THE CONSUMER COUNCIL OF NORWAY

Review of the Markets in Financial Instruments Directive

The Norwegian Consumer Council Answer to the 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.**

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 Norwegian Consumer Council as BEUC, expresses its concerns about the exclusion of investments provided by the employers as foreseen by article 2.1, e) and f). There is no serious reason to exclude investment services provided by an employer to its employees. Consumers should not be less protected when their employer is involved than when investment advice is issued by an investment firm. During the recent financial crisis and the economic recession that has followed it, a lot of employees and their families have lost a lot of their savings due to the dramatic loss of value of their employer's shares. Concentrating investment risk and the risk to lose his salary on the same company is not reasonable, unless the employers' shares represent a small part of the employee savings and investments. Unfortunately, this is generally not the case. Employees do not necessarily have any knowledge and experience with investing in shares. When employers propose shares from the company or a parent company to their

		employees, the latter are not really free to buy them or not; there is some peer pressure: trough buying their employers' shares, employees are expected to show that they believe in the future of their company. They are often proposed at a price lower than market, which constitutes a clear incentive to buy these shares. Unless the employer's shares are offered for free as a gift or a bonus on certain occasions, offering shares by the employer should be assimilated to an investment advice. The exclusion foreseen by Article 2.1, e) should be abrogated and Article 2.1, f) should be amended.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	The Norwegian Consumer Council as BEUC, fully supports the inclusion of structured deposits in the MiFID scope (Art. 1.3). Such deposits are complex investment products and are offered to consumers in several Member States. As they are not regulated at EU level as investment product, banks may advise or offer such structured products without carrying any suitability or appropriateness test. This regulatory loophole has to be addressed. It is important to consumers to have consistent regulations, tackling in a similar way products that present similar economic characteristics and answer to the same consumer needs.
	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?	*A regulation framework that doesn't provide same restrictions on third country access to the EU Market opens up for regulative "run to the bottom" where European corporation to migrate their activity. All promotion directed to European consumers should be regulated equally.*
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and	The Norwegian Consumer Council as BEUC, welcomes the improvement of corporate governance proposed in article 9, especially paragraph 6 (a) specifying that the management body shall *'define, approve and oversee a policy as to*

	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?	*services, activities, products and operations offered or provided by the firm, in accordance with the risk tolerance of the firm and the characteristics and needs of the clients to whom they will be offered or provided, including carrying out appropriate stress testing, where appropriate.* The Norwegian Consumer Council considers this measure as a reaction to miss-selling practices as revealed by the financial crisis. It takes the problem at the source, avoiding that non-transparent, complex or too risky products are offered to retail clients. It also contributes to restore consumer confidence in the financial sector. The company boards should also have a legal responsibility to question how the company achieve their profits and to have the legal responsibility for the profit earned is comparable to the code of conduct or ethical standards the company expresses to their shareholders. A serious assessment of new products is not only necessary to protect consumers and to prevent excessive market risks linked to massive mis-selling practices. Several distributors of structured products issued by Lehman Brothers (LB) have had to guarantee their clients against the LB default. Such interventions have an important pro-cyclical effect. In Norway several complaints is pending in wait for supreme court verdict. In Belgium, a bank that was already supported by public authorities, put recently 263 million euro aside to face the consequence of mis-selling 600 million euro of a 'first to default' structured product affected by the Greek sovereign debt crisis. By consequence, the financial stability will also benefit from such a provision.
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
	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?	The Commission proposal focuses on orders and on a short conservation period. This can be explained by the will to detect and prove market abuse practices, which is a good measure to improve market efficiency and consumer confidence in financial markets, but is not driven by consumer protection needs. To strengthen consumer protection the requirements for investments firms to keep record of all trades should have a timeframe for as long as the product or investment is offered, traded or running as a minimum, supplied by general legislation on maximum timeframe for prosecution on violation. To better protect consumers, there is a need both to extend the obligation of recording communications and increase the shelf life of records. We support BEUC in their suggestion for the harmonisation of telephone and electronic

