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NFU Response to Consultation on the review of the Markets in Financial Instruments Directive (MiFID)

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.

General remarks

Most of the questions asked by the Commission in the consultation paper are dealing with matters that are largely oriented towards the securities issuers and investors on the market, and hence not for NFU to comment specifically.

In our reply, we have focused on matters that will have an impact on employees in the finance sector now and in the future.

Also, NFU generally supports the steps envisaged in this consultation regarding the extension of the scope of the Directive. As pointed out below, NFU has maintained the importance of all financial market players being subject to the same duties and controls, and supports one regulatory model that will cover any type of actor, as well as products that are similar in their nature. It is of utmost importance to prevent loopholes and lacunae in the regulatory framework, to eliminate arbitrage and create a truly level playing field.

(5) What is your opinion about converting all alternative organized trading facilities to MTFs after reaching a specific threshold? How should this threshold be calculated, e.g. assessing the volume of trading per facility/venue compared with the global volume of trading per asset class/financial instrument? Should the activity outside regulated markets and MTFs be capped globally? Please explain the reasons for your views.

NFU strongly agrees with the idea of a global cap on activity outside regulated markets and MTFs. It is in the interest of all stakeholders and indeed the global financial stability that a framework governing the activities outside regulated markets be put in place. The Commission should forcefully work to this end, not least in order to maximize the effects of EU legislation in this area.

(14) What is your opinion of the suggestion that all high frequency traders over a specified minimum quantitative threshold would be required to be authorised?

NFU agrees with the Commission that HFT needs to be more thoroughly regulated than the case is today. There are already examples where rogue HFT algorithms have seriously distorted the market, albeit for very short periods of time. This is however a most relevant challenge for the financial system, and market participants deploying automatic trading must be regulated and supervised in accordance with the requirements that other actors have to fulfil.

NFU has maintained the importance of all financial market players being subject to the same duties and controls. This should naturally be the case when it comes to HFT as well. NFU supports one regulatory model that will cover any type of actor.

Separate rules for different market actors, and different markets, increases market opacity and make it harder for investors to survey and evaluate different investment choices, as well as for employees to give proper advice and information. This makes especially sense with respect to the existing and ever-expanding interlinkages between different actors on the global financial market, as we have witnessed with regard to the latest financial crisis.

As regards organizational requirements for automated traders, the definition of robust and proper risk controls must be made adequately strong.

(24) What is your opinion of the suggestion to require regulated markets, MTFs and organised trading facilities trading the same financial instruments to cooperate in an immediate manner on market surveillance, including informing one another on trade disruptions, suspensions and conduct involving market abuse?

NFU believes that this is a very constructive proposal. Requiring such cooperation could improve the possibility to detect and, in the longer term, prevent market abuse etc. much better. If this is combined, e.g. with an EU reporting mechanism, such as suggested in question 80, the functioning of such a mechanism could be even more efficient.

(27) What is your opinion of the suggested changes to the framework directive to ensure that waivers are applied more consistently?

NFU agrees with the Commission that transparency is crucial for market participants to be able to identify a more accurate market price and to make trading decisions about when and where to trade. NFU also agrees with the Commission that the use of waivers, to some extent, is valid, to mitigate potential market impact.

Such waivers must, however, be used with precaution in order to not distort the financial system. A trading apparatus that enables large investors to hide their intentions, while the trading of smaller investors requires transparency, might be damaging in the long run. NFU supports the proposal by the Commission to provide ESMA with the task of monitoring the waivers on an ongoing basis and to report annually to the Commission about their use. It is necessary, as the Commission points out, that waivers of any kind are applied consistently throughout the European Union.

(32) What is your opinion about the suggestions for reducing delays in the publication of trade data? Please explain the reasons for your views.

NFU agrees with the Commission that the sooner post-trading information can be disclosed, the better for financial market investors.

Reducing the time-limits for post-trading information must not, however, impose any additional pressure on the employees in the finance sector to provide this information. It is vital to take into account the working conditions of the employees in financial institutions. The enforcement of time-reduction regarding post-trading disclosure cannot be solely based on the economic interests of the customer; the interests of employees must also be taken into account.

(33) What is your opinion about extending transparency requirements to depositary receipts, exchange traded funds and certificates issued by companies? Are there any further products (e.g. UCITS) which could be considered? Please explain the reasons for your views.

NFU agrees with the proposal by the Commission. As pointed out under question 14, NFU believes that a level playing field should be achieved for all market participants in order to enable the proper assessment of different investment choices. The idea of a level playing field of course also goes for products that are similar in their nature, as pointed out in the consultation document.

