Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Response from ILAG – UK Life Assurance and Investment Trade Body

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?	
	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?	
	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?	
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?	
	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?	
	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?	
	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?	
	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 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?	**Response from ILAG – UK Life Assurance and Investment Trade Body** In general, we agree that these requirements are sufficient for the purpose intended. However, we would make the following observations: • Para. 5 (i): the requirement to assess a "sufficiently large

		• Para. 5 (ii): the prohibition on receipt of fees, commissions or other monetary benefits from a third party if the firm providing advice is doing so on an independent basis, and the absence of any such prohibition on firms providing advice on any other basis (e.g. if they are "tied" to one or a small number of providers), is illogical and will mean there is not a level playing field between independent and tied adviser firms. The inability of an independent adviser firm to take commission from providers will necessitate their charging fees to retail clients for the advice given. It is well known that a very large proportion of retail investors and potential investors (particularly those with comparatively limited disposable income which could be diverted into investment) will be unable, or reluctant, to meet the cost of advice through fees. We consider, therefore, that the behaviour of a significant element of this market segment could be skewed towards taking advice only from firms which are not independent of providers, in order that payment of the cost of the advice they receive can be

	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	**Response from ILAG – UK Life Assurance and Investment Trade Body** Our understanding of this proposal is that the determinant of whether a product is complex or non-complex is, in almost all circumstances, the inclusion or not within that product of either an embedded derivative, or a structure which makes it difficult for the client to understand the risk involved. Our experience suggests that, in many instances, not only clients but also their advisers have difficulty in determining whether or not a product, or some element of a product, embeds a derivative. If the presence of such a derivative is to be a major determinant of complexity, then we consider that ESMA should develop (1) a standard formula for the identification of such derivatives, (2) a standard definition of 'embededness', and (3) a standard template for disclosure in fair, clear and not misleading terminology.
	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?	**Response from ILAG – UK Life Assurance and Investment Trade Body** We do not consider any changes are needed to the requirements described in Directive Article 27.

	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	**Response from ILAG – UK Life Assurance and Investment Trade Body** We consider that the protections available to the different categories of client are appropriately differentiated.
	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?	**Response from ILAG – UK Life Assurance and Investment Trade Body** Although we do not consider that any adjustments are needed to the proposed powers themselves, we believe that procedures should be put in place to ensure that such powers are used as sparingly as possible, and invoked only after full and exhaustive investigation into the level of risk presented by the product, activity or practice in question, and ESMA or the relevant competent authority being able to demonstrate conclusively that it is not possible to address or mitigate the risk in any other, less draconian, fashion. In particular, we are concerned that indiscriminate use of these powers could lead to greater detriment, or potential detriment, to investors (by the removal of choice and access to products generally suitable or appropriate for one or more market sectors) or to market stability or functionality (by the prohibition of proven workable procedures or practices), than the adoption of an alternative, but less preventative, strategy. We believe that the possibility of giving rise to unintended consequences should always be considered in depth before these powers of intervention are invoked.
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?	

	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?	
	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?	
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	
	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?	

	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	
	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?	

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
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