		recording when the contact with the consumer leads or could lead to giving personal recommendations (financial advice) or collecting orders. Recording of face to face meetings where advice is given would also be of use to consumers and advisers in situations where a dispute arises. This is consistent with paragraph 6 of the same article: *"An investment firm shall arrange for records to be kept of all services and transactions…"* This can be justified by the following reasons: - Recording helps to prevent conflicts between retail clients and investment firms. When conflicts are not prevented, recording helps to solve them in the respect of the rights of all parties. It happens too often that consumers trapped in a conflict with a bank are unable to lift the burden of evidence about the information or the advice that was given before the investment decision. Nowadays, when conversations are recorded by a firm, records are only used by the firm if it is in its own interest. - This is the only way to avoid abuses of financial advice given by telephone and followed by a recommendation to give the transaction order through the execution only platform of the firm. - Recording is also a good means to detect insider trading when information is given by telephone without collecting the order at the same moment. The conservation period should be equal to the investment period plus one year as a minimum. The records and documents should be stored at least as long as the consumer cannot face the real consequences of the investment he has been advised on. A period of three years is definitely too short. Investments are generally made for a longer period than 3 years and the return of some products, like structured products, remains uncertain until the very end of the investment. In Norway, like Denmark and Belgium, where we are represented in alternative dispute resolution bodies in charge of financial services, it has been observed that consumers who file a complaint about their litigious investments have generally been advised more than three years before realising that financial advice they received was

		wrong.
	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?	To provide for effective competition between providers, the provision on non-discriminatory access to market infrastructure and to benchmarks in Title VI the aspect need to be broadening to include the consumer rights and consumer protection as the other part in the contract. Access to the market should be added with whether the offered product is of value to the consumer as presented. If the investment product is sold as an investment it should reflect so, and not actually be a high risk speculation product. A competition and access need not only to focus on the right to sell your product in any EU market, but also to have the possibility to exclude damaging financial products to prevent excessive market risks linked to massive mis-selling practices since such product from speculative companies steels unrightfully trade from the responsible companies.
	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	No comment

	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?	Unfortunately, if only portfolio management and truly independent advice become commission free, conflicts of interest will continue to affect the majority of sales initiatives done towards consumers, except in the few member states where truly independent financial advisors are largely available and in the member states where the commission ban is (or will become) broader than what is currently proposed by the European Commission. If the Commission proposal remains unchanged, financial sellers who currently call themselves "*independent advisor*" would just have to change their "logo" to other attractive words like *professional advisor*. The consumer won't be able to understand the difference unless truly independent advisor business is well developed in his country. As a minimum requirement each state should demand a public licence to be authorised as financial- or investment advisor, and the advisor should be regularly controlled by the appointed public regulatory office. In Norway for instant, there is no such demand for a professional licence to list as a financial or investment advisor, since this is not a protected title. On the other side, in most member states, access for consumers to truly independent and affordable advice is limited or nonexistent. Most of the advice is given by agents or sales employees who are remunerated or whose performance is measured in terms of target sales of investment product creating added value for the firm, often in conflict with the consumer's interest. This is not addressed by article 24 but by article 23 (see Detailed comment on articles of the draft Directive hereunder).

		We support BEUC in their suggestion for a general ban on commissions and inducements for advisors and intermediaries who recommend financial instruments. After 4 years since the current MiFID has entered into force, we think that it is the best and most effective way to avoid conflict of interests and stimulate the sales of financial instruments serving the client's benefit rather than benefit of the distributors or advisors. It is also the best way to stimulate the sales of investment products that are less commission charged than they currently are. As an alternative, if financial instruments free of commissions and inducements are not available, all commissions and inducements should be passed on to the client. But even in this case, commissions or inducements linked to the volume of financial instruments distributed should be prohibited as they create high conflicts of interests between advisors and their clients. Additionally, business models based on commissions, inducements or remuneration schemes designed in such a manner that they are detrimental to the quality of advice or recommendation given to the consumer are not compliant with Article 24.1[1]. Finally, The Norwegian Consumer Council as BEUC, thinks that as long as commissions, inducements or remuneration schemes are designed in such a way that they can impact advice or recommendation given to the consumer, the investments' intermediary should not be authorised to call himself 'advisor' as it is essential that an advisor must be in position to be trusted by the consumer. Biased advice is not advice; this is just a sale argument.

