

Response by Legal & General Group Plc

Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2

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Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

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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?	No comment.

	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	<p>We do not agree with the inclusion of structured deposits within the proposals. We do not believe that these pose the same level of risk given the deposit nature of the product and the fact that there is no risk to capital if held to maturity.</p> <p>We also note that the provisions proposed will only apply to credit institutions. Given that there are proposals under PRIPS relating to structured deposits we are concerned that restricting the MIFID provisions to credit institutions whilst opening up similar provisions in PRIPS proposals for all firms may result in a dual regulation of these products. This could result in the same product being subject to slightly different rules depending on the advising/selling institution. We do not believe that this is in the interest of consumers and would argue for harmonisation across both the MIFID and PRIPs proposals with an exclusion of all deposit based products from both the PRIPs and MiFID regime</p>
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	No comment.
	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?	<p>We need to ensure that current transactions with third country counterparties are not hindered, nor discourage inward participation in EU markets.</p> <p>The current proposals around equivalence and reciprocity seem unnecessary and unworkable. We agree that an EU passport for third country firms seems a sensible approach and would advocate that an approach similar to that proposed in the AIFMD would be appropriate. This would also ensure consistency in approach.</p>
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?	<p>Whilst we agree in principle with the provisions around corporate governance and note that they are reflective of the CRD proposals, we are concerned that they are very prescriptive and do not allow the necessary flexibility to take account of the different corporate structures used across the EU.</p> <p>One particular concern is the requirements regarding the number of</p>

		<p>directorships that an individual can hold at one time. Given that some funds are structured as individual corporate entities with separate legal personalities there is a concern that due to different structures used holding a directorship on the board of such entities could count as a single directorship. We do not believe that this was the intention when drafting and would suggest that an exemption for such instances is included in the drafting.</p> <p>We are also concerned with the provision that ESMA develop regulatory standards around the principles of knowledge, integrity and diversity. These are relatively abstract notions, which are not only difficult to define, but which we believe should not be constrained by specific drafting. If ESMA were to set out specific requirements to meet these principles we are concerned that this could lead to a ‘tick-box’ culture. We would prefer that the high principles are retained to allow flexibility. We are disappointed that the provisions on corporate governance have been included ahead of the other work being done by the Commission in this area – specifically the two Green papers published last year. It will be necessary to ensure that there is collaboration and consistency across these work streams to ensure consistency and fairness.</p>
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 comment
	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?	No comment
	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?	No comment

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	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?	No comment
	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?	No comment
	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?	No comment
	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?	No comment
	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?	No comment
	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?	No comment

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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?	We agree with the proposal to require advisers to clearly set out the service they are providing and whether this is being done on an ‘independent’ or ‘restricted basis’. We believe that there is however some work that can be done to clarify the distinction between these two services. We also welcome the proposed ban on the receipt of commission for independent advisers but are concerned that the remuneration practices for restricted advisers has been left open. We believe that the reasons for the ban on commission for independent advisers are as valid for restricted advisers as they are for independent. There is a concern that many ‘independent’ advisers will re-brand as restricted to avoid the commission ban. We do not believe that this would achieve the objectives of the proposals.
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	<p>16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?</p>	<p>We are pleased that the Commission has moved away from a complete ban on execution only sales. However, we do not believe that the change to the definition of non-complex instruments was necessary nor reflects an identified need.</p> <p>We understand that the Commission is proposing to review the complexity of UCITs and their sale through non-advised channels as part of the UCITS V proposals. We are concerned that defining structured UCITs as ‘complex’ in MIFID with the potential for additional proposals around other UCITs under the UCITs provisions will generate confusion. This is particularly worrying given that UCITs is a strongly recognised and trusted brand. We would therefore advocate firstly that there is no need to change the existing definition of non-complex instrument in relation to UCITs and that should any changes be introduced these should be done under the UCITs provisions, not MiFID.</p> <p>We are also not convinced that the current appropriateness test under MiFID is an effective way to achieve the consumer protection the Commission is seeking. In our opinion whilst the test goes some way to assess the clients knowledge and experience in the investment field it does not in any way determine whether a product really meets the needs of the customer. There is always the risk that a consumer obtains a perception that where a product has been subject to an appropriateness test, this is a validation of the suitability of the product and provides a level of reassurance from the distributor of the product that is akin to advice. We would argue that consumer interests are better served through clear disclosures to the consumer regarding whom the product is targeted at and a recommendation that the consumer seek investment advice if they are unsure as to the features or suitability of the product.</p>
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	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?	No comment
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	No comment
	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?	<p>We acknowledge that it may be necessary in the interests of investor protection or market stability that product intervention, such as the banning of certain products, may be necessary. However, these measures should only ever be used as a matter of last resort after all other avenues have been exhausted and only where appropriate checks and balances govern their use.</p> <p>Specifically, regulators should be required to consult with the industry, consumer groups, and/or company at an early stage when ESMA and/or national regulator believe that there may be an issue. A ban should only then be imposed if after those involved in the action have had an opportunity to state their case and a thorough cost benefit analysis been carried out there is no other option. Imposition of a ban without this consultation should be only carried out in extreme cases and limited to one month to allow appropriate consultation.</p> <p>The powers seem open-ended with no set end date or temporary nature implied. There should at the least be a requirement for a review of the powers following further investigation or consultation with the firms involved or industry as a whole.</p>
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?	No comment

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	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?	No comment
	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?	No comment
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	No comment
	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)?	No comment
	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?	No comment
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>We believe that each ESA needs to consider and consult with each other, particularly on cross-cutting issues, as there are considerable sequencing issues to consider when it comes to implementation. For example the EBA will require the banks to undertake measures that will ultimately impact on the investment managers, whilst ESMA is simultaneously setting their own requirements.</p> <p>Consistency between legal texts, and a consistent approach to supervision is required.</p>

	<p>27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?</p>	<p>We are happy that ESMA has recognised in its recent work programme for 2012 that a consistent application of the requirements under MiFID II is required, which may, in some instances require direct intervention by ESMA. We do not believe that any further requirements are required to enable the competent authorities to supervise the provisions under MiFID II, but as noted above consistency in supervision is required.</p> <p>We also note the recent work that ESMA has done on publishing guidelines on the current MiFID suitability requirements and believe tools such as these could be used in the future to achieve this consistency.</p>
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	<p>28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?</p>	<p>As noted above structured deposits fall across both PRIIPs and MiFID, with these products falling within the scope of MiFID where they are sold by credit institutions. If structured deposits are to be within the scope of PRIIPs and apply across all distributor then it will be necessary to ensure consistent provisions to ensure a level playing field.</p> <p>Similarly, as noted above, if issues of complexity of financial instrument are to be embedded across both MiFID and UCITS V in relation to UCITS the provisions have to be consistent. If UCITS other than structured UCITS are 'non-complex' under MiFID but are to be considered under UCITS V in relation to complexity then there is real concern for inconsistency/confusion across the two pieces of legislation.</p> <p>Other overlapping legislative proposals which must also be considered are:</p> <p>EMIR CRD/CRR MAD/MAR SSR AIFMD Solvency II</p>
	<p>29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?</p>	<p>No comment</p>
	<p>30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?</p>	
	<p>31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?</p>	
<p>Detailed comments on specific articles of the draft Directive</p>		

Article number	Comments
Article ... :	
Article ... :	
Article ... :	
Detailed comments on specific articles of the draft Regulation	
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Article ... :	
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