

| |
|--|
| <p style="text-align: center;">MiFID Transposition Quality Check Results of call for evidence from market participants</p> |
|--|

Summary of responses to DG Internal Market and Services questionnaire

1. Introduction

Directive 2004/39/EC on markets in financial instruments (MiFID) and its implementing measures ("Level 2" Directive 2006/73/EC and Regulation 1287/2006) entered into force on 1 November 2007. The deadline for transposition by Member States had been set on 31 January 2007, in order to allow industry sufficient time to adapt to the new MiFID environment. After initial delays in the transposition of MiFID and its implementing Directive by a number of Member States, the situation has now improved. By October 2008, almost all Member States had notified complete transposition of MiFID and its implementing Directive.

As part of the process to ensure the high quality transposition and consistent implementation of MiFID and its implementing Directive, the Commission issued a call for evidence on 1 July 2008 (open till 15 September 2008) to 25 European associations of investment firms, banks, regulated markets and investors (see list 1. in Annex). The aim of the call for evidence was to obtain information concerning national implementing measures and practices from different categories of market participant affected by the new rules, and thereby to identify any possible transposition and implementation problems.

Following a risk-based approach, the questionnaire focussed on the core provisions of MiFID and its implementing Directive. More specifically, questions were asked in relation to:

- authorisation procedure and requirements;
- investor protection provisions (best execution, information requirements, 'know your customer' test, inducements);
- provisions aimed at enhancing competition between different trading venues;
- transaction reporting; and
- efficient supervision / cooperation among competent authorities.

The industry representatives were asked to specify whether in their view problems they experience result from faulty transposition by Member States, or from incorrect application of the rules by competent authorities. The questionnaire also included questions which asked whether specific provisions (e.g. on best execution) are respected by all market players. However, the purpose of the questionnaire was not to assess the effectiveness of MiFID. This will be addressed in a review intended to be carried out by the Commission in 2010.

Going beyond the specific questions, the respondents to the call for evidence were invited to report any other transposition or implementation issues that they may have encountered.

In parallel with the call for evidence to industry representatives, another questionnaire on the same set of MiFID issues was sent to the Member States.

This document provides a high level summary of the comments received. Participants have been assured that their answers will be treated confidentially. However, this paper does not aim to assess or verify the information provided with regard to faulty transposition or incorrect application by Member States. The Commission will take account of the information

supplied and will decide in due course whether there is a need to act and, if so, what form this action will take, notably whether infringement procedures will be launched

2. Overview and general comments

The Commission has received comments from 20 organisations (see list 2. in Annex). The respondents were mainly European associations representing investment firms, the asset management industry, regulated markets and banks, as well as associations representing investors. The answers given cover transposition and implementation practice by most Member States.

Respondents made some general comments on MiFID transposition that do not relate to specific provisions: many respondents argued that the transposition deadline for MiFID and its implementing Directive had been too tight both for Member States and market participants. As some Member States only transposed the rules into national law very shortly before 1st November 2007 (in some cases even after that date), there was sometimes very little time left for the investment firms to adapt to the new regime. In this context, one respondent claimed that the implementation period should not start before work by the Committee of European Securities Regulators (CESR) on "Level 3" providing guidance for the implementation of MiFID has been completed.

Member States further argued that it is still too early to draw a final conclusion on the correct application of the rules by competent authorities of the Member States. Many said that for the time being they could only provide preliminary views; this is due to the fact that some Member States only recently started, with considerable delay, to apply the national implementing rules. Similarly, it was argued that it is still too early to evaluate the general functioning of MiFID provisions, as markets are currently developing and adapting to the new environment. It was further argued that compliance of firms with national rules implementing MiFID provisions should be assessed by the competent authorities.

3. Responses to individual questions

3.1. Authorisation procedure and requirements (Title II, Chapter I MiFID) / maintenance of previous authorisation under the Investment Services Directive ("ISD – 93/22/EE)

Almost all respondents answered that Member States do not require the fulfilment of requirements in addition to those provided for in MiFID for the granting of an authorisation in order to provide the investment services and activities included in Annex I Section A of MiFID. However, one association of investment firms pointed out that one Member State has wrongly transposed the authorisation requirements with regard to initial capital requirements for investment firms. This complaint refers to the transposition of Articles 20 and 46 of the Capital Requirements Directive (2006/49/EC). With regard to transition problems from the previous regime (Directive 93/22/EEC- ISD) to MiFID, a number of respondents experienced problems especially due to the late transposition of MiFID in some Member States, which gave investment firms very little time to adapt to the new regime. It was reported that smaller investment firms/banks in particular faced problems in adapting to the new organisational requirements (Article 13 MiFID), in implementing a system to manage conflicts of interests (Article 18 MiFID) and with regard to reporting to competent authorities.

