

February 2020

EBF comments to the German Position Paper¹ on MiFID Review

Key points:

- ◆ The EBF is supportive of further consistency in EU regulation (in particular MiFID, PRIIPS and UCITS). The EBF would also like to stress the need for amendments to be evidence-based and for firms to be given a sufficiently long implementation period in order to adapt to the new rules. Finally, the EBF supports the need for an overall assessment of MiFID 2/MiFIR to be conducted according to the principle of proportionality.
- ◆ Wholesale clients should be exempted from the information requirements in MiFID 2 whilst allowing individual clients to opt down and be treated as retail clients for a particular service or transaction. With specific reference to the disclosure of the costs and charges' requirements, we believe it would be more balanced to provide a full exemption from the ex-ante disclosure.
- ◆ We support the proposal to allow investment firms to provide ex-ante cost information under the same conditions as set out in Article 25 (6) MiFID 2. The article entitles the provision of a suitability report immediately after the transaction under certain conditions and without having to delay the transaction.
- ◆ Regarding market structure, we support the improvement of data quality and reporting requirements and would highlight, too, the issue of raising data costs.

➤ Introductory remarks

The EBF Secondary Market Working Group (EBF) welcomes the initiative of the German Ministry of Finance to publish two position papers on proposed changes to MiFID 2/MiFIR regarding investor protection and market structure. These position papers have started an important discussion amongst market participants, investors and trade associations, well ahead of the upcoming MiFID 2 refit².

¹ German Ministry of finance papers are available online relating to [market structure](#) and [investor protection](#).

² In line with the Commission Work 2020 programme announced on the 29th January 2020

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The purpose of this EBF note is to contribute to the discussion by identifying some of the issues that EBF members consider to be particularly important for the future well-functioning of the EU securities secondary markets.

As a starting point we would like to make the following introductory remarks:

- **Near Term vs. Medium/Long Term;** the EBF agrees with the analysis that some issues should be addressed in the near term whereas other issues require further analysis or data and therefore need to be considered on a more medium/long-term basis, e.g. in the context of the Capital Markets Union (CMU 2.0). However, for the medium/long-term issues, too, it is important that the review work be initiated as soon as possible. With this in mind, we would like to refer to the EBF's campaign, Markets4Europe, which proposes a number of game changing solutions to develop a truly integrated EU financial market as part of the 2019-2024 agenda: <https://markets4europe.eu/>
- **Principle of Proportionality;** EBF supports the need for an overall assessment of MiFID 2/MiFIR to be conducted according to the principle of proportionality. As widely recognised, rules need to be fit for purpose, taking into account both the type of end-client and the financial instruments in question.
- Although we have sympathy for the ambition to facilitate smaller investment firms and trading venues, it is important for the integrity of the EU markets to ensure that an appropriate level of investor protection always applies ("same business, same risks, same rules").
- **Consistency between EU regulations;** investment firms and their clients are subject to an increasingly large number of regulations which may be, at times, both overlapping and inconsistent. In some cases, this is in direct conflict with the intention to enhance investor protection. It also leads to increased costs and operational risks for investment firms, as well as making supervision more difficult. As a strong supporter of the Better Regulation agenda, the EBF considers that it should be a medium/long-term goal of the Commission to analyse further the interaction between MiFID 2 and other EU regulations, such as EMIR, SFTR, PRIIPs, IDD, UCITS, AIFMD, Prospectus etc, both from an investor and an investment firm perspective.
- **Evidence-based proposals and implementation periods;** during the past two years, EU investment firms as well as their clients have made significant investments in technology and staff training in order to be compliant with MiFID 2. It is therefore important to ensure that any proposals for amendments are evidence-based and that firms are given a sufficiently long implementation period in order to adapt to the new rules. Where relevant, the introduction of grandfathering provisions should also be considered for ongoing business.

➤ **Investor Protection Issues**

Wholesale clients; under MiFID 2, most information requirements (including, but not limited to, costs and charges) apply to all types of clients, i.e. also professional clients and eligible counterparties. However, wholesale clients have little use of this information as they have the necessary expertise and access to other sources of information in order to make informed investment decisions. Moreover, many of the requirements are

administratively burdensome for investment firms and even slow down the trading process, to the detriment of clients. As a result, the EBF agrees with the proposal to limit the scope of the information requirements in the case of wholesale clients.

From an operational point of view, we consider that the best solution would be to exempt wholesale clients from the information requirements in MiFID 2 whilst allowing individual clients to opt down and be treated as retail clients for a particular service or transaction. With specific reference to the disclosure of costs and charges' requirements, we believe it would be more balanced to provide a full exemption from the ex-ante disclosure.

Only if such an exemption is not possible from a legal perspective, and on the condition it does not introduce excessively onerous and burdensome operational requirements for firms, we would consider a solution that grants wholesale clients the possibility to opt out of the information requirements on financial instruments and the disclosure of the cost and charges' requirements.

Distance communication; the EBF agrees that it is important to review the MiFID 2 requirements in regard to distance communication. We support the proposal to allow investment firms to provide ex-ante cost information under the same conditions as set out in Article 25 (6) MiFID 2 regarding the provision of a suitability report, i.e. immediately after the client is bound by the agreement, provided that the client consents hereto and has been given the option to delay the transaction.³

Moreover, in order to make the rules on distance communication work in practice, it is important to consider the format of the information provided. In this respect, the EBF supports amendments to MiFID 2 which would enable investment firms to provide information to their clients, electronically, by default (contrary to what applies now) unless the client has requested to receive the information on paper. Such an amendment would in our view also be in line with the Commission's digitalisation agenda. However, it is essential to make the rules on distance communication workable for non-digital clients i.e. that have chosen to receive information on paper. In fact, we should consider an investment firm to have fulfilled its obligations in providing information (e.g. ex-ante cost & charges or suitability report) immediately after the transaction, and when it has sent the information to the client by post, even if the postal service takes several days.

