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Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS
Securities markets

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MIFID TRANSPOSITION QUALITY CHECK

CALL FOR EVIDENCE

1. INTRODUCTION

The present document is a call for evidence addressed to industry and consumers representatives. Answers should be submitted to the European Commission services to assist the quality check of the transposition in Member States of Directive 2004/39/EC¹ on markets in financial instruments (MiFID), as amended², and the implementing Directive 2006/73/EC³ (MiFID implementing Directive).

1.1. Background

Member States have the obligation to transpose into national law Directives adopted by the European Parliament and the Council and Directives adopted by the European Commission. They also have to implement and enforce effectively those national implementing rules. Under the "Level 4" of the Lamfalussy process, the European Commission checks Member State compliance with EU legislation. The European Commission, as guardian of the Treaty (Art. 211 EC), may take legal action against Member States suspected of breach of Community Law having the power to start infringement procedures against those Member States which have not correctly transposed the Directives. In order to do so, the Commission services have to proceed with a rigorous quality assessment of the transposition texts notified by Member States. At this stage, the Commission services intend to carry out this assessment for core provisions of the Directives. Only key MiFID provisions, including provisions of its Implementing Directive will be assessed (the overview of them is to be found in chapter 2 of this document).

The purpose of this call for evidence is to obtain information from market participants and other stakeholders about inconsistent or faulty transposition or application of legislation in all Member States.

¹ OJ L145, 30.4.2004

² See Directive 2006/31/EC of the European Parliament and of the Council of 5 April 2006 amending directive 2004/39/EC on markets in financial instruments, as regards certain deadlines (*OJ L114, 27/04/2006, p.60*); Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (*OJ L247, 21/09/2007 p. 1*); and Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 concerning the implementing powers conferred on the Commission (*OJ L76, 30.4.2004, p.33*)

³ OJ L241, 2.9.2006

This call for evidence is not a MiFID evaluation exercise. The purpose is not to identify policy issues that might lead to a modification of the MiFID or to adoption of new measures, but to check whether transposition in all Member States has been done in a consistent manner. Moreover, it relates only to MiFID and not to the transposition of other directives.

In order to gather general and thorough information the addressees of this consultation are European associations, in particular investment firms associations, banking associations, regulated markets associations and investors associations. Evidence, to one or several of the issues below, can be submitted by email to the following email address: markt-g3@ec.europa.eu.

The call for evidence will be open for comment until 15 September 2008.

1.2. Scope

Where essential, and to the extent possible, when answering the questions please identify the relevant provision in national law, its corresponding section/article in MiFID, as well as whether the problem concerns faulty transposition or incorrect application. As mentioned above, the quality check of national legislation is based on the main provisions of MiFID. However, information on the transposition and practical implementation of other provisions of MiFID than the ones mentioned below would be appreciated.

In some cases national legislation outside the scope of MiFID might have the effect of indirectly infringing MiFID. Therefore, if market participants or investors are encountering hurdles in a given Member State due to such other requirements, this information would be valuable for the assessment of the implementation of MiFID in the relevant Member State. To the extent possible, please identify what aspect(s) of MiFID are impacted by the presence of these national provisions outside its scope. Moreover, trends about problems that may be observed in more than one Member State are also to be identified.

The questions involve both investment firms and credit institutions providing investment services and activities. Although the text of some questions may be more closely related to either firms or investors, all addressees to this call for evidence should feel free to respond if they consider that they have some useful input to provide.

The Commission services will use the feedback received in the context of its quality check of national legislation and may propose to the Commission to proceed, where appropriate, with infringement procedures. Responses received will be treated under a confidential basis. In case additional information is needed, the Commission services retain the right to contact the respondents.

2. OVERVIEW OF MOST IMPORTANT PROVISIONS

MiFID is intended to transform the landscape for the trading of securities, and to introduce more competition and efficiency throughout Europe's financial markets. For investors, it has both increased their level of protection and given them greater choice. For service providers, it creates a level playing field and they are benefitting from wider market access.

2.1. MiFID authorisation

MiFID establishes a high degree of harmonisation for the provision of investment services in the European Economic Area (EEA), thus allowing for effective mutual recognition ("MiFID passport") of the authorisation granted by the competent authority of the home Member State. According to Directive 2006/73/EC, Member States can introduce additional measures only under strict conditions⁴. Moreover, Member States can only impose such additional requirements on investment firms that are authorised and supervised by their own competent authorities. Concerning branches, Member States can only apply those additional requirements for aspects which are included in Article 32(7) MiFID⁵.