In general, the industry has encountered few legislative or administrative obstacles to the provision of investment services. In this respect it was reported that Member States do not always qualify financial services/products uniformly, which creates problems in the application of the passport created by MiFID on the basis of home country authorisation and could hamper the level playing field. This concerns notably the interpretation of investment advice (Article 4 (1) 4) MiFID and Article 52 MiFID implementing Directive) and the qualification of binary options as financial instruments. The respondents did not report any problems with regard to transitional measures provided for in Art. 71 MiFID.

3.2. Organisational requirements (Article 13 and 18 MiFID; Chapter II and Article 51 MiFID implementing Directive)

Regarding organisational requirements, the industry does not seem to have experienced major shortfalls in transposition.

Few respondents reported cases where Member States had added organisational requirements to those provided by MiFID. One of the examples given relates to a national rule implementing Article 5 (1) d) MiFID implementing Directive regarding the skills, knowledge and expertise required of the personnel of investment firms. It was claimed that in this case the national implementing rule is much more detailed than the MiFID rule and therefore it could be perceived as "goldplating". With regard to record keeping, one respondent is of the opinion that the CESR list of minimum records in Article 51 (3) of the MiFID implementing Directive (CESR/06-552c) goes beyond the boundaries set by the rule at "Level 2".

Finally, one respondent mentioned problems concerning the handling of complaints (Article 10 MiFID implementing Directive). He reported that only a small number of complaints are currently being brought forward by investors, mainly due to practical obstacles. For instance, investors would not know how to file a complaint or are dissuaded by the investment firm from making an official complaint.

3.3. Freedom to provide services and establishment of branches (Articles 31, 32 MiFID)

About one third of the respondents mentioned problems with the "MiFID Passport". Some of the problems relate to host Member States asking for additional requirements not covered by the authorisation obtained in the home Member State, such as a translation of the annual reports in the local language or the registration of outsourcing agreements with the host Member States. According to some respondents, the division of competences between home and host competent authority regarding the supervision of branches (see Article 32 (7) MiFID) is still not fully clear, although it was acknowledged that the situation has improved due to CESR work in this area¹.

Finally, one respondent complained that the freedom to provide investment services and activities (Article 31 MiFID) had not been transposed in its national law. The Member State concerned would grant this freedom on a discretionary basis but the national legislation does not contain a clear legal right for investment firms.

3.4. Best execution (Article 21 MiFID; Chapter III, Section 5 MiFID implementing Directive)

¹ CESR protocol on the supervision of branches under MiFID, October 2007, CESR/07-672.

Most of the respondents agreed that the MiFID provisions on best execution had been properly transposed in the legal orders of the Member States. However, there seems to be some need for clarification on how best execution rules apply to illiquid markets and Over-the-Counter (OTC) markets. One respondent questioned the efficiency of Art. 21 (3) last subparagraph MiFID requiring investment firms to obtain the prior express consent of their clients before proceeding to execute their orders outside a regulated market or an MTF.

On the question of whether market players comply with best execution rules, answers were divided. Some respondents reported shortfalls regarding the execution policy made public by some investment firms (being vague or incomplete). Many respondents answered that it is the task of the competent authorities of the Member States to monitor the application of best execution rules with regard to the supervised entities, while CESR should ensure convergence in the application of the rules.

Moreover, some respondents mentioned problems with respect to post trade transparency due to delayed reporting of trades and double reporting. This could in their view affect best execution by preventing a full comparison of the prices offered by different venues. Some others said that the market in post trade data would need more time to adjust to the new environment offering a greater variety of trading venues.

3.5. Information requirements (Article 19 MiFID; Chapter III, Section 2 MiFID implementing Directive)

Many respondents were satisfied by the transposition of information requirements by Member States. They answered that most Member States did not add information requirements to those provided by MiFID apart from those notified to the Commission under Article 4 MiFID implementing Directive which are published on the Commission's website². However, some examples were provided where Member States allegedly added information requirements without having notified them to the Commission: those cases referred to specific information requirements demanded by certain Member States with regard to illiquid products, investment advice or investment services sold by way of canvassing. It was mentioned that although one Member State had properly transposed the MiFID rules into national law, other national legislation was still in force in this Member State, resulting in additional information requirements related to the solicitation of clients for investments in financial instruments.