Reporting to clients; a further issue where changes could be important is the reporting to clients. An example of reporting rules to be re-assessed in an upcoming review is the article 62(2) of the delegated regulation to MiFID II⁴ which requires investment firms to notify retail clients when the value of their (portfolio of) leverage instruments decreases with (multiples) of 10%. In our view, these rules are overly burdensome for investment firms and provide little benefit for clients, in particular, when investing in smaller amounts. Another example of a reporting requirement in MiFID 2 needing to be reviewed is the quarterly execution quality report under RTS 27. Owing to the requirements' extreme level of detail, their uncertain scope and the one-size-fits all approach, considerable data is currently being published which is of little use to firms and their clients when evaluating best execution. Taking into account the considerable IT investments made by firms in

³ ESMA's Q&A 9.28 needs to be revised, in particular as regards the requirement to provide the information "simultaneously" through a durable medium, which is not a workable solution in practice and not in line with the wording of article 25.6 MiFID 2 or the rules on distance communication in PRIIPs.

https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf

⁴ Delegated regulation (EU) 2017/565 of 25 April 2016

order to be compliant with these reporting requirements, it is important that any proposals for amendment be made subject to in-depth consultation with stakeholders.

We would like to suggest the deletion of the obligation in Art. 63 (1) of the delegated regulation to MiFID II that requires investment firms to send to each client a statement on the financial instruments being held for the client, on a quarterly basis. As far as we can see, clients do not use these reports. Instead, they check their accounts online.

Research; the impact of MiFID's new rules on research had various consequences. Some market participants stated that these rules had positive effects on research costs (especially for research relating to large companies), while others claimed that the rules had negative effects on SME research. For this reason, a thorough review should be conducted on the impact that these rules have on the costs and availability of research relating to small and medium-sized businesses. Any amendments to the legislation should ensure that incentives for providing an adequate amount of research on SMEs are set.

PRIIPs – scope; the EBF supports the ESAs' supervisory statement dated 24 October 2019 in relation to the PRIIPs' scope for bonds. We fully agree with the ESAs that the purpose of the PRIIPs Regulation was to address packaged or wrapped investment products. In general, we support the need for further details regarding the PRIIPs' scope of application.

Horizontal review of information requirements; as a medium/long-term project, the EBF proposes that the Commission take a horizontal approach to align the rules on pre-contractual disclosure in MIFID, PRIIPS, IDD, prospectus and UCITS/AIFMD more effectively. We believe that such a review is important in order to ensure that (i) clients are provided with information that is neither contradictory nor comparable and (ii) EU legislation provides a level playing field between different business models and discourages regulatory arbitrage. In our view, this long-term project on pre-contractual disclosures could also form an important part of CMU 2.0 as it is likely to facilitate the retail client's engagement in capital markets and increase competition.

➤ **Market Structure Issues**

Improvement of data quality; according to the EBF, on the basis of specific business cases, described by our members⁵ over the last 18 months a prioritised area for the MiFID Review would be a sensible improvement of reference data quality and availability. Currently, such data are hard to find and difficult to source. Furthermore, over time, they become unstable. In reality, timestamp differ from vendor to vendor and the need for reconciliation becomes crucial. Given the prospect of moving towards a MiFID refit, we believe the data quality could improve significantly so long as ESMA's database (FIRDS) is qualified as a "golden source" which firms can use in order to ascertain which instruments are traded on a trading venue. However, while we very much welcome the proposal to make FIRDS the "golden source" for reference data we would like to emphasise that the FIRDS' database requires a comprehensive technical upgrade to increase system stability and speed, significantly.

⁵ And that we are ready to share

We agree that the “traded on a trading venue” (ToTV) concept, which is of fundamental importance for both the transparency and transaction reporting regime in MiFIR, needs to be reassessed. For example, this is the case for the application of ToTV to non-standardised OTC derivatives. As already mentioned, we believe that the data quality is likely to improve significantly so long as ESMA’s database (FIRDS) is considered as a “golden source” which firms can use in order to ascertain which instruments are traded on a trading venue.

Cost of market data; costs for market data have increased since the entry into application of MIFID 2. Despite the Directive stressing that the costs of market data should be provided on a reasonable commercial basis - explicitly specified as being based on cost - with a reasonable margin, the new requirement has not reached its objective. Overall market data costs and complexity have continued to increase whereas market data transparency and data quality have decreased. The main cost driver for market data users is not so much an increase in already existing fees but the introduction of new fees related to multiple display-terminals, non-display applications, reporting and distribution licences, systematic internalisers’ market data fee, connectivity fees etc. combined with unclear and complex market data policies and definitions and unreasonable audit procedures. Additionally, regulatory requirements contribute to the increasing cost of market data. For example, the Market Abuse Regulation requires access to realtime data to ensure proper surveillance. Akin to what is occurring in the European Union, market data costs visibly increased in the USA, where the SEC intervened during 2019. This provides a further confirmation that ‘market data’ gained prominence around the globe and gradually became a very valuable “commodity” to dispose of and to source.

Harmonisation of reporting regimes; the EBF agrees that an important medium/long-term project would be one that subjects the reporting regimes under MiFID/MiFIR, EMIR, SFTR, REMIT, the Short Selling Regulation and MAR to a comprehensive analysis with a view to harmonising and avoiding overlap and duplication. This project was indeed provided for in the Commission’s EPTF Report, dated August 2017, and in a number of responses to the related market consultation. Similarly, existing and planned requirements regarding the use of identifiers such as LEI, ISIN, UTI and UPI should be reassessed.

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About the EBF

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international - while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.