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.**

NFU Response to Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

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About NFU

Nordic Financial Unions (NFU) is an organisation for co-operation between trade unions that organise employees in the banking, finance and insurance sectors in the five Nordic countries. At present, eight trade unions are affiliated to the NFU; two in Denmark, two in Finland, two in Sweden, and one in each Iceland and Norway. Through these trade unions, NFU represents 160 000 employees in the Nordic financial market.

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?	***The measures proposed to strengthen corporate governance are important and necessary. However, it should also be recognised that employee representation in the management body can contribute to better risk management. Employees have a long-term interest in the sustainable management of the institution and furthermore experience and knowledge of its internal structures. It would be relevant to make a reference to this in the Recitals of the Directive.***
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?	NFU is positive towards the new wording but suggests the following addition (new text in bold): "[…] w*hen investment advice is provided, information shall specify whether the advice is provided on an independent basis* **or not** *and whether […]"* Furthermore, NFU suggests adding a reference in the Recitals (Recital 40) to avoid disproportionate use of sales targets for sales of investment products, which is potentially damaging to the quality and objectiveness of the provision of investment services as well as to employee health. This should be further specified in the Commission Level 2 Directive.

		Jutification: The wording would lead to more objective advice as well as better analysis. It has to be pointed out, though, that such a thorough and exhaustive provision of advice requires both time and other resources in order for the employee to carry out his or her duties in the right way. This leads to a conflict of interest in those cases where an employer puts certain sales targets on the employee, in advance or in retrospect. Employees who want to act in accordance with legal rules and his or her own professionalism and competence sometimes end up in situations where the demand for good advice are conflicting with sales targets and cost cutting. Sales targets are not bad in themselves, but they should be adequate and proportional and not conflict in any way with the provision of quality advice.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	A new Article should be introduced regarding Minimum Competence Requirements. Staff of investment firms must possess an appropriate level of knowledge and competence in relation to the products offered. This is particularly important given the increased complexity and the continuous innovation in the design of investment products. Buying an investment product implies a certain risk and investors must be able to rely on the information and quality of assessments provided. In the Commission proposal for Directive on Credit Agreements Relating to Residential Property 2011/0062(COD), a similar formulation is suggested. Given the complexity of investment products, the introduction of qualification requirements is even more relevant in the MiFID directive.

		NFU therefore suggests to introduce a new article 26 (see concrete formulation below)
	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?	Systems for reporting of breaches (art.77 MiFID II) is proposed also in the CRD IV (art. 70) and Market Abuse Regulation (art. 29). In the MAR proposal art. 29 it is stated that "Member States shall put in place effective mechanisms to encourage reporting of breaches of this Regulation to competent authorities, including at least: […] appropriate protection for persons who report ***potential or actual*** breaches;" [emphasise added] It is imperative that the wordings in the three regulatory acts are similar in regard to this topic. Both potential and actual breaches should be covered. Furthermore, it is important to ensure that sanctioning regimes in different directives do not lead to double enforcement of sanctions.
	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?	Article 73 – Administrative sanctions NFU emphasises that it is crucial that the sanctions befall the right (legal) person. An employee who has followed internal practices, routines, or instructions in a company, be they official or unofficial, should not be subject to administrative sanctions. It is the employer who is responsible for deficient instructions, practices, company culture, education, oversight, or control.

		Article 77 – reporting of breaches In general, NFU welcomes the wordings on whistle blowing in the proposal. Employees of financial institutions need somewhere to turn with suspected breaches, where their concerns are taken seriously and there identity is protected. It has to be clarified in the Directive what a minimum of "appropriate protection" actually means. Protection for employees who denounce potential or actual breaches must be adequate, foreseeable and clear. It should include effective protection against retaliatory actions toward the whistle blower as well as a prohibition to inquire his or her identity. Adequate protection should include: 1) The legal protection should include all employees, including those on a short-term or temporary contract, as well as persons outside the traditional employee relationship (such as consultants and interns). It should also include a prohibition on retaliatory action, dispute resolution rules, as well as compensation rules. 2) The protection should be designed as a principal rule with a positive right to blow the whistle, complemented with indirect, adequate protection for the person who reports the potential or actual breach. (Cf. Heinisch v Germany 28274/08) 3) The employer must be prohibited from inquiring the identity of the whistle blower. Full protection of the whistle blower's identity should apply both when reporting to an external authority and through internal

		channels within the company. 4) It should be possible to report breaches anonymously to competent authorities, who is responsible for setting up appropriate technical solutions to enable such a procedure. Such a protection is fully in line with international conventions (Council of Europe and ILO). 5) Employees should be informed about the rules on reporting of breaches and the potential consequences. Employees should also be informed about the value of reporting, in order to curb illegal practices and misconduct. For concrete amendments, please see below.
	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**
Recital 38	New text in bold italics: […] To avoid group thinking and facilitate critical challenge, management boards of investment firms should be sufficiently diverse as regards age, gender, provenance, education and professional background to present a variety of views and experiences. ***Employee representation in the management body, in view of their long-term interest in the sustainable management of the institution and because of their experience and knowledge of its internal structures, can contribute to this aim and thus to better risk management in the institution.*** Gender balance is of a particular importance to ensure adequate representation of