3.6. Know your customer test (Article 19 MiFID; Article 35 MiFID implementing Directive)

In general, respondents seemed to be satisfied with the implementation by Member States of the 'know your customer' test. Two respondents reported that some Member States apply a broad definition of investment advice leading to a broader application of the suitability test, whereas other Member States follow a "pragmatic approach" and allow investment firms to stipulate in the contract with the client that no investment advice will be provided with the consequence that no suitability test has to be carried out (a practice which is not accepted by other Member States).

With regard to the application of the suitability and appropriateness tests by investment firms, the majority of the respondents reported that firms are applying the tests in accordance with MiFID. On the question of whether investment firms or investors have encountered obstacles

² http://ec.europa.eu/internal_market/securities/isd/mifid_implementation_en.htm

in a given Member State concerning MiFID requirements related to the suitability and appropriateness tests, one respondent said that the different concepts of professional client according to MiFID (see Annex II MiFID) and qualified investor according to the Prospectus Directive (Directive 2003/71/EC, see definition of qualified investor in Article 2 (1) e) Prospectus Directive) may cause problems. Another reported that the data protection law in force in one Member State would hamper data collection of clients required by the suitability/appropriateness tests of MiFID. Concerning the provision of "execution only" services with regard to non complex instruments, some respondents noted that the interpretation of the criteria set in Article 19 (6) for execution only services and the definition of non-complex instruments in Article 38 MiFID implementing Directive are not fully clear. This could result in a different application of the rules providing for an exception to the obligation to carry out an appropriateness test.

Regarding the categorization of clients (Article 19 (3) MiFID and Article 28 MiFID implementing Directive) shortfalls have been reported in the application of those rules by banks in one Member State. A considerable proportion of the firms in that Member State have not yet been categorized by the banks and often the same clients have been categorized in a different way by different banks. Moreover, a large proportion of the banks were reported as not having informed the clients of the possibility to change the category and did not explain what the chosen category implied.

3.7. Inducements (Article 19 MiFID; Article 26 MiFID implementing Directive)

In general respondents have not met obstacles concerning MiFID requirements related to inducements which hinder the provision of services. Some uncertainties regarding the interpretation of the rules by national regulators have been reported. Nevertheless, CESR's work in this area³ is considered to be helpful.

3.8. Competition between trading venues (Article 5, 27, 34-36 and 46 MiFID)

Regarding competition between trading venues, several respondents made the point that due to the lack of interoperable links between trading and post-trading infrastructures the choice of firms to designate post-trade systems is still limited. According to these respondents the European Code of Conduct for Clearing and Settlement has not yet fulfilled its purpose. It was also reported that certain MTFs encounter difficulties in securing access to clearing and settlement and central counterparty (CCP) services which would effectively restrict competition between those trading venues that have access and those that do not.

The second major issue raised relates to government bond markets. It was reported that MTFs offering trading venue services for government bonds face obstacles in many Member States due to the fact that national Debt Management Offices often favour specific trading platforms in the selection process of primary dealers.

One respondent claimed that not all banks acting as systematic internalisers have actually registered as such. In addition, those who have registered would not always fully comply with pre-trade transparency rules and reporting by these firms would be sometimes delayed or lacking in substance.

3.9. Transaction Reporting (Article 25 MiFID)

³ CESR Recommendations on Inducements under MiFID, May 2007, CESR/07-228b.

Many respondents believe that a common European approach with regard to transaction reporting is still missing. Respondents said that Member States apply a wide range of additional reporting requirements and require reports to be delivered in different formats. In addition, it was reported that competent authorities do not have a common approach regarding the investment firms that are subject to the reporting obligations: The definition of the "firms which execute transactions" in Article 25 (3) MiFID would be interpreted differently by Member States despite the guidelines issued by CESR on this topic⁴. Moreover, respondents said that competent authorities have different understandings concerning the financial instruments that have to be reported, for instance whether over-the-counter (OTC) derivatives should be covered.

Some respondents have encountered problems with multiple reporting requests from different competent authorities. Respondents have the impression that it is still not fully clear to competent authorities whether the home or the host Member State should be the addressee of reports regarding transactions executed by a branch.