[1] Article 24.1: *Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8 this Article and in Article 25.*

	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The Norwegian Consumer Council as BEUC[2], supports the Commission proposition to exclude structured UCITS from the non-complex products category. Until now, all UCITS are considered by the MiFID as non-complex products, even if it does not match the reality: since the implementation of the UCITS III Directive, many complex UCITS have been offered to consumers. However, excluding only structured UCITS[3] from the execution-only service is too restrictive to encompass all complex UCITS. Limiting the scope of complex UCITS to those that provide investors *at certain predetermined dates* with *algorithm-based* payoffs is too restrictive. Many other UCITS present risks that are difficult for the client to understand. Those UCITS, which are also complex, should be also excluded from the execution-only service. There are a lot of examples of complex non-structured UCITS including synthetic exchange traded funds (ETFs), actively managed UCITS adopting constant proportion portfolio insurance (CPPI), variable proportion portfolio insurance (VPPI), etc. The MIFID (level 1 directive) should give a broader definition of complex UCITS and ESMA should be mandated to develop guidelines to identify them.
	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

[2] With the exception of VZBV, German BEUC Member, who thinks that all orders should undergo an appropriateness which is lighter than the suitability test applying to investment advice. This increase consumer protection against the consequence of aggressive marketing and fraud practices consisting in verbal investment advice combined with the recommendation to transmit the order through an execution-only service.

[3] Article 36.1.2 of Commission Regulation 583/2010 : *Structured UCITS shall be understood as UCITS which provide investors, at certain predetermined dates, with algorithm-based payoffs that are linked to the performance, or to the realisation of price changes or other conditions, of financial assets, indices or reference portfolios or UCITS with similar features.'*

	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?	No comment
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 support an increase in pre-trade transparency as a key element of the price formation mechanism, and a guarantee for fair markets. -The fragmentation of trading venues has made it more difficult for consumers to obtain a complete and accurate picture at a given time. Firms with the means to invest in data consolidation and monitoring across venues are in a privileged position, which should be balanced by an easier and better access to all parties. -'Consolidated quote solutions' should be explicitly supported in the Regulation – reference can be made to the US, where a 'Consolidated Quotation System' functions in parallel, and much the same way, as a 'Consolidated Tape System' – based on a 'utility' model.
	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	No comment

	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?	No comment
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	- Current waivers, de facto creating dark pools, are too flexible and detrimental to the efficiency of the price formation process. - The effectiveness of Regulation Articles 4 and 8 – i.e. a definition of waivers that is not detrimental to the principle of pre-trade transparency – depend too much on the content of the delegated acts. - In any case the application of pre-trade waivers should be strictly coherent across member states, under ESMA supervision.
	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)?	The Norwegian Consumer Council supports the ambition to create a Consolidated Tape. See question 20.
	25) What changes if any are needed to the	- Post-trade transparency should be exhaustive and as close to real-time as possible