	demographical reality.
Recital 40	New text in bold italics: The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 measures to: (a) define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and/or disclose conflicts of interest when providing various investment and ancillary services and combinations thereof; (b) establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the clients or potential clients of the investment firm. ***This includes disproportionate use of sales targets, which is potentially damaging to the quality and objectiveness of the provision of investment services as well as to employee health.***
Recital 51	New text in bold italics: […] The continuous relevance of personal recommendations for clients and the increasing complexity of services and instruments require enhancing the conduct of business obligations in order to strengthen the protection of investors. ***For the same reason, staff of investment firms must possess an appropriate level of knowledge and competence in relation to the products offered. This is particularly important given the increased complexity and the continuous innovation in the design of investment products. Buying an investment product implies a certain risk and investors must be able to rely on the information and quality of assessments provided. It is furthermore necessary that staff is given adequate time and resources to be able to provide all relevant information to clients.***
Article 23.1:	Amended text in bold italics: Member States shall require investment firms to take all ~~appropriate~~ ***necessary and sufficient*** steps to identify conflicts of interest between themselves, including their managers, employees and tied agents, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course of providing any investment and ancillary services, or combinations thereof.
Article 24.3:	NFU suggests the following addition (new text in bold italics): […] when investment advice is provided, information shall specify whether the advice is provided on an independent basis ***or not*** and whether […]
Article 26 (new)	NFU suggests introducing a new article on Minimum Competence Requirements. A sufficient level of qualifications must be ensured for staff providing investment services. In the Commission proposal for Directive on Credit Agreements Relating to

	Residential Property 2011/0062(COD), a similar formulation is suggested. Given the complexity of investment products, the introduction of qualification requirements is even more relevant in the MiFID directive. The following wording is suggested: ***Minimum competence requirements*** ***1. Home Member States shall ensure that:*** ***(a) The staff of investment firms possess an appropriate level of knowledge and competence in relation to the conclusion of investment services in order to satisfy the requirements of article 24 of this Directive [General principles and information to clients]. Where the offering of an investment product includes an ancillary service related to it, they shall also possess appropriate knowledge and competence in relation to that ancillary service.*** ***(b) The natural persons within the management body of investment firms who are responsible for or have a role in the intermediation, advice or approval of the investment service, possess appropriate knowledge and competence in relation to investment products.*** ***(c) Investment firms are monitored in order to assess whether the requirements referred to in paragraph 1, points (a) and (b), are complied with on a continuing basis.*** ***2. Home Member States shall ensure that the appropriate level of knowledge and competence is determined on the basis of recognised qualifications or experience.*** ***3. Home Member States shall make public the criteria they have established in order for investment firms' staff to meet their competence requirements. Such criteria shall include a list of any recognised qualifications.*** ***4. The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 to specify the requirements provided in paragraph 1 and 2 of this Article, and in particular, the necessary requirements for appropriate knowledge and competence.***
Article 73.2:	New text in bold italics: Member States shall ensure that where obligations apply to investment firms and market operators, in case of a breach, administrative sanctions and measures can be applied to the members of the investment firms' and market operators' management body, and any other natural or legal persons who, under national law, are responsible for a violation. ***No sanctions shall be applied to employees of investment firms who have followed internal rules, instructions and/or practices, be they official or unofficial, within the institution.***

Article 77.1 (b) :	The article should cover both potential and actual breaches as is the case in COM(2011) 651 article 29 (b). Furthermore, employees must be ensured full anonymity Suggestion (new text in bold italics): NFU suggests (new text in bold italics: 1. Member States shall ensure that competent authorities establish effective mechanisms to encourage reporting of ***potential or actual*** breaches of the provisions of Regulation …/… (MiFIR) and of national provisions implementing this Directive to competent authorities Those arrangements shall include at least: (a) specific procedures for the receipt of reports and their follow up; (b) appropriate protection ***and full anonymity*** for employees of financial institutions who denounce breaches committed within the financial institution; (c) protection of personal data concerning both the person who reports the breaches and the natural person who is allegedly responsible for a breach, in compliance with the principles laid down in Directive 95/46/EC.
Article 77.2 :	New text in bold italics: Member States shall require institutions to have in place appropriate procedures for their employees to report breaches internally through a specific channel. ***The same protection of personal data as referred to in paragraph 2c shall apply.***
Article 81.3 :	Employee representatives or trade union staff receiving inside information must also in future be allowed to pass this information on to a third party if this is required for carrying out trade union duties. NFU suggests that the exemption found in COM(2011) 651 art. 12.6 (last paragraph) is introduced into the Directive: **[…]** However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes. ***This paragraph shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association, or on a contract.*** Comment: In the Nordic countries, employee representatives who receive sensitive information during negotiations are entitled to pass this information on to other employee representatives whom themselves are under duty of confidentiality. The same rules apply to

	employee representatives on company boards. In relation to the Directive on insider dealing and the issue of employee representatives' right to pass on information, there is case law from both the ECJ and Danish national courts.
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	