Respondents said that most of the problems mentioned here are not caused by faulty transposition, as MiFID would grant some discretion to Member States in this respect. On the other hand, respondents strongly advocated a more harmonised approach with respect to transaction reporting: differing implementation and interpretations create additional costs for market players if they need to report to different regulators.

In order to facilitate transaction reporting, many respondents asked for the establishment of European databases containing all financial instruments listed on a regulated market and common codes for all EU investment firms which are subject to transaction reporting. It was proposed that CESR could play a key role in setting up those databases.

3.10. Efficient Supervision/Cooperation among competent authorities (Articles 49, 50 and Chapter II of Title IV of MiFID)

Most respondents seem to be broadly satisfied with the level of cooperation among competent authorities. Among the areas which deserve better cooperation, transaction reporting was often cited (see above 3.9.). Also, some firms experience uncertainty as regards the division of competences between home and host competent authorities regarding the supervision of branches (Article 32 (7) MiFID). Industry noted that there is still only a limited number of arrangements between home and host authorities in place despite the CESR recommendation to implement such arrangements⁵.

4. Conclusion

Most respondents share the view that in general MiFID and its implementing Directive have been well and consistently transposed by Member States. Only a limited number of outright failures in transposition have been reported. The Commission will analyse those issues and address them in the appropriate manner in the near future.

Apart from certain transposition issues, respondents drew the attention to the functioning and the efficiency of specific MiFID provisions that would deserve closer consideration in the upcoming review of MiFID (scheduled for 2010). The framework of transaction reporting

⁴ CESR Level 3 guidelines on MiFID transaction reporting, May 2007, CESR/07-301.

⁵ CESR Recommendation, the Passport under MiFID, May 2007, CESR/07-337, recommendation Nr. 5.

(Article 25 MiFID) as well as access to central counterparty and clearing and settlement facilities (Article 34 MiFID) are among those areas.

Moreover, industry reported areas where there seem to be shortfalls in the compliance of some investment firms and banks with national rules implementing MiFID. "Best execution" rules (Article 21 MiFID, Chapter III, Section 5 MiFID implementing Directive), the interpretation of "execution only" with regard to non complex instruments (Article 19 (6) MiFID and Article 38 MiFID implementing Directive), registration and pre-trade transparency obligations for systematic internalisers (Article 27 MiFID, Article 21 MiFID implementing Regulation) and the way investment firms handle complaints (Article 10 MiFID implementing Directive) are among those areas that should be closely monitored by national competent authorities.

Finally, certain issues were reported which might deserve further consideration at "Level 3" in order to ensure convergence in the application of MiFID rules and in order to further enhance cooperation between competent authorities. In this respect, reference was made to the cooperation between home and host competent authorities with regard to the supervision of branches, the definition of investment advice and the setting up of databases which facilitate transaction reporting.

Annex

1. Associations to whom the call for evidence has been sent

| <u>Name of Association</u> | <u>President/Secretary General/Director General</u> | <u>Address</u> |
|--|--|--|
| Bureau Européen des Unions de Consommateurs (BEUC) | Monique Goyens | Avenue de Tervueren, 36 Bte 4 B - 1040 Bruxelles |
| EFFAS-European Bond Commission | Christian Schedling | Einsteinstrasse 5 DE - 63303 Dreieich/Frankfurt am Main |
| Euribor ACI | Manfred Wiebogen | 8 Rue de Mail F-75002 Paris France |
| Euro Debt Market Association (AMTE) | Corinne Lambert | 40 Rue de Courcelles 75008 Paris France |
| EUROFI | Didier Cahen | 11 bis, rue Mansart 75 009 Paris (France) |
| European Association of Co-operative banks (EACB) | Hervé Guider | Rue de L'Industrie 26-38 1040 Brussels |
| European Association of Listed Companies (EALIC) | Dorien Fransens | Rue Belliard 4-6 1040 Brussels - Belgium |
| European Association of Public Banks (EAPB) | Henning Schoppmann | Avenue de la Joyeuse Entrée 1-5 1040 Brussels |
| European Associations of Corporate Treasurers (EACT) | Olivier Brissaud | 20 rue d'Athènes 75 009 PARIS (France) |
| European Banking Federation (FBE) | Guido Ravoet | 10 rue Montoyer B- 1000 Brussels |
| European Forum of Securities Associations (EFSA) | Véronique Donnadieu | AMAFI, 13 rue Auber, 75009 Paris |
| European High Yield Association (EHYA) | Gilbey Strub | St Michael's House 1 George Yard 2 nd Floor London EC3V 9DH |
| European Pension Fund Investment forum (EPFIF) | Fred Jaffe | 212 Piccadilly London W1J 9HG |
| European Primary Dealers' Association (EPDA) | Mark Austen | St Michael's House 1 George Yard 2 nd Floor London EC3V 9DH |
| European Private Equity & Venture Capital Association (EVCA) | Javier Echarri | Minervastraat 6 1930 Zaventem |
| European Savings Banks Group (ESBG) | Chris DE Noose | WSBI-ESBG aisbl Rue Marie-Thérèse 11 B-1000 |

