

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@europa.eu by **13 January 2012**.

Name of the person/ organisation responding to the questionnaire	Transparency International Liaison Office to the EU (TI EU) Rue Breydel 40 B-1040 Brussels Belgium http://www.transparencyinternational.eu Contact: Carl Dolan T: +32 (0)2 23 58 603 E: cdolan@transparency.org TI EU is the EU liaison office for the Transparency International (TI) movement. TI is the global civil society organisation leading the fight against corruption.
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Theme	Question	Answers
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>Financial services, including investment firms, face serious corruption and bribery risks. Corruption and bribery may arise in connection with (i) soliciting investment into a fund, or other inducements to obtain or retain business and (ii) investments made by the adviser/manager in the course of managing the fund's assets.</p> <p>Financial services may be particularly exposed to corruption risk due to inadequate controls. A recent thematic review by the UK Financial Services Authority (http://www.fsa.gov.uk/pubs/anti_bribery.pdf) found serious weaknesses in the systems and controls of some regulated insurance brokers. The FSA identified a number of serious concerns, in particular that there is "significant risk of illicit payments or inducements being made to, or on behalf of, third parties to win business". The report is clear that many of the issues covered are relevant to firms in other sectors, all of whom should take note.</p> <p>The processes that characterise strong corporate governance systems align in many respects with the key elements for countering bribery that have been outlined in the Transparency International (TI) policy positions on corporate governance. Anti-corruption principles are a vital part of effective corporate governance because they underline the need to take seriously the long-term viability and interests of the company and its stakeholders ahead of the interest of the board or management in generating short term gains or inflated remuneration and bonuses.</p>

		<p>TI supports the Commission's proposals to strengthen the governance arrangements in investment firms and trading venues; notes that it is consistent with proposals to improve governance in credit institutions (COM 2011 453/3); but believes that the provisions for investment firms could be improved by the addition of the following elements:</p> <ul style="list-style-type: none"> • The requirement to publicly report on corporate governance structures, including anticorruption systems, overall operations and performance. Greater transparency in this respect is beneficial in encouraging higher standards of behaviour and establishing the legitimacy of the company as a responsible enterprise in society. • It should be made clear that the management body is responsible for ensuring that remuneration schemes – both for employees and senior executives – do not contradict policies that promote integrity. The management body should also ensure that recruitment, training and promotion policies are also consistent with the promotion of integrity and a sustainable management culture. Firms should report regularly on measures they are taking to implement these policies. • Specific board responsibilities should be designated to oversee corporate governance, as well as ethical and integrity issues, taking account of the size, scale and complexity of the firm and its activities. • There should be explicit mention of the management
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		<p>body's responsibility for the oversight of internal controls and state-of-the-art compliance systems to ensure that decisions are taken with integrity and in the best interests of investors. Those controls and systems should pay particular attention to the role of third parties and the appropriate due diligence should be carried out. Recruitment policies and criteria should reflect the need for members of the management body to have the necessary skills and capacities to carry out this function.</p> <ul style="list-style-type: none"> • Effective reporting channels and protection for whistleblowers are critical elements of a firm's internal controls. TI welcomes the proposal that these be made available to staff members in investment firms and that competent national authorities encourage reporting. The current proposals, however, are limited to reporting breaches of legislation. The whistleblowing facilities and protection should be extended to cover other areas of concern, such as excessive risk-taking or irregularities that are not clear breaches of the legislation. In line with the recommendations in the G20 Anti-Corruption Action Plan, the proposal should further emphasize the need for disclosure mechanisms to be easily accessible and that reports need to be followed up independently and without major time delay. • In addition to limiting the number of concurrent directorships held by members of an investment firm's management board, consideration should be given to measures that would limit the <i>duration</i> of the mandate of directors and ensure that that the board's membership is
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		<p>refreshed periodically. This would reduce the risk of 'group think' and help to promote the contrarian thinking that enables the board to carry out its functions properly.</p>
	<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>Financial market infrastructures serve a vital economic function. Their smooth functioning can help alleviate the impact of financial shocks, as in the 2008 banking crisis, while their failure can result in a bail-out by public authorities. EU reforms such as the European Market Infrastructure Regulation (EMIR) will increase their systemic importance. Consequently there is a strong public interest in their efficient operation and accountability. Preferential access to particular Central Counterparties (CCPs) or Trading Venues can reduce efficiency by distorting competition and facilitate the functioning of hidden cartels. Further, unfair restrictions on the ability of trading venues to trade and CCP's to clear militate against the G20 objectives of migrating the trading and clearing of standardised derivatives to organized trading platforms/CCP's.</p> <p>The end goal of any policy in this area should be a more transparent post-trading environment that maximises the benefits to end-users and stakeholders: investors, issuers, regulators and the wider public. Inefficient legacy European models can serve to entrench existing barriers and are ill-adapted to meet the demands of end-users for greater transparency and simplification.</p> <p>Improving competition – both within the EU and globally - through measures for non-discriminatory access to</p>

