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.

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

Name of the person/ organisation responding to the questionnaire	**EVCA (European Private Equity and Venture Capital Association)**

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?	
	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?	It is not appropriate to the extent it restricts the ability of third country firms to provide services to persons in the EU, particularly where such persons are directly or indirectly regulated in the EU. Any kind of regulation must not result in discrimination between EU funds and managers on the one hand, and non-EU managers on the other. This would be the case even if EU funds only used the services of EU managers/advisors. But the reality of the market is more complex and EU funds depend very much also on the advice of EU and non-EU managers/advisors, both on a regular basis. For private equity and venture capital (PE/VC) fund structures, in the same way as it is important for EU financial service providers to have access to the non-EU markets, it is also important for non-EU service providers to have access to the EU markets. For example, EU institutional investors are interested in having flexibility to make use of a broad scope of investment opportunities globally, including in non-EU countries. This, however, requires that a non-EU advisor can provide advisory services to an EU-based fund. EU-based PE/VC fund structures very often have advisors in third countries. PE/VC fund structures are very internationally driven in that they operate on a cross-border basis in many senses: they have investors from everywhere in the world whose regulatory and other needs must be addressed by the structure and they very often are investing

		globally and the manager of the fund must have advisors in the various target countries to be able to choose and monitor portfolio companies properly. Requiring that non-EU advisors must be subject to "equivalent" regulation would be very problematic as different countries have different concepts of jurisdiction and it would be burdensome and difficult, if not impossible, to show that a non-EU advisor is subject to "equivalent" jurisdiction. Hence, it must be at the EU regulated firm's discretion to choose an advisor that it deems appropriate. A restrictive approach lacking flexibility would have a significant impact on the relationship with investors, subsequently alter flows of finance and redirect investors to other more flexible jurisdictions. At the same time, from an EU investor point of view, reducing access to non-EU advisors and therefore to non EU-funds would mean reducing their choice in their investment strategy which would then be more risky. Finally, we would like to note that the Alternative Investment Fund Managers Directive (AIFMD, Directive 2011/61/EU) already contains rules on investment managers. Third country provisions have been exhaustively treated under AIFMD, and we feel that adding to that regulation a MiFID overlap would be confusing and cumbersome. At least, the solution found in AIFMD should be taken into account, which is based on cooperative agreements between EU and non-EU jurisdictions and on requiring non-EU jurisdictions to ensure a "similar impact" of some rules instead of "equivalence" of the rules.

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?	
Organisation of markets and trading	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?	
	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?	The concept of an advisor "assessing a sufficiently large number of financial instruments available on the market" in order to meet the independency test is merely not possible in a PE/VC context. PE/VC funds are investing in private companies, each of which is unique, there may be many opportunities or no other

		investment opportunities; the investment decision is based upon a highly subjective analysis taking into consideration the special circumstances of the fund and its portfolio (synergy effects, etc.). It makes no sense to refer to "instruments available on the market". The proposal goes too far by banning advisors and managers from receiving payments from third parties. Private equity and venture capital are a specialist asset class (or rather ownership model turned asset class for institutional investors through their co-investment) dedicated to business growth. PE/VC investors have a strong tendency to incentivise management and employees at both the investee company and the manager by reference to returns actually achieved and also received by investors (in cash or cash equivalent terms rather than on notional or valuation based measures). One of the key characteristics of PE/VC is the alignment of the interests of investors with those of the manager and the individuals engaged in management. In this respect, management incentives are aligned with the interests of investors through co-investment/profit sharing mechanisms. Conflicts issues are a key focus for investors. PE/VC fund managers' conflicts management arrangements are very carefully negotiated by investors in the fund documentation. For example, investors may require specific arrangements to be in place (such as manager co-investment arrangements) in order to align the interests of the PE/VC fund and its investors with those of the AIFM and key staff.

		Furthermore, in a professional PE/VC investor fund the investors agree with the AIFM on the conditions under which the AIFM may receive payments from third parties, it is an important part of the contractual negotiations and overall structure of the fund. Indeed this very fact has been recognised both by the European Commission and by IOSCO in their work on conflicts of interest. As a conclusion, the flat-out prohibition of Article 24 may actually prove detrimental to investor protection instead of improving it, since deal fees would tend to facilitate and secure investments. It will also be detrimental to the investment made compared to commitments, in contradiction with the EU interest to increase the level of investment. Prevention of conflict and investor protection can be ensured by less harmful measures such as disclosure of such deal fees in the fund documentation and at the time of the investment.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	
	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?	

	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 two most important pieces of legislation for the PE/VC industry with an explicit reference to MiFID are AIFMD and the European Commission's Proposal for a Regulation on European Venture Capital Funds (2011/0417 (COD)). More specifically, AIFMD refers to MiFID in Article 4(ag) 'Definitions', when defining 'professional investor': "(ag) 'professional investor' means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to

		Directive 2004/39/EC;" The proposed regulation on venture capital funds (EVCFR) refers to MiFID in Article 3 'Definitions' and 'Article 6', which contains detailed provisions on the investors eligible to invest in qualifying venture capital funds: "Venture capital fund managers shall market the units and shares of qualifying venture capital funds exclusively to investors which are considered to be professional clients in accordance with Section I of Annex II of Directive 2004/39/EC or may, on request, be treated as professional clients in accordance with Section II of Annex II of Directive 2004/39/EC, or to other investors where: (…)" The European PE/VC industry is very concerned that MiFID does not provide for an appropriate definition of professional clients in particular as regards to the application of the MiFID professional clients definition for the purposes of defining "professional investors" under AIFMD and describing eligible investors under EVCFR. The current definition is not appropriate for investors in PE/VC funds as it does not provide suitable criteria for investments in non-listed, closed-ended co-investment arrangements (like PE/VC funds) which are designed for long-term investment and are entered into only following a lengthy period of due diligence by investors.

		The criteria for identifying expert investors set out in MiFID, notably the frequency of dealing and limitation to financial instruments are inappropriate for PE/VC funds. In relation to the PE/VC asset class, a frequent dealing defined as an average of 10 transactions per quarter over the last four quarters as required under MiFID would be a highly inappropriate and risky level of trading in such assets or in AIF themselves. The procedural requirements of Annex II of MiFID and the general obligation to ensure qualitatively that the relevant person has appropriate expertise to be capable of assessing the risks involved and making his own investment decision provide the necessary investor protections without adding requirements for frequency of dealing or excluding expertise in the relevant asset sector. For more information, please find attached EVCA's latest memo on the industry's key concerns regarding the MiFID investor definition. The VC proposal provides a first step towards a satisfactory regime that combines investor protection and flexibility for funds and managers. It is important to ensure that MiFID/MiFIR does not contradict provisions of the VC proposal. The reform of MiFID provides the ideal opportunity to revisit the definition of professional client and adapt it to the broader role it plays in distinct regulatory contexts. Otherwise, all AIFMD compliant PE/VC funds will no more be able to market actively towards some of their traditional and well advised clients (such as entrepreneurs). This would be a pity in a time

		when savings must be channelled towards SMEs and innovation.
	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?	
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	

Detailed comments on specific articles of the draft Directive

Article number	**Comments**
Article 4(9):	Please see our comments above on the professional client definition.
Article ... :	
Article ... :	

Detailed comments on specific articles of the draft Regulation

Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	