	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?	to allow supervisors to better foresee any risk related to activities of investment firms (similar to those that led to recent financial crisis). - Consolidation and format harmonization should be core principle of post-trade transparency. Standardization mechanisms should be defined to ensure maximum transaction traceability.
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?	No comment
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	Article 22.1 of MiFID provides that the national competent authorities monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in this directive (chapter II, from Art. 21 to Art. 35, including the provisions to ensure investor protection) without specifying what they should do to achieve this objective. The Commission proposal does not bring any changes to this paragraph. As demonstrated by the findings of a BEUC study on "*Financial Supervision in the EU: a consumer perspective*"[4], the current monitoring varies a lot from one member state to another leading to poor consumer protection in some countries. For example in Germany and Norway, there is no dedicated public body in charge of consumer protection in the financial services area; in many other member states consumer protection does not constitute a priority nor issue for the supervisory authorities. While the conduct of this aspect of financial supervision at national rather than EU level is well justified on the grounds of efficiency, ***the activity of national supervisors necessitates a certain minimum degree of***

[4] See www.beuc.eu

		harmonisation to ensure an effective high level of public enforcement for the benefit of all EU consumers.[5] The Norwegian Consumer Council support BEUC whom has recently adopted a position paper[6] calling EU policymakers to adopt the necessary measures to ensure that powerful and independent Financial Consumer Protection Authorities (FCPAs) exist in every Member State. This is the reason why Article 22 should be completed in order to ensure effective supervision.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	No comment
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	No comment
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	The Norwegian Consumer Council as BEUC, strongly supports the improvements of the sanction regime proposed by the Commission, in particular by: • Imposing sanctions on both individuals and financial institutions responsible for a violation (Art. 73.2); • Systematically publishing sanctions (Art.74). This should be done as early in the process as is feasible; • Defining a sufficiently high level of administrative fines to allow national authorities to impose effective, proportionate, and dissuasive fines (Art. 75.2);

[5] EC consultation on "*Reinforcing sanctioning regimes in the financial services sector*", December 2010: http://ec.europa.eu/internal_market/consultations/2010/sanctions_en.htm

[6] For more details, see the BEUC

		• Taking into account appropriate criteria, including aggravating and mitigating circumstances, when applying sanctions (Art.76). The Norwegian Consumer Council as BEUC, supports the protection of whistleblowers and the obligation, for financial institutions, to have in place specific procedures for their employees to report breaches internally (Art. 77).
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	The Norwegian Consumer Council considers that too much is currently left to Level 2 measures within MiFID. Our demands are detailed in our answers to the questions above and in the detailed comments on specific articles hereunder. We sum up here the most important domains where more detailed provisions should be adopted to guarantee a more better enforcement of MiFID: avoidance of conflict of interest, assessment of suitability and appropriateness, reporting to clients, on-going supervision and right of appeal.
Detailed comments on specific articles of the draft Directive		
Article 1.3	**Scope** See above, question 2).	
Article 2	**Exemptions** See above, question 1).	
Article 9	**Management body** See above, question 5).	
Article 16.3	**Conflicts of interest** Conflicts of interest between service providers and clients are a key issue in financial services in general and investment services in particular. Avoiding conflict of interest should be a priority. Conflicts of interest are damaging to consumers because they do not receive the best advice they pay for (in general indirectly through the costs charged on their investment and passed on to the advisor). As they undermine consumer confidence in their intermediaries and increase the risk of large mis-selling practices, they are also damaging for investment firms and the financial stability. It is not surprising that the Member States like UK and the	

