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	**VOTUM Verband Unabhängiger Finanzdienstleistungs-Unternehmen in Europa e. V. (Association of Independent Financial Services Companies in Europe)**

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?	Please see Article 24, paragraph 5 below for more detailed comments.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	
	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?	
	18) Are the protections available to eligible counterparties, professional clients and retail clients 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?	
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**

Article 3 paragraph 1 last en-dash:	Under Article 3 (Optional exceptions) the revised Directive provides adjustments, which will strengthen investor protection. In accordance with recital 27, even though exempt, persons or legal entities' should at least in some areas fulfill the main requirements of the directive. We welcome this requirement and have supported the new national law which already implements the basic intentions of recital 27. However we have concerns regarding the revision of Article 3. Paragraph 1, last en-dash points out that the procedure for the approval and ongoing supervision, under the optional exemption, Articles 7, 8, 9, 10, 21 and 22 of the Directive should apply to persons and legal entities' accordingly. Even though this is only a legal adaption, the reference to the Articles 7 to 10 does not correspond with the activity of a single self employed German IFA. Rather than make a reference to this single provision of the Directive, we believe it would be advisable to choose a general formulation, which could be revised as follows: *"These persons should be subject to requirements in accordance with national regulations, which contain at least provisions for approval and ongoing monitoring. The approval criteria of reliability and qualification of such persons must be adopted."*
Article 3 paragraph 1:	In Article 3, paragraph 1 the case is made that an investor-compensation scheme for persons operating under the optional exception should be introduced. The creation of an additional investor compensation scheme is not essential and such a system, which to provide customers with equivalent protection can be completed in the form of a pecuniary damage liability insurance, which is currently in place. We consider the pecuniary damage liability insurance as the most effective and most appropriate coverage for all claims for damages against a customer about an investment advisor or broker. The investor protection granted here is significantly more effective than, say, the investor compensation in the German event of Phoenix.
Article 24, paragraph 5:	We welcome the principle that the rules have to ensure investor protection under Articles 24 and 25 of the Directive also be implemented by persons and legal entities', acting in accordance with the optional exemption in Article 3. However, significant concerns remain with the definition of Article 24, paragraph 5, based on the recital 52. Through this regulation persons and legal entities' that offer its customers independent investment advice are prohibited to receive commission payments from a third party, for example commission payments from the recommended product providers. Resulting in customers only receiving independent investment advice in the future on the payment of a fee. This regulation does not therefore strengthen the position of the investor, but leads directly to deterioration. Currently, whether the customer decides to pay a fee for investment advice, or compensate the consulting fees, along with the product cost, whereby the commission percentage is disclosed. In future the client is required to pay a fee, since it the independent

	investment advisors can no longer offer to act on a commission basis. It is not understandably why - on the grounds of investor protection - an option is taken away at the expense of the investor. It is feared that the requirements of the Directive, will encourage an enhanced class system among investors. Independent investment advice will only be offered to the person who is willing and able to pay a fee. Members of the lower and middle-income groups especially, could be excluded from independent investment advice. One gets the impression that in the drafting of directive a logical thinking error was made that it can be concluded that form of payment for advice is based on the quality of its contents. The mere fact that a fee is collected from a customer for a consultation does not guaranty activities of a high quality service. It is assumed here, that a fee-based consultation as opposed to a commission-based consultation eliminates the possibility of a fundamental conflict of interest. This is however unrealistic to assume. Even with fee-based consultation, conflicts of interest can arise due to fact that advisor can charge an hourly rate for their service, whereby their own economic interests can influence offering this advice repeatedly to increase their honorary hours. In our opinion the compensation system is not decisive for the quality of advice, but the appropriateness of compensation whereby the customer knows the product selection and the identification of both the cost of a product as well as the fact that the consultation fees are paid from this. In the area of investment advice we are convinced, that payments on a commission basis are in the interest of the customer. The consultant only receives remuneration, if the customer has finally opted for a product and if it is suitable. Such a commission-based consultation offers the client the possibility to receive advise on several occasions before a final decision, without incurring additional cost. The client has the ability to select the best advice and the most convincing system concept without thereby entering into a cost risk. Such a possibility does not give the client a compelling obligation to take out a fee-based consultation. In this case the client would have to obtain multiple opinions resulting in multiple fees being paid. Regularly expressed concerns that a broker placed its customers with a product only on the grounds of receiving a commission, or presenting a product, which assures the highest commission claim are against the background of the legislature and case law evolving information, consulting and documentation requirements are unfounded. In addition, the sustainable and long lasting customer care of those who rely on commission payments is a key success factor. In the long term, a consultant can only secure his income by offering contracts that meet the client's interest and are thus protected from a reverse transaction. Furthermore, only a sustained relationship with satisfied customers leads to the possibility of completing subsequent transactions. A compensation commission is therefore not in principle against increasing risk and does not lead to a fundamental loss of quality. According to § 34 f of the German Commercial Code which applies to advisers of investment fund holdings, commission payments shall not jeopardize independent advice on product selection. The commission rates paid in this segment are almost uniform. There

	is therefore no risk that a broker recommends a fund just because he can hope for this higher commission income. The handling of the fund is subscription rather than centralized fund trading banks that pass the uniform pro rata premium of the respective fund as commission to the broker. Due to the similar rates of commission the independent choice among investment funds, is not compromised by commission payments. We therefore ask you to ensure that the provision in Article 24, paragraph 5 is adapted so that each customer has the option to decide whether he wants to be advised against commission or a fee. A commitment to fee-based advice is neither appropriate nor does it lead to an improvement in investor protection.
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	