(78) What is your opinion on the introduction of a separate trader ID? Please explain the reasons for your views.

NFU is positive to the introduction of a trader ID, but if such identification is to be introduced, it must be ensured that proper data protection applies. This information should not be public, but only for the supervisory authority, for the sake of employee protection and privacy.

(80) What is your opinion on the possibility of transaction reporting directly to a reporting mechanism at EU level? Please explain the reasons for your views.

NFU agrees with this proposal. Market surveillance may improve quite a lot, double reporting can be avoided, and the possibilities to detect trade disruptions, market abuse etc. can be much better, if such a reporting mechanism is implemented (see also under question 24).

(84) What is your opinion about limiting the optional exemptions under Article 3 of MiFID? What is your opinion about obliging Member States to apply to the exempted entities requirements analogous to the MiFID conduct of business rules for the provision of investment advice and fit and proper criteria? Please explain the reasons for your views.

NFU agrees with the proposal to limit the optional exemptions under Article 3, and the idea of applying, analogously, the MiFID conduct of business rules to the exempted entities. NFU agrees that investors depend to a large extent on suitable recommendations provided by professional advisers, and that investors should enjoy the same level of protection irrespective of the location or the nature of the service providers. Exempting some service providers even on a national basis without setting a minimum regulatory framework for investor protection is not only inappropriate but unfair.

To have exemptions for some market participants, albeit relatively small, regarding the obligation to provide suitable advice according to certain standards is unjustified. This opens up for a competitive advantage for some companies at the expense of others.

(85) What is your opinion on extending MiFID to cover the sale of structured deposits by credit institutions? Do you consider that other categories of products could be covered? Please explain the reasons for your views.

NFU agrees with the idea of extending MiFID to cover the sale of structured deposits by credit institutions. As pointed out under question 14, NFU believes that a level playing field should be achieved for all market participants in order to enable the proper assessment of different investment choices. The idea of a level playing field of course also goes for products that are similar in their nature, as pointed out in the consultation document.

(91) What is your opinion of the suggestion that intermediaries providing investment advice should: 1) inform the client, prior to the provision of the service, about the basis on which advice is provided; 2) in the case of advice based on a fair analysis of the market, consider a sufficiently large number of financial instruments from different providers? Please explain the reasons for your views.

(92) What is your opinion about obliging intermediaries to provide advice to specify in writing to the client the underlying reasons for the advice provided, including the explanation on how the advice meets the client's profile? Please explain the reasons for your views.

(93) What is your opinion about obliging intermediaries to inform the clients about any relevant modifications in the situation of the financial instruments pertaining to them? Please explain the reasons for your views.

(94) What is your opinion about introducing an obligation for intermediaries providing advice to keep the situation of clients and financial instruments under review in order to confirm the continued suitability of the investments? Do you consider this obligation be limited to longer term investments? Do you consider this could be applied to all situations where advice has been provided or could the intermediary maintain the possibility not to offer this additional service? Please explain the reasons for your views.

Although it is beneficial for all to ensure that finance industry customers have access to as much relevant information as possible in order for them to make informed decisions regarding their investments, there is also a risk for information overload if too many factors are introduced. This might lead to a situation where, as pointed out in the Consultation by Commission Services on legislative steps for the Packaged Retail Investment Products initiative, the more information is included that is extraneous to investment decision making, the less effective a document will be at informing such decision making.

It is also a question of striking the balance between the responsibilities of the intermediary and the investor. It can be questioned if it is reasonable that an intermediary should keep track of his or hers clients and their investments, or if it is more proportionate that the clients, backed up with the information and data they have received prior to the investment, keeps track of their own investments?

Regarding the basis for advice, NFU believes that all investment products sold by financial institutions must contain a declaration. The declaration should be worked out by an authority consisting, for example, of representatives from the National Financial Services Authority, a National Consumer Council, a National Bankers Association and the National Financial Services Unions. The declaration must stipulate a rating of the product's complexity and risk, as well as a description of the type of customer at which the product primarily is aimed. It would also make crystal clear the respective responsibilities and commitment of the intermediary on the

one hand and the investor on the other. It is important that such a declaration is objective and unquestionable and do not have a marketing purpose.

The fact that such a declaration would be worked out by a neutral party would provide consumers with a trust-worthy support in the investment situation and would help restoring confidence in the financial industry and its products. Given the increasing interlinkage between the players on the financial markets it is of course vital that investors on all levels receive and understand the information given from product issuers as well as intermediaries.

