

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@europarl.europa.eu by 13 January 2012.

Name of the person/ organisation responding to the questionnaire	Vanguard Asset Management, Limited Richard Wane (Director) The Vanguard Group, Inc. ("Vanguard") began operations in the United States in 1975. Today Vanguard also operates in Europe, Asia and Australia. In Europe, Vanguard has offices in London, Paris, Amsterdam and Zurich. Vanguard aims to offer investors the highest value investment products and services available, and is one of the world's largest and most respected investment management companies, managing 23 million customer accounts worth \$1.9 trillion worldwide (as at 30 June 2011). Vanguard's model is to keep costs low and provide clarity and communicate candidly with investors in relation to investment risks, costs and potential rewards, in keeping with Vanguard's "plain talk" philosophy. The Company does not pay commission to distribute its funds, but instead works with fee based investment professionals and investors who appreciate this investment approach.
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Theme	Question	Answers
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Scope	<p>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?</p>	<p>In terms of answering the first question, we would answer “No”. It would be appropriate to make clear that MiFID does not attempt to regulate the investment services provision by already regulated providers incorporated outside of the EU through a contractual arrangement with a MiFID licensed firm or UCITS management company. At present the combination of Art 36 (of MIFIR) and Arts 41-50 of MiFID may indicate that where a MiFID or UCITS firm contracts for the portfolio management of a fund domiciled in the EU to a third party outside of the EU that the third party will need to be licensed or require some European based permission to provide such services. This would also appear to apply to the mere execution of securities trades – requiring all securities brokers outside the EU to be licensed.</p> <p>This seems unnecessary particularly in situations where the third party is a company with the same group as the instructing firm and/or where the third party in a jurisdiction with recognised arrangements for co-operation between the relevant EU and third party country supervisors. It adds another layer of administrative cost that will ultimately be borne by investors investing in the relevant product, which may commonly be an already regulated UCITS or equivalent fund.</p> <p>If a blanket exemption is not deemed permissible then perhaps consideration could be given to providing a list of “acceptable” (as opposed to “approved”) jurisdictions to which delegation of investment management activity (and the associated securities execution activity) could be made without the satisfaction of further requirements.</p>
	<p>2) Is it appropriate to include emission allowances and</p>	<p>No response</p>

	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?	No response
	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>Please see our answer to question 1). MiFID II appears to go beyond the UCITS and even the AIFM directives in these areas and we would suggest that those two directives together with other refreshed parts of the MiFID directive are sufficient to provide investor protection.</p> <p>Clarification should also be provided that the execution by a MiFID licensed firm of orders on behalf of a non-EU investment management company are not captured by MiFID II.</p> <p>At present, in the absence of clarity about the delivery of services to or by a professional investor, there is a concern that the simple execution of orders generated by a non-EU investment management company for a non-EU based fund investing in EU securities might mean that the non-EU instructing fund management company requires a licence to issue such execution instructions.</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?	No response

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 response
	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 response
	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 response
	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 response
	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 response
	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 response

	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 response
	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 response
	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 response
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>No. The restriction in Art 24 (5) on only <u>independent</u> advisors from receiving fees, commissions or monetary benefits from any third party or person acting on behalf of a third party in relation to the provision of services to clients will not protect investors who purchase their investments from non-independent advisors.</p> <p>Virtually by definition, if an advisor is not independent they must be in a conflicting position. Where it may be possible to explain such conflicts by disclosure, it does not tackle them. This restriction will not assist the vast majority of investors, who may continue to be at risk of being sold products driven by</p>

		<p>incentivisation or commission payments from providers or on behalf of providers – who are not independent. It may also have the effect of making the cost of doing business as an independent provider increasingly prohibitive, leaving investors with less choice and fewer independent advisors in the market if commissions can continue to be paid to those who do not offer independent advice.</p> <p>MiFID II represents an opportunity for a step forward in assisting investors to be taken by seeking to ban on all retrocessions to distributors and platforms - creating a market that values good advice across the market of available products, rather than investors being sold products simply because they pay more commission or rebate to the intermediary than others.</p> <p>Further this opportunity could extend to execution only situations. Without such an extension there is a risk that the advisory sector contracts as there is no incentive to provide advice – rather there is every incentive to sell products that pay a commission or rebate on an execution-only basis.</p>
	<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>Art 25 3 a) (iv) indicates that certain UCITS will be categorised as “structured UCITS”. There is a significant risk of confusion amongst market professionals, product providers and investors as to what this means. Either a UCITS is a UCITS or it is not.</p> <p>Any term that requires judgement to be exercised on what exactly constitutes a “structured UCITS” runs the risk of incorrectly categorising products. Many UCITS will, for example, have the full investment powers of the UCITS Directive written into their investment restrictions but may not</p>

		<p>exercise those powers to their full extent. When a UCITS becomes a “structured UCITS” what is to be done about the practical issues of holders of the UCITS fund who may have invested in it for some time and who now are in a product that should not be sold to them without the need to obtain information – and yet the product itself is still and always was a UCITS fund.</p> <p>If there is a desire to identify a more complex form of fund that means information should be obtained from investors who wish to invest in it then a different form of European-wide product regime should govern that product – and it should not be possible for it to be called a UCITS fund.</p>
	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 response
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	No. Professional clients are not mentioned in a key area – Art 36 (MIFIR) and Arts 41-50 (MIFID) leading to uncertainty about the provision of services to or ability to establish a branch to service professional clients. As noted in our answer to Q1) and Q4), it is not necessary for a licence to have to be obtained by a non-EU third party in an acceptable jurisdiction to provide portfolio management services in respect of a fund or account managed by a professional investor in an EU member state.
	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	No response

	financial markets?	
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 response
	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 response
	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 response
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	No response
	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)?	It is important that trade volume information is consolidated and Reported to reflect actual liquidity in fund activity – particularly for products with a public listing, such as exchange traded funds.

	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?	Same as Q24) It is important that trading volume information is consolidated and reported to reflect actual liquidity in fund activity – particularly for products with a public listing, such as exchange traded funds.
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 response
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	No response
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	No response
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	No response
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	No response
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	No response

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