ESBG response to the questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

ESBG welcomes the possibility offered by Markus Ferber to take part into the legislative process by giving ESBG the opportunity to share its point of view.

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?	ESBG has no strong opinion.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	ESBG is very critical of extending the scope of MiFID with regard to structured deposits. The definition in Art. 1 (3) is very unspecific and the corresponding recital (n°26) is very confusing and brings a lot of legal uncertainty. ESBG fears that simple deposits will fall under the scope of the directive although not justified.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	ESBG has no strong opinion.
	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?	ESBG has no strong opinion.
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	ESBG has no strong opinion.

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	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?	ESBG supports the creation of a broad category of organised trading facility to apply to all organised trading functionalities, as this step will enhance the level-playing field. However, as a general remark it is important to have a clear cut definition and to distinguish the definition from other trading facilities, and in particular from MTFs.
	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?	ESBG has no strong opinion.
	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?	ESBG supports the European Commission's proposal on High Frequency Trading. Nevertheless, a clear separation should be made between Algorithmic Trading and High Frequency Trading. Algorithmic trading is broadly used and can serve a lot of purposes like simple routing of order, in order to meet the "best execution" requirement. High Frequency Trading on its side is very specific and is where the risk is. It may have a strategy of arbitrage (simultaneous purchase and sale of an asset in order to profit from a difference in the price), or strategies that can resemble market abuse practices, in both cases its characteristic is to benefit from a technological advantage against regular investors.
	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?	ESBG has no strong opinion.

	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?	ESBG is in favour of the conservation of the current regime regarding the recording of electronic conversations, *i.e.* national discretion. There is a lot of diversity throughout the EU regarding client's behaviours and habits. ESBG is of the opinion that cultural differences have to be respected, to enable the advisors to provide clients with the service that they really expect. This is why ESBG advocates for a neutral text, enabling Member States to adapt their rules to their national realities as is already the case.
	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?	ESBG has no strong opinion.
	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?	ESBG has no strong opinion.
	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?	ESBG has no strong opinion.
	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?	ESBG has no strong opinion.

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?	– **Categorisation of advisor between independent and non-independent:** The proposed category creates a dichotomy between advisers that are "independent" and advisers that are "not independent". The term "independent" that is used to separate the two kinds of advice is misleading and detrimental for those that would be branded as "non-independent". The investor would most likely connect independency to fairness as is already the case in the European Commission, where there is a tendency to presume that inducements lead to conflicts of interest. Conflict of interest is neither an equivalent nor the only criteria that should come into account when assessing the quality of advice. Independent financial advisers have been proven to propose riskier investments compared to banks[1], so it may need to be taken into account that independent advisers may have incentives to propose riskier products to their clients, as they need more monitoring and such advisers would benefit from a regular demand of advice. There is no safety that the MiFID II regime offers a greater guarantee of advice quality from this new category of independent advisers. ESBG advocates at least for a change of denomination towards a more neutral name for the categories or for amendments to the text that would not lead to an opposition of the two models detrimental to the continental one. ESBG therefore suggests the following amendment: **Article 24(3)** - "[…] when investment advice is provided, information shall specify whether or not the advice is provided ***in conjunction with the acceptance or receipt of third-party inducements*** ~~on an independent basis~~, whether it is based on a broad or 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."

[1] *Consumer Market Study on Advice within the Area of Retail Investment Services – Final Report*, 2011, page 89 "It was generally observed that independent financial advisors (IFAs) tend to propose riskier investments compared to banks (about 72% of MiFID products recommended by IFAs were deemed as relatively high risk, compared to 53% for banks)." 76% of MiFID products offered by IFAs were unsuitable, against 55% by Banks Financial Advisers.

		– Ban on inducements regarding portfolio management: In the specific case of portfolio management all applicable safeguards such as suitability tests fully apply to this situation, as it is the case in financial advice, therefore a ban would be adding a restriction to a system that has already proven to be efficient. **– Ban on inducements regardless of the service offered:** ESBG is worried that the European Commission's proposal challenges the inducements' based scheme of remuneration and that various stakeholders request a complete ban in the framework of the Review. Inducements are a well-functioning scheme of remuneration for advisers that do not lead to conflicts of interest if all the applicable safeguards already existing in MiFID 1 are applied. The banning of inducements would exclude modest investors, who need the most help from investment advice. Such banning would make the 'up-front fee' rise accordingly and elicit the aversion to an 'up-front fee'. This won't have the same impact on wealthier investors, but would exclude the modest ones from investment advice, whereas these people really need it. As a result less well off people won't invest at all, or will invest by themselves and will most likely make bad decisions. This is why ESBG is not in favour of a ban on inducements for the advisers labelled as "non-independent" regardless of the service it offers.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The extension of the complex product category would penalise the experienced kind of investors that can properly evaluate by themselves their risk profile and apply the adequate strategy without having to pay for advice. They are looking for products that allow them to invest through complex strategies by using complex products because they cannot construct these by themselves. It's important not to treat investors like children by allowing them only to invest in very simple products that can be dangerous as well. The degree of complexity is an inappropriate scale when the final goal is to protect investors from "toxic" products. In particular, UCITS are highly regulated and transparent, they should be considered as non-complex because of the high level of protection offered by the UCITS framework.