(100) What is your opinion of, in the case of products adopting ethical or socially oriented investment criteria, obliging investment firms to inform clients thereof?

Without going in to details on if it should be mandatory for investment firms to inform about such criteria, NFU would like to point out that such information must be objective and relevant. A possibility for companies to provide additional information on ethical or socially oriented investment criteria must not be an opening to market their products with information that is hard to check or even misleading.

As pointed out under Question 91-94, NFU believes that this type of information also should be provided by a neutral party, such as social rating agencies or similar.

(113) What is your opinion on possible MiFID modifications leading to the further strengthening of the fit and proper criteria, the role of directors and the role of supervisors? Please explain the reasons for your view.

Promoting good corporate governance within financial institutions is, indeed, an area that deserves further attention. An important area could be to describe the competences of the board of directors in relation to the strategic challenges faced by the financial institution. This should be done on a revolving basis, e.g. in the annual reports of the institution, thus enabling the AGM, relevant authorities and other stakeholders to evaluate whether the board of directors has the suitable competences for the business plan of the financial institution.

This must not, however, lead to any impingements regarding employees' right to board level representation. When it comes to ensuring that directors and board members have suitable skills and qualifications, it is not only a question of a selection process. It is also a matter of training. The board members, including employee board representatives, competencies must be continuously updated to fulfil any requirements that have been deemed appropriate or necessary for the task.

(114) What is your opinion on possible MiFID modifications leading to the reinforcing of the requirements attached to the compliance, the risk management and the internal audit function? Please explain the reasons for your view.

(115) Do you consider that organisational requirements in the implementing directive could be further detailed in order to specifically cover and address the launch of new products, operations and services? Please explain the reasons for your views.

(116) Do you consider that this would imply modifying the general organisational requirements, the duties of the compliance function, the management of risks, the role of governing body members, the reporting to senior management and possibly to supervisors?

NFU believes that the reinforcement of risk management, compliance and other organizational requirements must include the involvement of employees. On a general level, NFU believes that it is necessary to strengthen the independence and authority of the risk management function in financial sector companies, especially in the wake of the crisis. NFU is of the opinion that employee representation ensures a bigger versatility of independence in the board, as well as in other decision-making or advisory bodies. NFU believes that it is important that the views of the employees can be put forward without being filtered through the chain of command. Employees should therefore have a clear role in the risk management system of a company, as well as in other organisational bodies.

(118) Do you consider that implementing measures are required for a more uniform application of the principles on conflicts of interest?

NFU supports a more uniform application of the principles on conflicts of interests, since the entire industry suffers if only a small proportion of the actors on the market divert from the common standards.

The pressure on the employees in the finance sector to provide suitable advice to customers is continuously increasing, even more so in the aftermath of the crisis where consumer protection has been high on the agenda. The complexity of financial products is increasing and at the same time the individual must take greater responsibility for pension savings.

At the same time, there is an ever-ongoing shift in financial companies' remuneration/bonus systems, leading to situations where the line between advice and sales has been effectively eradicated. Generally speaking, there is a pressure to give more and better advice, but at the same time to sell more products, since remuneration of employees are increasingly linked to their sales targets.

The pressure on the employees in the finance sector to push products and services that are in the best interest of their employer and not in the best interest of the customer puts the

employees in the finance sector in a very difficult position, since the objectivity of the employees in a situation where advice is given stands the risk of being questioned, leading to a very unsatisfying work situation.

That said, NFU is not promoting a level playing field on the grounds that it should be equally “bad” for everyone, but rather that it should be equally rewarding for everyone to work in the finance industry. NFU has maintained that consumers need to be educated primarily in the situation where they actually set out to buy services and are looking for the best deal. This means that finance sector employees have an important role to play and will be major providers of consumer education. The quality of services to the consumers will thus depend upon the level and content of training offered to employees. Furthermore, not only competent, but also sufficient personnel will be the key to success.

Financial education for customers is important from the trade union perspective, since it renders more competent customers. Competent customers, in turn, leads to more advanced work for financial advisors, which is satisfying for the employees. Bank workers want to be rewarded for good service, rather than for selling ever-increasing levels of debt to customers. Finance employees are also the best teachers in the sales moment when customers are willing to adopt the knowledge.

However, the employees must be given the time and opportunity to transfer this knowledge. Aggressive sales targets and merit rating systems are counterproductive to customer protection and qualified advice, and the finance industry employers need to take responsibility for this conflict between sales and advice. This of course also means that employers in the sector must take responsibility for ensuring that their employees have the competence and the time to provide this information to investors.