	Netherlands where important mis-selling of investment products occurred are those that are taking the best measures to avoid conflicts of interest. In the best interest of all parties, EU legislation should also learn lessons from those experiences. The wording of article 16.3: "…*with a view to taking all reasonable steps designed to prevent conflicts of interest*…" is too vague and weak to effectively prevent damaging conflict of interest and ensure consumer protection. As the current legislation did not succeed to avoid damaging conflict of interest, the Level 1 directive must give a stronger signal to ensure that implementing measures will be more efficient. See further details about conflict of interest in the discussion of Articles 23 and 24.
Article 16.7	**Recording** See above, question 10).
Article 22	**On-going supervision** See above, question 27).
Article 23	**Conflict of interest** In most member states, access for consumers to truly independent and affordable advice is limited or nonexistent. Most of the advice is given by agents or sales employees who are remunerated or whose performance is measured in terms of target sales of investment product creating added value for the firm, often in conflict with the consumer's interest. Article 23 (former Article 18) of the current directive has not been significantly modified by the Commission proposal. The way conflicts of interests are currently prevented or disclosed is not satisfactory. In general, existing disclosure takes the form of a discrete short ex-ante summary, and it is difficult to obtain more information even when asking for. Also evidence from Norway and the UK shows that merely disclosing inducements does not lead to the appropriate degree of consumer protection[7]. Bank employees are under pressure of sales targets and variable remuneration (bonuses). They are complaining that they are no more in position to give advice in the best client's interest and that they have to sell products even if they are not the most suitable for the client. As until now the implementation of current article 18 in Level 2 and Level 3 measures is not satisfactory, The Norwegian Consumer Council asks that the avoidance of conflicts of interest should be further detailed in the Level 1 directive. Product providers should play no role in determining the remuneration of the investment adviser and should be prohibited from

[7] http://www.fsa.gov.uk/pubs/other/CRAreport_menu.pdf

	paying commission or providing any other type of service which might influence the advice provided by the intermediary. The remuneration scheme and sales objectives of salespeople in an investment firm or a bank should not be designed in such a way that salespeople are induced not to take the interest of their client as first guide for their recommendations. The Norwegian Consumer Council supports also a ban on inducements for all investment advice services, including those provided by independent advisers, portfolio management and all sorts of restricted advice (advice that is based on a less than independent analysis of the market for products and services).
Article 24.3	**Information to clients** The Norwegian Consumer Council supports the new wording of art. 24, paragraph 3 as it avoids misunderstanding about the nature and the scope of the investment advice. But information specifying that advice is independent or not - whether it is based on a broad or on a more restricted analysis of the market and whether an on-going assessment of the suitability of the recommended financial instrument takes place or not - should not only be provided once, generally when the relationship is initiated, but also when advice is given at the same time the investment firm specifies how this advice meets the personal characteristics of the client (see new Article 25, paragraph 5).
Article 24.5 and 24.6	**Ban on commissions** See above, question 15)
Article 24.7	**Tying and bundling** The new paragraph 7 addresses the cross-selling practices among investment services. The Norwegian Consumer Council as BEUC, supports the approach adopted by the Commission in its directive proposal. BEUCs British member report that tying practices happen frequently on the British market. In particular high interest rates are given on deposits sometimes tied with complex products as structured products or structured deposits, sometimes with high charged products. Test-Achats, our Belgian member, reports a case where clients were teased with a very high interest rate on a short term deposit if they invest a same amount in a UCITS or a structured product; this is not acceptable because UCITS and structured products are from a completely different risk and complexity class than plain deposits. They do not respond to the same needs. In Norway we have seen tying of investments product and mortgage loans; to get the mortgage loan you are required to sign for an investment product. The Norwegian Consumer Council as BEUC, is particularly concerned when two investment products or a deposit and a financial instrument are bundled. Bundling investment products or an investment product with a savings product increases the complexity of the package in comparison with the products analysed separately. Consumers seeking a good deal tend to focus on the

