

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	Financial Services Consumer Panel
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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?	No comment
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	No comment

	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?	No comment
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 comment
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?	No comment
	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?	No comment
	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	No comment

	<p>practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?</p>	
<p>Investor protection</p>	<p>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>	<p>The Panel supports the proposals in Article 24, paragraph 5ii) that a firm giving investment advice on an independent basis 'shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party'. However, we believe this could be strengthened to include non monetary benefits, such as provision of software, IT services, or other support services. We also support the similar proposals in paragraph 6 relating to portfolio management.</p> <p>However, there is a serious risk that if such restrictions on fees, commissions and benefits are applied only to independent advisers and portfolio managers, the result will be regulatory arbitrage, leading to firms opting to change their status from 'independent' to some other name, and continuing to operate a business model which has already been identified as flawed and not in the best interests of consumers. Not only will consumers continue to be offered services from firms which may be inappropriately incentivised by providers to sell unsuitable products, but genuinely independent firms would be disadvantaged by operating an open and transparent charging structure, when their competitors can conceal remuneration received from third parties.</p> <p>The Panel supports the work of the Retail Distribution Review (RDR) already underway in the UK in this area.</p>

		<p>Earlier research (<u><i>Polarisation: research into the effect of commission based remuneration on advice</i></u>, Charles River Associates Ltd for the FSA, 2002) for the FSA identified significant commission bias in the advice given on a number of single premium products, specifically distribution bonds and with-profit bonds. The research also found that where there was bias, there was consumer detriment, and where the consumer detriment was found, it was appreciable.</p> <p>The RDR reforms, which will result in what is effectively the elimination of commission in the advised sector, are a major step forward for consumers. Suspicions of bias in favour of particular products, product types or product providers that will generate high levels of commission for the adviser will fall away and consumers will know - and have the opportunity to discuss - the level of charges set by their advisers, which will be addressed up-front. As with other professional services the adviser's charge will be directly related to the service provided by the firm. Investors who would rather not pay separately for advice will retain the option of having the agreed fee deducted from their investments. The new system will ultimately make it easier for consumers to 'shop around' more easily than at present and to consider factors such as value for money in terms of the service they have received. The Panel supports the Europe-wide adoption of such an approach.</p>
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		<p>Fiduciary duty</p> <p>Beyond the safeguards of the proposals in the draft Directive, the Panel suggests that consumer interests would be better protected if regulators had rule-making powers to apply a fiduciary standard to firms.</p> <p>A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. Fiduciary duty implies a stricter standard of behaviour than the comparable duty of care at common law. The fiduciary has a duty not to be in a situation where personal interests and fiduciary duty conflict, a duty not to be in a situation where his fiduciary duty conflicts with another fiduciary duty, and a duty not to profit from his fiduciary position without express knowledge and consent. A fiduciary cannot have a conflict of interest.</p> <p>The recent US Dodd-Frank Act provides authority for the Securities and Exchange Commission (SEC) to impose regulations requiring "fiduciary duty" by broker-dealers and investment advisers to their customers. Although the Act does not create such a duty immediately, it authorises the regulator to make rules which apply the fiduciary standard to firms.</p> <p>For consumers with limited experience and expertise, dealing with a provider of financial services which has a fiduciary duty would reduce the chances of detrimental</p>
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		outcomes when such consumers take responsibility for their decisions. It would be desirable to extend this approach to the generality of relationships between consumers and authorised persons.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	No comment
	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
	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?	The Panel welcomes ESMA's requirement to coordinate the actions taken by national competent authorities to permanently ban a financial product or practice, and, in emergency situations, to ban certain products outright. This is particularly welcome in that it permits action based on a perceived threat rather than having to wait for actual detriment to have occurred.
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 comment

	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 comment
	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?	No comment
	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)?	No comment
	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?	No comment

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?	The Panel recommends that the ESA stakeholder groups, in particular the ESMA stakeholder group, should be fully consulted in the development of MiFID. We welcome the recent initiatives from DG MARKT to encourage more non-industry stakeholders to participate in financial services policymaking, and suggest that this is an ideal opportunity to ensure that consumer groups are consulted on issues of direct consumer impact, such as sales processes, record keeping and client information.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	<p>Article 16.7 Telephone Recording</p> <p>The Panel supports the proposals in Article 16.7 which require telephone recording of reception or execution of orders on behalf of clients, but suggests that this should be extended to any situation where advice is given. This would give protection both to the consumer and the adviser in cases of dispute. We also suggest that records should be retained for a period equal to the duration of the investment plus one year, as there is no reason why all problems or complaints should materialise within the first five years of a product's life.</p> <p>Article 25.3 Execution only</p> <p>The Panel supports the retention of the facility, in Article 25.3, to provide execution only services. We have expressed concerns in the past about the potential limit on, or even abolition of, the execution-only regime. There are large numbers of consumers who have the capability and justified confidence to buy financial products on a non-</p>

		<p>advised basis. The abolition of this option would in our view be detrimental to consumer interests if those able to buy without advice were effectively required to obtain it. This would increase costs for consumers and ultimately benefit no-one.</p> <p>Article 80 Extra-judicial mechanism for investors' complaints</p> <p>The Panel strongly supports the requirement for member states to set up efficient and effective alternative dispute resolution bodies. In our response to the Commission consultation on alternative dispute resolution in March 2011 (<i>Response to the Consultation Paper on use of Alternative Dispute resolution as a means to resolve dispute related to commercial transactions and practices in the European Union</i>, Financial Services Consumer Panel, March 2011) we stated that there should be binding action at EU level requiring mandatory adherence to an ADR scheme for all significant financial services providers. This should apply to schemes in all Member States both in and from which the firm provides services.</p> <p>We are supportive of the UK Financial Services Ombudsman scheme in the UK and the role it plays in FIN-NET. We believe that all financial services ADR schemes should be required to meet the minimum standards necessary for membership of FIN-NET, and that they should be members of it.</p>
	28) What are the key interactions with other EU financial	No comment

	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?	No comment
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	<p>Article 74 Publication of sanctions</p> <p>The Panel supports the proposals in the Directive for a new sanction regime. In particular, it supports the requirement to systematically publish sanctions as outlined in paragraph 74. In fact, we would suggest that this requirement be strengthened, so that there is a presumption of publication of sanctions, unless there are clear reasons, such as affecting the stability of the financial system, why this should not be the case. Additionally, the publication of such sanctions should take place as early in the process as is feasible, and not once the process is concluded, to minimise the chance of continuing consumer detriment while investigations take place.</p>
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	No comment
Detailed comments on specific articles of the draft Directive		
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