

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**.

Preliminary remarks:

Euroshareholders welcomes the opportunity to express its views with regard to the MiFID/MiFIR 2 proposal.

Euroshareholders is the organisation of European shareholders associations. It was founded in 1992. At present Euroshareholders gathers around 30 national shareholders associations all over Europe, which count in turn more than 2.5 million individual members.

The main objectives of Euroshareholders are:

- to protect and represent the interests of shareholders and other investors in listed securities;
- to enhance shareholders' value;
- to guarantee equal treatment of all shareholders;
- to support harmonization at the EU level on appropriate issues;
- to support corporate governance principles at the European level;
- to promote financial education and scientific research on capital market and shareholder value, e.g. in the regulatory area

Given the very short deadline and our very limited resources, we could not develop replies on all questions and did not have the time to draft ready to use amendment proposals unlike the industry lobbies. Therefore, we would also kindly refer you to our response to the EC Public Consultation on MiFID, where you will find more explanations of our positions and more evidence (www.euroshareholders.eu).

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?	We question the exemption of insurers, “collective investment undertakings” and pension funds, as these are the biggest suppliers of retail investment products in the Union and providers of investment services for employees participation schemes,
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	Yes, but that is only a tiny part of investment products that are still not covered by MiFID conduct of business rules. Banks’ savings products, life insurance, personal pension products, etc. are still not covered at all. All retail investment products offered at retail points of sale should be in scope. We are concerned that the EC position to address part of this problem through the IMD revision may not be satisfactory, as it does not provide any guarantee of full harmonization of conduct of business rules whatever the retail investment product is, and whatever distribution channel is used. Plus, it will delay this much needed harmonization by at least several months if not years.
	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	Third country domiciled investment products should be submitted to the same rules if offered to individuals (non

	what precedents should inform the approach and why?	professional clients)
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?	One key corporate governance issue for the larger part of the European investment firms is linked to their affiliation to the commercial banks or insurance undertakings and the conflicts of interests that arise from these links. We believe proprietary trading, asset management and insurance should not be part of businesses allowed for commercial banks which benefit from the unique privilege of accessing central banks' funding. This privilege has consequences: it was and should still be reserved to the business of lending to the real economy, nothing else.
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?	We oppose the creation of OTFs by the EC as yet a third category of market "venues" after having already added a new one in 2007 ("MTFs"). This can only further fragment the capital markets to the detriment of retail investors, data transparency and consolidation. See Euroshareholders position paper and research results on the best execution and trade data transparency.
	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?	We strongly believe that the creation of OTFs will not make the capital markets more transparent. Except for some specific exemptions (large trades, etc.), all trades should go to regulated venues and financial institutions not complying should be sanctioned by the supervisors. In particular ESMA should be granted investigation powers to check if trades classified as "dark" or "OTC" by investment firms are appropriate and comply with the requisites for such classification.
	8) How appropriately do the specific requirements related to	Individual investors usually do not have access to algorithmic

	algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	trading techniques, and even less to HFT ones. The legislator should therefore ensure that HFT is properly checked to ensure that it brings real positive value to the real economy and users of financial markets i.e. end investors and issuers. We have not seen any evidence provided in the MiFID review on this point. Moreover, in many cases HFT leads to price manipulation which threatens the transaction fairness and is detrimental to the ‘small investor’. Therefore a ban of these practices could be envisaged.
	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?	We believe they are appropriate.
	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?	They are appropriate because it is the only way to verify that transactions have been executed following the rules of best execution and that they have not been subject to any conflict of interest.
	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?	As far as OTFs are concerned we have the same objections as above mentioned.
	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?	We believe it would be better to force all regulated venues (RMs + MTFs) to follow minimum requirements in terms of listing SMEs and trading SMEs securities, so that RMs and MTFs are on a level playing field. Indeed, the MiFID review does not provide evidence on the existing MTFs activities on listed SMEs (shares of listings, shares of trading volumes,

		etc.).
	<p>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?</p>	<p>Non-discriminatory access alone is not enough to ensure that competition will take place. For example, if the costs of accessing a venue can skyrocket when one has to use (and buy) a proprietary system that is being used which provide ‘non-discriminatory access’.</p>
	<p>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?</p>	<p>Yes, we agree on the absolute necessity to be able to take these measures in order to protect the market against manipulations and excessive speculation. Added to the fixation of more restrictive positions’ limits there could be also a sharp increase in deposits requirements.</p>
Investor protection	<p>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>	<p>In Euroshareholders’ view the new requirements Directive Article 24 are not sufficient to protect investors from conflicts of interest in the provision of such services. The article 24.3 introduces the notion of “independent” advice. Article 24.5 states that the advisors labelling themselves as “independent” should not receive third party commissions.</p> <p>Currently, in Continental Europe, probably less than 10 % of retail investment products sold are sold by self-labelled “independent” financial “advisors”. The major part of the distribution channels (banks, insurers networks, tied brokers, etc.) already do not label themselves as “independent”. Therefore, the proposed legislation will most likely have no impact on about 90% of retail distributors.</p> <p>Moreover, the EC proposal targets only the small distribution</p>

