Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP – Comments By the FPG[1]

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.

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 FPG understands that following G20 requirements all financial institutions should be in the scope of regulation. It appears that the category of independent financial advisers (IFA) remains regulated at national level. To be consistent, hey should fall under the EU wide regime of MiFID. In addition, as currently formulated in article 3 paragraph 1, second bullet point, a financial adviser whose function is precisely to give advice would be exempted from the scope of the directive. At the same

[1] The Fund Platform Group (FPG), based in Luxembourg, is an EU wide organisation/trade association of institutions that are stakeholders/intermediaries in the distribution of investment funds to the public at large. . The Group represents 21 organisations based in Luxembourg, France, the UK, and Germany.. Its mission is to build relationships and promote understanding between all stakeholders in the global fund distribution platform business. Through the promotion and development of the Fund distribution industry, the FPG aims to establish high professional standards and facilitate the efficient and secure distribution of investment funds to end investors.. The FPG counts amongst its members' large, medium and small sized organisations either independent or else linked to financial institutions.

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		time, entities only receiving and transmitting orders (like Transfer Agencies) may not be exempted from MiFID – this would be reversal of the present situation. As such entities only perform administrative and ancillary functions, not acting in the capacity of intermediaries bound to the end investor by a contractual relationship should therefore not be subject as such to fiduciary and conduct of business duties with regard to the latter, given the purely administrative nature of the relationship
	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?	This "upgrade" to MIFD status will be mostly applicable to non-credit institutions. But the credit institutions will be impacted through the need to review all their procedures. The fact that they would be subject to legal requirements that increase costs, requires some reorganisations for an activity that has experienced relatively few problems in the past and which is or will be regulated elsewhere (at least, under the securities law directive and the capital requirements directive). The activities of depositaries will also be directly regulated in the future by the UCITS and AIFM directives and consequently appropriately exempted in the MiFID. The FPG is therefore in favour of a status quo where depositary/custody activities services should remain ancillary as far as MiFID is concerned.
	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?	This is likely to prove a difficult subject. The FPG is not opposed to regulation for 3rd countries provided it creates a level playing field and that there are real and practical reciprocity measures. It should be as easy for non-EU IFs to work in the EU

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		as it is for EU IFs to enter specific non-EU markets. The notion of similar, identical, or equivalent legal framework are vague. Generally speaking, the FPG considers that most advanced economies share at least this characteristic and the remaining ones should also abide by global principles, such as the compliance to Basel Committee principles or IOSCO rules and of course comply with AML rules. Formal reciprocity agreements should be considered/established where feasible. The group would like to raise the issue in the current discussion on the Dodd-Frank act of the US and specifically the Vockler rules where the treatment of US based funds vs the non-US ones is at a clear disadvantage for both the manager of the fund and probably its investors.
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?	No. In the FPG's view that what should determine the organisation of platforms is the structure of the underlying market. As the rules are currently prepared it is likely that the OTF category will catch too many activities that are not trading platforms, this may include some custody like services which shall not be the objective of such a proposal.
	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?	

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	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?	As a intermediary in the distribution of funds the FPG has no specific views on these articles as long as market integrity is preserved.
	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?	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?	
	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	

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	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?	
As aInvestor 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 FPG thinks that the EU Commission found the appropriate approach at EU level. The terminology proposed may not be the most ideal from a client communication point of view, but it is going in the right direction. The Group would have proposed that each Member State is left to define on its own terms how to translate the "independent" concept. Regarding portfolio management, the prescription is probably too broad. For example, delegation of the management of part of the portfolio may as a consequence be forbidden, which is not optimal for investors. The FPG does not see, as CESR expressed in the recommendation 07-228b that retrocessions are always inappropriate, at least as long as sound conflict of interest policies and Chinese walls are in place and full disclosure is made to investors. As a regulation, the FPG would propose to impose a 3 steps approach whereby the product selection should first be determined based on qualitative and quantitative data, then a separate entity will/may negotiate any form of cooperation agreement and, finally, the remuneration of the person advising or managing the client's asset should not be linked to one specific product but to the "overall performance" as defined by IF criteria, so that the remuneration of the person facing the client is not linked to the direct sale of one specific product. This process is already in force in some markets and has proven to be quite robust. In summary, MiFID's suitability obligation applies