	product they want and may not understand or fully appreciate the risk of the attached investment product. The risk for biased and unsuitable consumer's decision therefore increases and should be carefully examined.
Article 25.1 and 25.2	**Suitability and appropriateness tests** Surveys conducted by the European Commission and consumer organisations have revealed that investment advice is of crucial importance for the consumer[8] and the current implementation of MiFID is of poor quality[9]. Investigations done by the Norwegian Consumer Council – by using Mystery Shopping techniques - as late as in 2011 has demonstrated that there are many cases where the sales staff do not conduct suitability tests at all. Good advice relies on proper suitability tests. Contracts and sales where suitability tests are omitted should be considered as void. The quality of the suitability test (Article 25.1), including the questions asked to the clients, varies from one member state to another and from one bank to another. Some questions asked to clients are drafted in such manner that they suggest answers to be given by clients. In some banks or investment firms, answers to the questionnaire are not drafted by the clients but by the bank's employees or investment firm's employees. The time allowed to the client interview can be really short and often not sufficient; the importance of the suitability test is not explained to the client and the interview is presented as a compulsory and annoying formality. This must be improved. As the implementation measures of the current directive did not succeed to create a generalised high quality of the suitability assessment, the MIFID (level 1 directive) should give an impulse in this direction adopting more detailed provisions. At the end of 2011, The European Securities and Markets Authority (ESMA) published a consultation on possible guidelines in this regard. MiFID should mention that ESMA is mandated to do so and to periodically review those guidelines. Additionally, as provided by Art. 22.1, national competent authorities in all member states should assess the compliance of service providers with this obligation. Article 25, paragraph 2 provides that '*investment firms, when providing investment services other than those referred to in paragraph 1, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess*

8 See *Consumer Decision-Making in Retail Investment Services - A Behavioural Economics Perspective"*; Presentation made for the conference "*Behavioural Economics, so what: Should Policy-Makers Care*?" organized by the European Commission on 22 November 2010; see slide 34. http://ec.europa.eu/consumers/conferences/behavioural_economics2/docs/decicion_technology_22112010_en.pdf

9 See *Consumer Market Study on Advice within the Area of Retail Investment Services – Final report*; Synovate Ltd.; 2011; http://ec.europa.eu/consumers/rights/docs/investment_advice_study_en.pdf

	whether the investment service or product envisaged is appropriate for the client.' When asking their clients to provide requested information, questionnaires from some service providers are reduced to a minimum, leading to poor appropriateness tests. If your bank sold you one or two structured products with principal protection (the initial invested amount is supposed to be reimbursed at the end of the investment), it does not mean you have the necessary knowledge and experience for all kinds of structured products or even derivatives. Furthermore, derivatives differ a lot from each other. The Norwegian Consumer Council asks for better appropriateness tests. ESMA should be mandated to develop guidelines in this regard. Additionally, as provided by Article 22.1, national competent authorities in all Member States should assess the compliance of service providers with this obligation.
Article 25.3	**Execution-only service** See above, question 16).
Article 25.5	**Reporting to clients** Paragraph 5 of Article 25 provides that '*when providing investment advice, the investment firm shall specify how the advice given meets the personal characteristics of the client.*' The Norwegian Consumer Council as BEUC, fully supports that it must be explained to the client how the advice given meets his personal characteristics. In our view, this is elementary to put the consumer in a position to make an informed choice and the best way of consumer education in practice. However, it is unclear if the report should be given in a written form or if verbal information is sufficient. A report in a durable medium is necessary, otherwise the client can neither prove whether he received advice nor, if applicable, that this advice was not suitable. The information should be written and guidelines should be drafted to ensure a minimum quality level of the report. In Germany, where financial advisors are already obliged to do so, BEUCs German member, VZBV, is of the opinion that many reports are substandard; instead of giving clear explanations to the client, the report is full of liability disclaimers. To ensure that reports are drafted in a way that meets the objective of this provision, clear guidelines should be developed by ESMA.
Articles 73 – 78	**Administrative sanctions** The Norwegian Consumer Council as BEUC, strongly supports the improvements of the sanction regime proposed by the Commission, in particular by: • Imposing sanctions on both individuals and financial institutions responsible for a violation (Art. 73.2); • Systematically publishing sanctions (Art.74). This should be done as early in the process as is feasible;