		<p>segment that is at least consisting of multi-providers (most bank networks and the so called “advise” sell only in-house products), and are on average more trained and experienced than bank retail sales personnel (“advice”).</p> <p>Finally, the EC proposal creates two categories of “advice”: independent” (no commissions) and “dependent” (commissions allowed). We believe that “dependent advice” is not “advice” and find the labelling “advice” and/or “advisor” very misleading since in most of the cases it is actually marketing and selling of the commissioned products.</p> <p>We therefore would like to propose two amendments to the proposals:</p> <ul style="list-style-type: none"> - We think that the new article 24 should forbid any retail financial distributor to label him/herself as “advisor” or financial advisor” if the major part of his/her compensation comes directly or indirectly from the products’ sales. - We would like to point out that MiFID implementation Directive already bans commissions if they are not in the primary interest of clients (article 26 of the MiFID Implementation Directive). It has just not been properly enforced (it seems that these “inducements” rules have been even forgotten by CESR in its “Consumer guide to MiFID”), which we believe should have been mentioned in the MiFID Review. We believe that ESMA should get a legislative mandate to set up technical standards on article 26 and to monitor the enforcement of article 26. <p>The EC should be careful in order not to over-regulate: just actually enforce existing rules on “inducements” (art 26 of Implementation Directive) and on fair and not misleading</p>
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		information (art 27 of the same directive). Euroshareholders would propose that the European Parliament asks the Commission to urgently review the enforcement of these provisions from 2007.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	<p>Financial products – especially retail ones – have become more and more complex and this is on purpose. Moreover, the financial literacy of an average EU citizen is very low.</p> <p>The main problem is that the complex and toxic products like retail structured funds are not “bought, they are “sold” or “dependently advised” to use the new jargon of the EC. Therefore, we believe article 25 should be reconsidered. We think that the current formulation of the article 25 would even reinforce the role of the “dependent” advisors vis-à-vis retail clients and would further discriminate the execution only channels.</p> <p>We refer to the recent case of the Belgian Supervisor ban of structured products’ sales to retail clients. This is the right step that needs to be done all over the EU. Additionally, the ESAs must very quickly make use of their new banning powers.</p> <p>There is also a problem with the “complexity” approach of the proposal: using a metaphor aspirin is a complex product but its expected performance is well understood and known. Therefore, it can be sold on an “execution only” (no prescription) basis. A retail investment product can be complex, but if its expected performance is clearly understandable (for example a synthetic index ETF), there is no reason to prevent retail investors from buying them on the secondary markets.</p>

	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?	Best execution is not enforced for retail clients due to market fragmentation, no direct access to the new venues like MTFs, and lack of consolidated tape. Our research shows that up to 17 % of retail trades do not get the best price available. In order for real (end) investors to finally benefit from the best execution, a mandatory and free consolidated tape like in the US must be very quickly enforced (it has been already more than four years since the MiFID induced market fragmentation).
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	We believe they are.
	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?	Impossible to answer until the ESAs actually use their new banning and investigating powers. We are concerned this may take a while given the current governance of the ESAs (they are controlled by the national supervisors: if they do not ban products, how can you expect the ESA to do it?). Also the ESAs stakeholder groups are controlled by the industry and its suppliers as the Euroshareholders complaints to the European Ombudsman demonstrate.
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?	We foresee that the stated requirements will mostly be sufficient. But this also depends on the further implementation of the requirements.
	21) Are any changes needed to the pre-trade transparency	No, we find the stated requirements sufficient. This should not

	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?	be changed by the European Parliament because it will be amended by any special interest group from the industry.
	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?	We find the requirements appropriate. This should not be changed by the European Parliament because it will be amended by any special interest group from the industry.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	We find the pre-trade waiver requirements appropriate. We find, however, that post-trade waivers should be abolished. As the transactions have taken place, we do not see a reason for deferral.
	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)?	Following the MiFID-induced market fragmentation with no benefits to end-investors as recognized by the EC itself, here is a strong and urgent need to establish a European-wide "Consolidated tape". Already years ago, the US capital market introduced a mandatory "consolidated tape" including all important consolidated trading data, which is accessible to all participants of the capital markets including the investors. Currently the lack of this information in Europe – especially with regard to post-trading data leads to the fact that investors are not able to find specific data in order to

		<p>measure the performance with respect to best execution of their orders.</p> <p>We are not proponents of having multiple tapes available. Competition in this area will not lead to better results, but only to fragmentation. Providers of consolidated tapes will all state that their tape is the most up-to-date, the most reliable and the most comprehensive. We thus believe that only one (mandatory) consolidated tape should be made available.</p> <p>Therefore we urge the European parliament to introduce a mandatory “consolidated tape” including all important consolidated trading data, which is accessible to all participants of the capital markets including the investors.</p> <p>Proposal in order to improve the current situation: The establishment of such a “consolidated tape” on the EU level should follow in order to reach a higher level of transparency for the investors and to guarantee the best execution. The consolidated trade data should be made freely available to individual investors within 5 minutes. Art. 19 of MIFIR would be the right place to introduce such a rule/obligation.</p>
	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?	See answer to question nr 24 above

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?	<p>The ESAs rank customer protection as their sixth and very last objective because they follow the traditional supervisory model of mixing sometimes conflicting objectives of firms' solvency on the one hand and customer protection on the other hand. The more appropriate "twin peaks" approach already adopted by the USA, Belgium and soon by the Netherlands and the UK is the way to go to effectively protect end-users.</p> <p>Moreover, the ESAs function in silos whereas the same distribution channels are selling products that are supervised by three totally different European supervisors. The role of the joint committee must be much more developed to ensure a minimum harmonization of the retail distribution supervision.</p>
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	See answer to question nr 26 above, but that is not within MiFID or MIFIR.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	The ESAs regulations, the IMD (insurance) and IORP (pension funds) to mention the most important ones. And any future PRIIPs legislation.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	See replies to questions nr 24 and 26 above: the US is much more advanced in drawing the lessons from the worst financial crisis since 1929: twin peaks supervision model, mandatory consolidated tape, banning of banks proprietary trading ,etc.
	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?	Obviously ESMA will be even more overloaded with legislative “technical standards” to design. This is a very serious issue in terms of timing and quality.
Detailed comments on specific articles of the draft Directive		
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