| | | |
|--|------------------------------|--|
| | | Brussels |
| European Securitisation Forum (ESF) | Rick Watson | St Michael's House 1 George Yard 2 nd Floor London EC3V 9DH |
| Euroshareholders | Jean-Pierre Paelinck | Rue du Lombard 76 B-1000 Brussels Belgium |
| FIN-USE | | c/o European Commission, SPA2 4/68 BE-1049 Brussels, Belgium |
| Futures and Options Association (FOA) | Anthony Belchambers | 2nd Floor 36-38 Botolph Lane London EC3R 8DE |
| International Capital Market Association (ICMA) | Thomas Hunziker | Talacker 29 P.O. Box 8022 Zurich Switzerland |
| International Swaps and Derivatives' Association (ISDA) | George Handjinicolaou | (European office) One Bishops Square London E1 6AD |
| The European Funds and Asset Management Association (EFAMA) | Peter De Proft | 18 Square de Meeûs 1050 Brussels |
| The Federation of European Securities Exchanges (FESE) | Judith Hardt | Avenue de Cortenberg 52 1000 Brussels |
| The Securities Industry and Financial Markets Association (SIFMA Europe) | Karsten Moller | St Michael's House 1 George Yard 2 nd Floor London EC3V 9DH |

2. Associations who have sent answers⁶:

| Name of Association | Address |
|--|---|
| Association française de la gestion financière (AFG) | 31, rue de Miromesnil F - 75008 PARIS |
| Association française des Trésoriers d'Entreprise | 20, rue Athènes 75442 Paris Cedex 09 |
| Association of British Insurers (ABI) | Association of British Insurers, 51 Gresham Street , EC2V 7HQ |
| Association of Members of the Athens Exchange (SMEXA) | 14-16 Fidiouo str. 106 106 78 Athen |
| Associazione Bancaria Italiana (ABI) | Roma (Palazzo Altieri) Piazza del Gesù, 49 |
| Baillie Gifford & Co | Calton Square 1 Greenside Row Edinburgh |
| Caixa Geral de Depositos | Gabinete de Suporte a Funcaou Compliance Fax.: 352 21 790 54 71 |
| Dansk Aktionærforening | Holte Midtpunkt 20 2840 Holte |
| European Association of Co-operative Banks (EACB) | Rue de L'Industrie 26-38 1040 Brussels |
| European Association of Corporate Treasurers (EACT) | 20, rue d'Athènes 75442 Paris Cedex 09 |
| European Association of Public Banks (EAPB) | Avenue de la Joyeuse Entrée 1-5 1040 Brussels |
| European Banking Federation (EBF) | 10 rue Montoyer B- 1000 Brussels |
| European Forum of Securities Associations (EFSA) | AMAFI, 13 rue Auber, 75009 Paris |
| European Fund and Asset Management Association (efama) | 18 Square de Meeûs 1050 Brussels |
| European Savings Banks Group (ESBG) | WSBI-ESBG aisbl Rue Marie-Thérèse 11 B-1000 Brussels |
| Federation of European Securities Exchanges (FESE) | Avenue de Cortenbergh 52 1000 Brussels |
| International Capital Market Association (ICMA) | Talacker 29 P.O. Box 8022 Zurich Switzerland |
| Investment Management Association (IMA) | 65 Kingsway London WC2B 6TD |
| Millennium bcp | Lisbon |
| Wirtschaftskammer Österreich (WKO) | Wiedner Hauptstr 63 1045 Wien |

⁶ We received answers from some associations/firms to which we had not formally sent the call for evidence. One explanation for this could be that targeted associations forwarded the call for evidence to their sub-organisations or to their members. Nonetheless, we think that the answers received reflect well the scope of market participants affected by MiFID.