2.1.1. Authorisation procedure and requirements / maintenance of previous authorisation

Investment firms are to be authorised by their home competent authorities if they comply with the authorisation requirements set up in MiFID⁶. The authorisation must specify the investment services or activities which the investment firm is authorised to provide. Investment firms based in any Member State must have the same opportunities of being granted an authorisation. Specific provisions⁷ aim at allowing the maintenance of authorisations granted under the previous regime (Directive 93/22/EEC – "ISD").

- Is your home Member State requiring the fulfilment of additional requirements to those provided by MiFID in order to grant the relevant authorisation?
- Have investment firms encountered any problem concerning the transition from the ISD to the MiFID regime?
- Have investment firms encountered other administrative, legislative, etc obstacles to the provision of investment services and activities and ancillary services for the financial instruments covered by MiFID?
- Have transitional measures concerning information communicated for the purposes of ensuring cross-border activities, been respected (Article 71(4) MiFID)?

2.1.2. Organisational requirements (initial and on-going)

MiFID⁸ requires for the granting of authorisations that investment firms establish adequate policies and procedures sufficient to ensure compliance of

⁴ See Article 4 MiFID implementing Directive

⁵ Article 32(7) MiFID provides that "The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down in Articles 19, 21, 22, 25, 27 and 28 and in measures adopted pursuant thereto".

⁶ Title I, Chapter II MiFID

⁷ Article 71 MiFID.

⁸ Article 13 and 18 MiFID; Chapter II and Article 51 MiFID implementing Directive

the firm with its obligations. Moreover, an investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients.

- Have investment firms encountered any specific concern with respect to compliance, internal audit, risk management and senior management requirements (Articles 6-9 Directive 2006/73/EC)?
- Have investment firms encountered any specific concern with respect to other organisational requirements, e.g. outsourcing, conflicts of interest, record keeping?
- Have investors encountered any problem concerning the handling of complaints (Article 10 Directive 2006/73/EC)?

2.1.3. *Freedom to provide services and establishment of branches*

In practical terms once an investment firm has been authorised by its home competent authority it can provide the investment services and activities covered by that authorisation in its home Member State. Furthermore, it can provide those services, either remotely or through a branch, in other EU Member States, provided that it notifies specified information to its home competent authority. That authority must then forward this information to the competent authority of the Member State in which the investment firm intends to provide service or open a branch within a specified deadline. The firm can only commence investment business in the 'host' Member State after the notification procedure, described in Articles 31 and 32 MiFID, has been completed.

- Are additional requirements being applied in host Member States when making use of the "MiFID Passport"?
- Concerning branches, have supervisory authorities of the host Member States exceeded their competences with regard to Article 32(7) MiFID

2.2. **Investor Protection**

MiFID has introduced strong investor protection rules across the EEA. Investor protection is ensured, *inter alia*, via the obligation to obtain the best possible result for the client, information disclosure requirements, client-specific rules on suitability and appropriateness and rules on inducements. As a general principle, MiFID places significant importance on fiduciary duties of the investment firms. That is why MiFID establishes a general obligation for firms to act in clients' best interest.

2.2.1. *Best execution*

MiFID⁹ obliges investment firms which execute orders on behalf of their retail or professional clients to obtain the best possible result for the client with regard to specified factors (so-called 'best execution'). In doing so,

⁹ Article 21 MiFID; Chapter III, Section 5 MiFID implementing Directive

investment firms have to establish and implement effective arrangements and an execution policy in order to fulfil their obligations. Further requirements concern the relevant information to be provided to clients and the prior consent to be obtained.

- Have investment firms encountered any obstacle in a given Member State concerning the MiFID requirements related to best execution?
- Is best execution respected by all the market players? Are firms really looking for the best possible result? Are they taking all relevant venues into consideration?
- Have investment firms encountered problems in accessing data enabling them to compare relevant venues?