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		in all cases, therefore the group fails to understand the conclusion that the quality of advice provided to a client should be depending on whether or not the advisor receives fees / commissions / benefits by any third party. The quality of the advice is related to analysis to the advice, so the suitability test in combination with appropriate disclosure around the characteristics of the advice should be the appropriate means to ensure high quality of advice.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The FPG would first and foremost remind that complexity does not equate to high risks and vice versa. What should prevail is the overall suitability of the product for the investor, in the knowledge that all financial investment present some risks. The scope for execution only products should accordingly remain as it is under MiFID I. There may be grounds for limited review, notably for some bonds or shares, the derivative component of which may be increasing the risk profile of the product. But as is the case today, a bond with a call option is a complex product, which may not be appropriate. Much of the debate is on UCITS, and presents the risk to create a divide between "good and bad" UCITS, what the group considers extremely damaging both in the EU and outside. The UCITS is a valued brand and shall not be tainted because of a regulation like MiFID. The FPG understands that there may be some cases where the brand UCITS could be fine tuned, but what should be avoided is a ban on some products. As a reminder, the retail category is the widest in scope as it includes natural private persons from very wealthy to very average and even corporates… Banning is thus not a good option. In the interest of the brand, UCITS, the

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		practical consequences of UCITS 4 should be considered before any further regulatory evolution. In the best of worlds, ESMA may be the most appropriate entity to address the issue, but then appropriate staff and capacities should be available to deal with the many issues they will undoubtedly face.
	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?	The FPG sees little value in defining the list of execution venues. This is a relatively burdensome procedure of little benefit for clients. What is probably more important for the client is to be able to execute an order rather than where it is executed (at least for retail).
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	With the review of the default position of local government, the FPG thinks that progress has indeed been made. The Group would nevertheless point to a weakness in the "eligible" category where implicitly there will be an assessment of each institution in that category. The FPG considers that this may create legal uncertainties regarding the treatment of some eligible clients. Some may probably be categorised outright in the lower categories of professionals if the intent is to increase their protection level. As a reminder, an eligible client can always require to be reclassified, what is probably enough. This reclassification should then probably be general in nature instead of being under a dual regime of ad hoc and general (for all trades).
	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?	Yes, in order not to discriminate against one specific product provider in a specific MS, the FPG would propose that any type of such intervention is performed by ESMA. If the proposal comes from a given MS, it shall then be endorsed by ESMA. Concretely the fear is a fragmentation and a return back to

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		market protectionism.
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?	The FPG shares the view that any rule shall be tailored according to the specificities of the market, large cap stocks or small caps may trade in very different ways, this not to mention other instruments. ESMA may define and review on a regular basis these requirements
	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?	Definitely, most of these products are not traded actively and most of them are traded in sizes that are commensurate. The idea would be to design a system that would preserve the specificities of these markets and allow for requests of quotes and "non-firm" quotations. In addition, requests to display continuous pricing and force trading on displayed quantities may be counterproductive. The FPG is of the opinion that each platform should announce and disclose how it will organise its trading as well as the rights and duties of its participants. Where possible, post-trade information should be as close to real time as possible if it does not undermine the market structure. Ideally, post-trade information should be aggregated via an ARM or consolidated post-trade tape.
	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?	See response to 21
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	

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	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?	The FPG would plead for a circumscribed and clear mandates and for the authority to have decisive powers when supervising markets, market activities and products. Notably, bans or suspensions of trading should in all cases be agreed/supported by ESMA, not by MS first.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	The FPG does no see specific improvements from the MIFID. Budget and staff should probably be assessed on a regular basis to remain in line with the tasks that are remitted to the agencies
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	There are 2 legislative initiatives that come to the fore front one is the PRIPS and the second shall be the review of the IMD, both will have an impact on the distribution of funds. The FPG would support an harmonisation of rules across distributors in the information and technicalities in order to have a smooth process. In that respect the FPG would like to promote at EU level the use of the FPP (Fund Processing Passport)
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	The FPG would draw the attention on the rules and prescription of the Dodd Frank act in the US and the risks created by the some aspects of the Vockler Rule, notably an unequal standing

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		of US mutual funds vs their regulated non-US counterparts.
	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?	Overall the balance may be appropriate, but to be pragmatic not all difficult discussion can be remitted to ESMA, sometimes the mandate for level 2 measures may lead to unexpected outcomes because there are many technical details left to level 2 and because ESMA when the time will come to analyse the different measures may still be under the required capacity both in staff and means.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article ... :	
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Information about the FPG:	
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