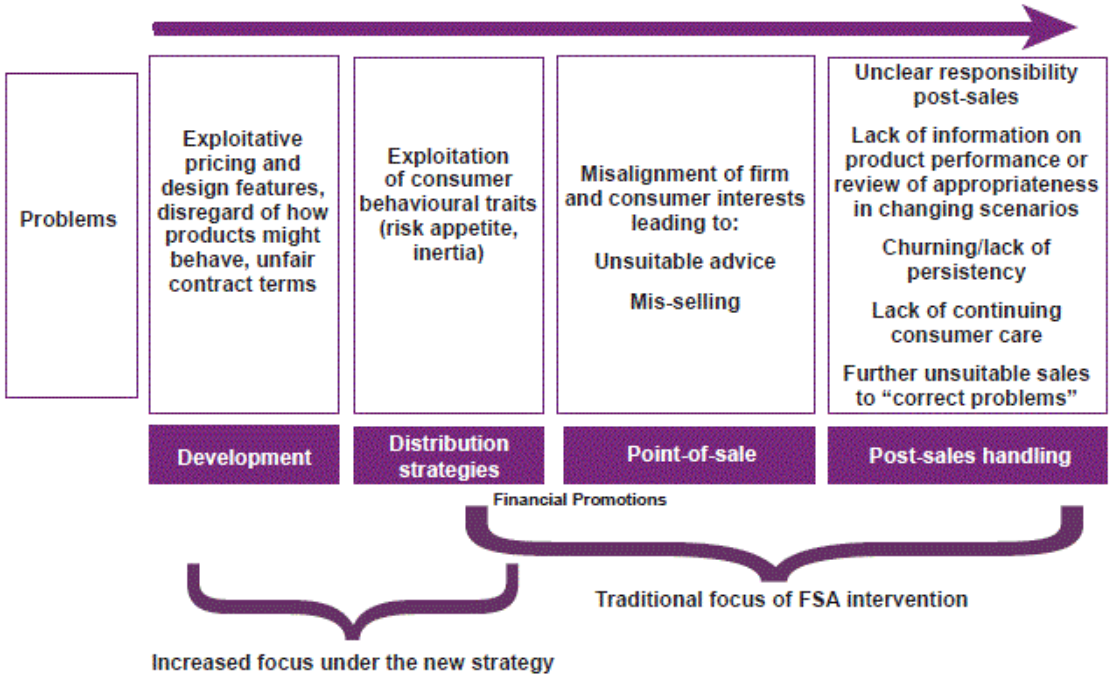
	• Defining a sufficiently high level of administrative fines to allow national authorities to impose effective, proportionate, and dissuasive fines (Art. 75.2); • Taking into account appropriate criteria, including aggravating and mitigating circumstances, when applying sanctions (Art.76). The Norwegian Consumer Council supports the protection of whistleblowers and the obligation, for financial institutions, to have in place specific procedures for their employees to report breaches internally (Art. 77).
Article 79	**Right of appeal** Article 79 paragraph 2 provides that one or more of the following bodies: public bodies, consumer organisations and professional organisations, may be entitled to take action before the courts or administrative bodies to ensure that national provisions for the implementation of MiFID are applied. Generally, the national provisions entitle only the supervisory bodies to act in this regard. Experience demonstrates that consumer organisations are very active in bringing injunctions at national level; so in order for consumers to maximally benefit from the provisions on injunctions, consumer organisations should be designated as qualified entities both for national and cross-border cases. It has to be taken into account that, in some countries there is traditionally mainly private enforcement undertaken for example by consumer organisations and not much public enforcement of consumer protection. This concretely means that it would not be possible to rely on public enforcement to help consumers obtain redress. In Norway the public authorities often have limited resources or do not necessarily see it as their priority to engage into ordering compensation for individual consumers. Therefore, The Norwegian Consumer Council strongly supports that consumer organisations should be entitled to take action to ensure that national provisions for the implementation of the MiFID are applied, notwithstanding whether public authorities are also entitled to act so or not.
Article 80	**Extra-judicial mechanism for investor's complaints** The Norwegian Consumer Council as BEUC, fully supports the obligation for Member States to be required to set up efficient and effective alternative dispute resolution bodies and the obligation for the investment firms to adhere to one or more ADR bodies. As more and more online brokers operate at cross border level, The Norwegian Consumer Council fully supports the compulsory cooperation between the ADR bodies to solve cross-border disputes. Investment services are long-term services. This is the reason why The Norwegian Consumer Council would oppose any blanket restriction to consumer access to ADR schemes based only on a time limit in function of when the original advice was given