The training of employees to better be able to meet the needs of consumers is also something that was highlighted in the Commission Staff Working Document on the Follow Up in Retail Financial Services to the Consumer Markets Scoreboard, where it is acknowledged that “... in-depth training on the advantages and disadvantages of the products on offer should form a key part of their profession.”

In this context NFU proposes the establishment of a certification or authorisation for financial advisors, with a view to ensuring that products are only sold by staff that are properly trained and have a thorough understanding of the products including their long term implications for customers.

Such a certification exists in some countries, but there is no legislation of that kind on European level. A certification would lead to a more foreseeable working situation for the employees in the finance sector, since it will be clear what is expected of them and on what grounds.

Such a certification would need to entail the development of competence policies and training schemes, which acknowledge every individual employee's rights to continuous development through regular training and support to achieve the professional qualifications required to uphold a position as financial advisor. A high degree of education and training would provide the advisors with the proper tools and knowledge for providing good customer service.

A certification, taken together with empowered and well-informed consumers, would also be positive for the stability of the financial system itself, leading to a stronger industry and more employment opportunities.

That said, since the Commission touches upon the subject of remuneration in conjunction with sales in the consultation document, NFU would once again like to point out that the issue of the European legislator regulating remuneration is of particular interest to the Nordic countries, since this regulation may impose restrictions on the right to free collective bargaining.

The social partners can, and must be allowed to, assume the responsibility of sound and sustainable remuneration principles. NFU strongly supports the idea of remuneration policies and practices that are consistent with and promote sound and effective risk management, but believes that remuneration policies should be left to the social partners to decide upon, since pay is, according to art. 153.5 in the Treaty on the Functioning of the European Union (TFEU), not for the EU to deal with.

This has also been acknowledged in Recital 14 in the European Parliament legislative resolution of 7 July 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations (see below).

Recital 14: The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular to the provisions of Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the rights, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.

The draft ideas regarding remuneration in the consultation document must therefore be revised on these matters, and it must be made clear that any provisions regarding remuneration policies in financial institutions do not apply to remuneration policies and provisions agreed in collective agreements.

(131) Do you consider that the obligation could apply to all forms of telephone conversation and electronic communications? Please explain the reasons for your views.

If a mandatory regime for telephone and electronic recording across the EU would be introduced, it is important that firms are only allowed to record on equipment provided to employees by the firm. Companies must not be permitted to record conversations taking place on equipment that is not provided by them.

There are, besides the privacy aspects for employees and rules on data protection, other integrity aspects to this discussion. One of the matters that need to be considered is if the possible introduction of recording requirements might lead to a situation where the employer can, through the monitoring of employees and equipment, survey in what way, when and how the individual employee is conducting his day-to-day business. Will the company be able to observe if an employee is talking on a phone not provided by the company, and if that is the case, what would then happen?

(136) What are the benefits of the possible introduction of whistleblowing programs? Please explain the reasons for your views.

From the employee perspective, ensuring sound and efficient whistle-blowing systems is a measure that would be appropriate, and NFU strongly supports the idea of introduction of whistle-blowing programs. Whistle-blowing is, indeed, about ensuring that early warnings from the bottom and up will reach the competent supervisory authority which should have the power, the mandate and resources to follow-up on the warnings and, where necessary, investigate the entire company. NFU is of the firm belief that employees are the first to recognize a systemic failure or a risky business, since it is part of their day-to-day-operations.

As pointed out above, sound and efficient whistle-blowing systems functions as early warning mechanisms, and might play a key role in detecting unsustainable lending trends, high-risk business etc., as well as down-right criminal behavior. Whistle-blowing will also increase financial market stability and mitigate the risk for, and effects of, future crisis.

Whistle-blowing would not only ensure a fast and efficient "point of entry" for national supervisors, but also providing employees with a measure where their concerns are taken seriously. This could be done in a way where the national supervisor consults with employee representatives in a suitable fashion, be it through anonymous "hot-lines" or scheduled, consultative meetings with trade unions. It is important to stress that for employees to be able to provide this information in an orderly fashion, the national supervisors must be able to create reliable systems for this, which are not filtered by a strong director or board of directors.



One of the most important aspects of the discussion on establishment of whistle-blowing mechanisms is to ensure proper safe-guards for employees. The identity of employees who chooses to exercise their right to “blow the whistle” must be protected, and there must be no repercussions of any kind for employees who exercise their right to inform supervisory agencies or similar of any types of misconduct in a company.

Yours faithfully,
Nordic Financial Unions (NFU)

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