	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?	It has been the ESBG's experience that retail investors have no interest in that topic. These new requirements would only add to the already existing information excess, therefore ESBG advocates that there is no need to strengthen investor protection regarding 'best execution'
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	ESBG objects to the modifications put forward by the European Commission's proposal regarding the categories of investors. In particular ESBG is not in favour of changes to the regime of eligible counterparties; the statutory requirements are already very strict.
	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?	ESBG has no strong opinion.
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?	ESBG has no strong opinion.
	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?	An extension of the transparency regime to non-equity products has questionable interests. Some securities may suffer from this requirement, in particular, some products, as bonds would not benefit from a pre-trade transparency regime and may experience adverse effects. Bonds are illiquid assets where sellers have trouble to find buyers. If an institutional investor wants to purchase or sell a large amount of bonds, the transparency associated to a low liquidity would be very favourable to sellers that would easily be able to play against the large investor and make profit from it, and may also repulse small buyers facing a large amount of offer, withdrawing the liquidity.

	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?	ESBG has concerns regarding the multiple waivers regime that could be detrimental to the efforts made by the European Commission to address the current opacity of some markets (*e.g.* dark pools). Furthermore, these waivers are granted by national authorities, raising consistency and competition concerns.
	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)?	ESBG has no strong opinion.
	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?	ESBG has no strong opinion.
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?	ESBG is willing to cooperate with the European Supervisory Authorities, both through the ESMA Stakeholders Group, experts groups and bilateral contacts. ESBG is also ready to collaborate during the implementation of the MiFID Review.

	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	ESBG has no strong opinion.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	ESBG has no strong opinion.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	ESBG has concerns regarding the distortion of competition that may occur when 'MiFID regulated institutions' sell investment products outside the EU. For instance, there is no obligation for disclosure of inducements in Japan (nor in the rest of Asia); hence a European firm would have to disclose these inducements, whereas a local firm would not have to. Thus a Japanese firm would be able to offer virtually cheaper products then a European firm as a result. Therefore ESBG would welcome that such distortion between jurisdictions is taken into account.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	ESBG has no strong opinion.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	The most concerning measures regarding the savings banks' model would come from level II as it is currently not possible to have a clear view of the Review's impact because of a too broad mandate for the level II implementing measures and technical advice. The wording of the proposal is at several occasions very vague and brings a lot of legal uncertainty, while giving much power to ESMA. ESMA would need to be guided better by the European legislator in order to be sure that the regulation serves the client's interest rather than going against it. **As explained throughout ESBG's response to the questionnaire, there is on many items issues regarding a too vague or lack of Level I, as well as concerns regarding the Level II if the Commission applies the changes foreseen within the winter 2010 consultation. ESBG therefore would like to emphasize the gravity of the imbalance between the Level I and the Level II in the Commission's proposal and to warn the European legislator about the significance of the measures that the Commission set apart for the Level II. ESBG advocates that the main issues needs to be decided on Level I.**

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article 25 (5)	The European Commission's proposal creates a new compulsory periodic communication to clients occurring after the investment advice. From the point of view of ESBG, it is problematic. If such provisions are put in place, the cost would be on the client, regardless of whether or not they have asked for this service. Therefore this service should be offered to the client, and not imposed upon him. The right balance has to be found between investor protection and cost for the investor. Furthermore, the wording of the level I proposal is very vague and its compulsory characteristic regardless of client's will is not acceptable. Requiring advisors to periodically communicate to clients such amounts of information would blur the separation between investment advice and portfolio management. If investors want an update, they should ask for it or opt for portfolio management. However, if such a provision is put in place, the periodicity of the communication must take into account the kind of investment. For instance investments in stocks and in bonds don't have the same horizon. An investment in pure stocks may need to be monitored on a regular basis (a very simple task that the holder can perform by himself), whereas bonds are usually held until maturity and therefore do not need to be monitored, as can be the case for investments in UCITS that may have reached maturity. ESBG advocates for at least a clarification at level I regarding its binding characteristic and the content of this additional service.
Level II Directive 2006/73/EC (to be reviewed) Article 26: Inducements	In the winter 2010 the European Commission's consultation, contained modifications foreseen regarding transparency on the service provided to the client. In particular for the disclosure of inducements, the European Commission foresees an abolition of the possibility to provide a summary disclosure of the inducements that would be received by the adviser and a introduction of an ex-post reporting detailing the inducements that the adviser obtained after the investment. That full transparency on inducements may induce a 'knee-jerk' reaction against inducements from the client, leading the client to make a decision which opposes the advice received. In such a case, advice geared towards the investor's interest, as it is mandatory in MiFID I provisions, will result in the investor making a bad decision regarding the investment. Thus, there is no need for more disclosure but for good advice, i.e. an application of MiFID I. Furthermore this transparency may lead to better comparability of products prices. As a consequence the client will be able to make the price the first criteria when it comes to choosing between investment vehicles and it will no longer be the adequacy of the product to the client expectations. An expensive product suited to the client profile may be less attractive than a cheap product that will not fulfil the client's expectations. In a way, transparency weakens the efficiency of the suitability test. Therefore, ESBG has concerns regarding the distribution of foreseen new provisions in the overall review of the MiFID framework that some of the most concerning measures would be drowned away from the European Parliament's attention to the discretion of the Level II authorities.