



13 January 2011

By email: [econ-secretariat@europarl.europa.eu](mailto:econ-secretariat@europarl.europa.eu)

From: BVCA Regulatory Committee

Dear Sirs

I am writing on behalf of the British Private Equity and Venture Capital Association ('BVCA') in response to the Review of the Markets in Financial Instruments Directive questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP.

The BVCA is the industry body for the UK private equity and venture capital industry. With a membership of over 450 firms, the BVCA represents the vast majority of all UK based private equity firms and their advisers. This submission has been prepared by the BVCA's Regulatory committee, which represents the interests of BVCA members in regulatory matters relevant to the private equity and venture capital industry.

As major investors in private companies, and some public companies, our members have an interest in regulatory matters relating to those companies and the impact on their management.

Although the Alternative Investment Fund Manager Directive ("AIFMD") will, once it is in force, apply to probably the majority of private equity and venture capital firms, there will remain a number of firms who are either investment advisers or discretionary investment managers and who will fall within the scope of MiFID 2. These firms are principally in the UK and are already regulated under the existing MiFID. They will therefore be affected by MiFID/MiFIR 2. However, many of the provisions (and hence questions on the questionnaire) will not be applicable to the activities of venture capital and private equity firms. As a result, we are not responding to most of the questions which are raised.

Yours faithfully

A handwritten signature in black ink, appearing to be 'M. Chamberlain', is written over a horizontal line.

Margaret Chamberlain  
Chairman, Regulatory Committee, BVCA

## 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](mailto:econ-secretariat@europarl.europa.eu) by 13 January 2012.

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?	

<p>Our understanding is that the proposal is to restrict the ability of third country firms to provide services to persons in the Union. We consider this to be highly damaging to the financial markets. In our context it is essential that venture capital and private equity firms based in Europe are able to use the services of other third country firms. For example, if an EU adviser/manager is managing or advising on investments which include investments in developing economies, it may well be essential for it to have investment advisers based in those countries and/or to access the markets through the use of third party intermediaries. It is not realistic to suggest that these services can only be provided by the third country firm if it is appointed "on the own exclusive initiative" of the venture capital/private equity firm. We say this because this concept is defined to mean that the third country firm cannot have undertaken any advertising or marketing. This simply does not reflect the realities of commercial life, and investment firms should be responsible for selecting the appropriate service provider. The proposal does not reflect the reality that firms need to interact with other firms in the jurisdictions where they plan to invest, and these jurisdictions are highly unlikely to be equivalent in the way defined by the Commission. We consider that at the very least, MiFID investment firms should be able to appoint such advisers and service providers as it thinks appropriate in the exercise of its duties to act in the best interests of its clients.</p>	<p>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?</p>
<p>Corporate governance</p>	<p>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</p>

	<p>Directive Article 65 to ensure that they are proportionate and effective, and why?</p> <p>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?</p> <p>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?</p> <p>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?</p> <p>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?</p> <p>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?</p> <p>11) What is your view of the requirement in Title V of the Regulation</p>
<p>Organisation of markets and trading</p>	

	<p>for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?</p>	
	<p>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?</p>	
	<p>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?</p>	
	<p>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?</p>	
<p>Investor protection</p>	<p>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?</p>	<p>We consider that the new requirements will have an adverse impact on the professional investors who use the services of venture capital and private equity firms. In a venture capital/private equity context, the concept of an adviser "assessing a sufficiently large number of financial instruments available on the market" in order to describe</p>

		<p>itself as independent, is simply not applicable. Where a firm is investing in private companies, each of which is unique, the concept of the "instruments available on the market" makes no sense. In addition, it is common in venture capital/private equity for the investment firms to reach agreements with their clients as to the basis on which they may receive fees, commissions or other monetary benefits from third parties. At the very least these proposals should be restricted to the provision of services to retail clients.</p>
	<p>16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?</p>	
	<p>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?</p>	
	<p>18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?</p>	
	<p>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?</p>	
<p>Transparency</p>	<p>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?</p>	

	<p>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?</p>	
	<p>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?</p>	
	<p>23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?</p>	
	<p>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)?</p>	
	<p>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</p>	

	reasonable cost, and that competent authorities receive the right data?
Horizontal issues	<p>26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?</p>
	<p>27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?</p>
	<p>28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?</p>
	<p>29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?</p>
	<p>30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?</p>
	<p>31) Is there an appropriate balance between Level 1 and Level 2 measures within MiFID/MiFIR 2?</p>



**Detailed comments on specific articles of the draft Directive**

Article number	Comments
Article 4(9):	<p>This provides that a professional client meets the criteria laid down in Annex II. This definition is now also used in the AIFMD. It has never been suitable in the context of venture capital/private equity, because the criteria for determining who may be treated as a professional client on request do not reflect the reality of the true "professional" venture capital/private equity investor. This is because the Directive requires that a client meets two out of three criteria. In many cases this will simply not apply because the three criteria are:</p> <ul style="list-style-type: none"> <li>- The client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters, <i>This simply does not work in a venture capital/private equity context. Even the largest firms may not carry out that many transactions even in a year. It therefore becomes an irrelevant criteria.</i></li> <li>- The size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds €500,000, <i>Whilst this can be less of an issue, it can work to exclude venture capital/private equity executives who work in the sector and have some expertise in the sector but who have not got a financial instrument portfolio of that size.</i></li> <li>- The client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged. <i>Many persons who want to use the services of venture capital/private equity firms are themselves successful entrepreneurs from ordinary businesses that have been backed in the past by venture capital/private equity. They may well not have worked in the financial sector, but will have a good understanding of how the industry works.</i></li> </ul> <p>As a result, you can see that whilst the conditions may be suitable to assess the professionalism of investors in liquid equity markets, they are</p>

	<p>not suitable in a venture capital/private equity context.</p> <p>We believe that it is important that the opportunity is taken to introduce sufficient flexibility into the definition to cope for the wide range of firms (and accordingly professional clients) who may be within scope. The importance of this is increased by the introduction of European-wide regulation of venture capital/private equity through the AIFMD which is based largely on the use of this definition. We attach a separate paper written to the Commission by the European Venture Capital Association on behalf of the Public Affairs Executive of the industry which makes suggestions on this very topic.</p>
Article ... :	
Article ... :	
<b>Detailed comments on specific articles of the draft Regulation</b>	
<b>Article number</b>	<b>Comments</b>
Article ... :	
Article ... :	
Article ... :	