accordance with the conditions laid down in Article 48(2*). The possibility of delegation has been deleted, however there are Member States, where the competent supervisory authority has delegated the above mentioned tasks. Delegation of tasks could lower the supervisory costs for the investment firm. We believe that the possibility of delegation should continue to exist.
Article 24.1	**Best interests** Article 24.1 of the proposed recast MiFID on "General principles and information to clients" (former Article 19.1 on the "Conduct of business obligations when providing investment services to clients") reads: "*Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm acts honestly, fairly and professionally in accordance with the* ***best interests*** *of its clients and comply, in particular, with the principles set out in this Article and in Article 25."* BIPAR believes that the concept of "best interests" is unclear and could lead to legal interpretation problems. The wording also disregards the possibility of having aligned interests. Therefore we would suggest amending this article (and the related recitals) by the following wording: "1. *Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm acts honestly, fairly, professionally and* ***taking into account the rights and interests*** *of its clients and comply, in particular, with the principles set out in this Article and in Article 25."*
Article 24	See above under Question 15 for our comments on this article.
Articles 74 , 75 and 76	**Sanctions** See below under Question 30 for our comments on these articles.

30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	Articles 74 to 76 deal with the sanction of breaches of requirements. Although we understand that it is necessary to set up a system of sanctions, we believe that this system should be in any case reasonable and proportional and take into account the gravity of the breach and the size of the responsible investment firm.