2.2.2. *Information requirements*

MiFID¹⁰ sets forth the general principle that all information (including marketing communications) addressed by an investment firm to clients or potential clients shall be fair, clear and not misleading. It provides – amongst others – that if the information contains an indication of past performance of a financial instrument, financial index or an investment service, or refers to simulated past performance of such financial instrument or financial index certain conditions are to be satisfied. The appropriate information on risks associated with investments in financial instruments and costs and associated charges is to be provided in comprehensible form to clients or potential clients.

- Have investment firms been hindered in their provision of investment services/activities by the application in a given Member State of additional information requirements to those set up in MiFID and its implementing measures?
- How are costs and associated charges disclosed to clients (Article 33 of Directive 2006/73/EC)?

2.2.3. *Know your customer test*

MiFID¹¹ does not rely solely on informational requirements to protect investors. When firms provide services that entail a personal recommendation on the part of the firm (investment advice) or the management of portfolios, they must collect adequate information (client's objectives and personal circumstances) of the client in order to assess the 'suitability' of the specific transaction to be recommended to him/her (or entered into in the course of providing portfolio management). For other services, where clients do not rely on firms' recommendations (such as execution of orders, reception and transmission of orders, etc), firms are required to apply a test of 'appropriateness'.

¹⁰ Article 19 MiFID; Chapter III, Section 2 MiFID implementing Directive

¹¹ Article 19 MiFID; Article 35 MiFID implementing Directive

- Have investment firms/investors observed in some Member States that no clear distinction is made between suitability and appropriateness? Are investment firms applying the suitability and appropriateness tests in accordance with MiFID requirements?
- Have investment firms/investors encountered any obstacle in a given Member State concerning MiFID requirements related to the suitability and appropriateness tests?
- Have investment firms/investors encountered problems in the provision of "execution only" services with regard to non-complex instruments (Article 19 (6) of Directive 2004/39/EC and Article 38 of Directive 2006/73/EC)?

2.2.4. *Inducements*

Inducements¹² are subject to rigorous conditions: intermediaries must diligently undertake duties of care to the retail client. MiFID provides the tools to manage these concerns in order to ensure that investors can count on objective and professional intermediation. It stipulates that the most sensitive inducements must be disclosed and can only be provided where they are designed to enhance the quality of the relevant service to the client and do not impair compliance with the firm's duty to act in the interests of the client.

- Have you encountered any obstacle in a given Member State concerning the MiFID requirements related to inducements which hinder the provision of services?

2.3. **Competition between trading venues**

MiFID¹³ has abolished the concentration rule, providing for free competition between regulated markets, multilateral trading facilities and systematic internalisers for the trading of shares. An incorrect transposition of the relevant MiFID Articles and its implementing measures would hinder the free competition ensured by the Directive.

- Have investment firms encountered legal or administrative problems or other obstacles in obtaining a licence to operate a MTF or in operating as a systematic internaliser?
- Have investment firms encountered problems in the application of pre-trade transparency requirements for MTFs and systematic internalisers?
- Have investment firms encountered problems in relation to the use of published pre-trade transparency information in terms of availability, accuracy and commercial terms on which the information is provided?
- Have investment firms encountered problems in the application of post-trade transparency requirements?
- Could you identify any obstacles that due to an inaccurate transposition/application of MiFID hinder efficient price formation process or access to data related to price?

¹² Article 19 MiFID; Article 26 MiFID implementing Directive

¹³ Article 5, 27, 34-36 and 46 MiFID

- Are there any problems concerning the access to central counterparty, clearing and settlement facilities and the right to designate settlement system?

2.4. Transaction Reporting

MiFID¹⁴ determines that investment firms have to report transactions in any financial instruments admitted to trading on a regulated market to the relevant authority, whether or not such transactions were carried out on a regulated market. The purpose of transaction reporting requirements is to enable the competent authorities to monitor the activities of investment firms with regard to financial instruments admitted to trading on a regulated market in order to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.

- Have investment firms encountered any problem in fulfilling their transaction reporting obligations arising from MiFID and its implementing measures in a given Member State?

2.5. Efficient Supervision/Cooperation among Authorities

MiFID¹⁵ introduces requirements on the ability of supervisory authorities to check whether investment firms and regulated markets are complying with the MiFID provisions in order to allow for an efficient supervision and thus creating an EU level playing field.

- Have investment firms/regulated markets faced problems due to the fact that there is a lack of cooperation among competent authorities?

¹⁴ Article 25 MiFID

¹⁵ Articles 49,50 and Chapter II of Title IV of MiFID