	rather than when the consumer first became aware of their grounds for complaint. **Burden of proof and collective redress** It is particularly difficult for clients to be compensated when they suffer damages due to negligence or fault from their investment firm. The distribution of financial instruments guaranteed by Lehman Brothers is a good illustration of such problem: infringements are difficult to be proven by consumers which makes any individual action almost impossible. For example, in Belgium only wide inquiries carried out by the 'inspection des services économiques' made possible to prove malpractices and aggressive sales of those structured products. The Norwegian Consumer Council considers also that if there were an increased possibility for retail investors to get compensation when justified, it would be an important incentive for the industry to improve the quality of its financial services. Therefore, The Norwegian Consumer Council as BEUC, strongly supports that, beyond the compulsory adhesion of investment firms to independent ADR bodies, - the burden of proof must be on the side of the investment firm. This can be more efficient than other detailed provisions; - collective redress must be put in place in each Member State to enable European consumers to collectively bring a case before the court to obtain compensation for loss or damage caused by the same financial service provider or intermediary.
Detailed comments on specific articles of the draft Regulation	

Articles 32 – 33	**Product intervention by competent authorities** The Norwegian Consumer Council strongly supports the empowerment of competent authorities to prohibit or to restrict financial products in general, or (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or (b) a type of financial activity or practice, when it raises significant investor protection concerns. As described by the UK Financial Services Authority (FSA)[10], the origin of detriment for the client can be found at different levels in the product life: at the development level when designing distribution strategies, at the point of sales and at the post-sales handling.

[10] See: FSA, Discussion Paper DP11/1, Product Intervention, p.19 - http://www.fsa.gov.uk/pubs/discussion/dp11_01.pdf

Figure 2: Where problems can occur in the product life cycle



Improving the suitability of consumers' investments with their needs, avoiding large scale mis-selling which is detrimental both for consumers and industry, can be done by regulating at the different stages of the product life. Product information, suitability of investment advice, avoiding conflict of interest in the distribution, etc. are traditionally addressed by existing EU legislation. As proposed by Articles 32 and 33 of the MiFID and suggested by the FSA, more attention should be given at an earlier stage of the life cycle. The different available techniques are complementary and no one should be put aside. Intervening at an earlier stage is one of the best means to avoid dissemination of too complex or too risky products for the targeted public. Better product design and better client segmentation are key elements in that way. The experience has shown that this does not happen

	naturally. For instance, Article 32 allows competent authority to prohibit investment products that are indubitably unsuitable for the targeted consumers, and to allow their distribution only to more sophisticated or professional investors who are really able to understand those products and the risks they involve. Preventing the dissemination of such products is a powerful tool to avoid mis-selling and consumer detriment. It contributes to make the retail financial market cleaner for consumers and improves their confidence in the market. The UCITS regulation, before the UCITS III directive, is a good example of what can be achieved in retail investment product regulation. Direct market intervention on specific products is already known in EU. Banning practices and products is not new in the EU. Ban on un-supported (naked) short-sales has been used in several states during the 2008 financial crises. Both Lithuania (2011) and Norway (2008) has banned sales of structural products (including structural deposits) to the consumer sector after gross mis-selling practises. However, some of the restrictions foreseen to prevent excessive use of this power may paralyse it when urgent measures are required. Competent authorities should be authorised to take action immediately, on a temporary basis, when they can proof that any delay could cause irreversible damage to consumers. In that case, the competent authority should inform competent authorities of other member states which may be significantly affected by the action, in place of consulting them as provided by article 32.2, d). The one month 'freezing delay' after having informed ESMA and other competent authorities foreseen by article 32.3 should never apply in this case.	
END		