		<p>infrastructure and benchmarks is an important element in bringing about a more transparent and efficient post-trading environment.</p> <p>TI believes that the current proposals will help improve competition in the short run. In the longer run, the demand for real-time risk management – in part as a result of new practices such as high-frequency trading - and the benefits of new data processing technologies will require more integrated trading, clearing and settlement systems. This in turn will require greater interoperability and standardisation of systems if older, more rigid and hierarchical structures are not to prevent competition between venues.</p>
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?	<p>TI welcomes the proposed ban on fees, commissions or other monetary benefits paid to investment firms by third-parties in relation to the provision of services to clients. Such financial inducements are a source of potential conflicts of interest.</p> <p>The current proposals, however, only forbid such inducements in cases where advice is provided on “an independent basis”. TI believes that the proposals should forbid those inducements in all cases where financial advice is provided, whether such advice is labelled “independent” or not. This would reduce the risk of confusing consumers and is in line with practices introduced in some Member States, such as the UK Retail Distribution Review (RDR), which will come into effect in 2013.</p>
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and	As indicated in the answer to question (13) above, a more efficient and transparent market infrastructure will require a

	<p>investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?</p>	<p>move toward more integrated and interoperable trading, clearing and settlement systems.</p> <p>In order for this system to work, it will be necessary for market participants to agree on actual interoperable addressing and reference standards, which will ensure that transactions are processed correctly and are referred to the appropriate data sets in the different databases. There will also be a requirement for common processing conventions to facilitate transactions.</p> <p>In this framework the most important address information will be a common custody account numbering system for investors' assets, ICAN (International Custody Account Number) which will operate in the same way as the IBAN identifies any money account within the EU area.</p> <p>Each transaction processed in the network will also to be identified via a common structured identifier. This provides the possibility to trace the transactions through the system and match them individually. This kind of code could, for example, be called ISTI (International security transaction identifier).</p> <p>Making this standardised information available to competent authorities would greatly facilitate the monitoring of market activity and the build up of systemic risk, as well as improving transparency in international financial flows by allowing authorities to identify the owners of securities.</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>In general, there is a good deal of evidence that the effectiveness of enforcement in securities markets depends not just on the "laws on the books", but of enforcement</p>

		<p>intensity – the extent to which laws enacted laws are put into practice. More intense public enforcement – as measured by staff, budgets, number of enforcement actions - is linked to better financial market outcomes¹.</p> <p>Given the numerous and significant powers that are delegated to the European Securities Markets Agency (ESMA) in these proposals – banning products and services, drafting technical standards, registration of third country firms, managing and limiting positions of market participants, coordination of information exchange between national authorities – it will require sufficient resources – in particular skilled staff – to enable it to carry out these functions to a high standard.</p> <p>It will also need large amounts of high-quality and real-time data if it is to carry out these functions. There is a lot of information that will be made available as a result of this legislation from national authorities and trade repositories. ESMA would be helped in processing and analysing this data by the establishment of an independent Office for Financial Research in the EU. Such an office was established by the US Authorities after the passing of the Dodd-Frank Act in 2010. Importantly, the US Office has powers of subpoena to access information that may not be available through the normal regulatory channels, and impose common reporting standards.</p> <p>ESMA, as well as national authorities, would be aided in their tasks by greater public disclosure of much of the information</p>
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¹ *Public and private enforcement of securities laws: resource-based evidence*, Jackson and Roe, Transparency International Global Corruption Report 2009, p. 431

		<p>that is to be made available (insofar as this does not contravene data privacy laws or is commercially sensitive) as well as making public the results of formal assessments (such as the equivalence assessments carried out on the supervisory and regulatory frameworks of third countries), in addition to the proposal to publish sanctions and other measures taken in accordance with Article 74 of the Directive. This would allow market participants and civil other society actors to play their role as part of the full set of checks and balances on the behaviour of investment firms.</p> <p>The introduction of a standardised system for identification of securities custody accounts and securities transactions (the ICAN and ISTI protocols referred to in reference to question (25) above) would also improve supervisors ability to track securities and relate them to firms or individuals.</p> <p>Finally, we note that under Article 10 of the Directive, competent authorities can refuse to authorise the performance of investment services until they have been informed of the identities of shareholders or members that have qualifying holdings, with a view to assessing their suitability. In order to carry out this task thoroughly, authorities would need to be able to establish the true beneficial owner of shares or holdings. There should therefore be an obligation on investment firms to hold information about their own beneficial ownership, including documentary proof; and to make such information available to competent authorities.</p>
Detailed comments on specific articles of the draft Directive		

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