

REVIEW OF THE MIFID

EC CONSULTATION

BEUC RESPONSE TO CONSULTATION

Contact: Financial Services – financialservices@beuc.eu
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BEUC, the European Consumers' Organisation
80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

 **EC register for interest representatives:** identification number 9505781573-45 

Summary

BEUC welcomes the consultation issued by the Commission services on the MiFID review.

BEUC's contribution to this consultation focuses on investor protection (part 7 of the Consultation document).

BEUC supports the strengthening of consumer protection within MiFID and the future application of the MiFID framework to the sales of all PRIIPS

Regarding the **scope of the Directive**, BEUC:

- supports the Commission's suggestions regarding the exempted entities;
- strongly supports that structured deposits should be covered by the MiFID;
- expresses its concerns about the 'grey capital market' that should also be covered by the Directive.

Regarding the **conduct of business rules**:

- except one of its members, BEUC supports the ban of execution only services;
- BEUC strongly supports strengthening all measures regarding the prevention of conflicts of interests, including a ban on inducements for all advice services, the inducements disclosure and a ban of all remuneration schemes and sales objectives that naturally lead salespeople not to act honestly, fairly and professionally, even if they want to;
- the liability regime of investment firms should be improved: burden of proof must be on the side of the firm, genuinely independent ADR procedure must exist in each Member State and collective judicial redress must be put in place;
- BEUC fully supports the measures suggested regarding organizational requirements for the launch of products, operation and services, in particular:
 - o assessing the compatibility of the product, service or operation with the characteristics and requirements of the clients to whom these products would be offered;
 - o stress testing the products and services as appropriate;
 - o ensuring that staff possesses the necessary expertise to understand the characteristics and risk of products and services provided and receive the appropriate training when new products are offered.

BEUC supports the recording, with adequate protection of privacy in place, of telephone and electronic contacts with retail clients that lead or could lead to giving financial advice or collecting orders.

General remarks

This document is BEUC's contribution to the European Commission consultation on the review of the MiFID¹. The consultation document² addresses several aspects of the MiFID: developments in market structures, pre- and post-trade transparency, data consolidation, measure specific to commodity derivative markets, transaction reporting, investor protection and provision of investment services.

BEUC's contribution to this consultation focuses on investor protection (part 7 of the consultation document).

Regarding pre and post-trade transparency (part 3), BEUC considers that the retail investor with sufficient knowledge and experience should have access to post-trade consolidated information in a reasonable term and at a reasonable price.

Pre and post-trade transparency are required to allow the investment firm to comply with their best execution duty. The retail investor should be in a position to be confident that the firm has access to all required information to comply with their duties vis-à-vis their clients.

Analysis of the consultation

7. Investor protection and provision of investment services³

7.1. Scope of the Directive

7.1.1. Optional exemptions for some investment service providers

(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.

One of the key findings of the 1st Behavioural Study on Retail Investment Services (which was conducted on behalf of the European Commission) is that in most of the cases, the retail investors' decision is influenced by the advice of an investment professional (intermediary or advisor):

Advice is ubiquitous in the retail investment market. Nearly 80% of investments are made in a face-to-face setting, usually with an employee of the investment provider or a professional advisor. 58% of investors say their final choice of

¹ Directive [2004/39/EC](#) of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

² http://ec.europa.eu/internal_market/consultations/2010/mifid_en.htm

³ From this point, we follow the titles as mentioned by the European Commission in the consultation document.

product was influenced by an advisor, while the advisor initiated the purchase on a quarter of occasions. ⁴

It is of crucial importance to note that – according to the study – the retail investor believes in the advice provided by the advisor, irrespective the location or the nature of the service provider.

Maintaining the optional exemptions of article 3 can create an unlevel playing field for MiFID firms who provide services to retail investors. Those should not be disadvantaged in comparison with non MiFID firms that, in some Member States, could be subject to lighter requirements regarding investor protection.

BEUC generally agrees with the requirements those firms could be subject to as suggested by the Commission⁵.

However, the duty to act in the best interest of their clients should be a general principle applicable to all services provided to retail investors by those firms. This requirement should not be solely applicable to the reception and transmission of orders like suggested in the consultation document.

Secondly, the appropriateness test (art. 19.5 of MiFID Directive) should be required for all orders collected by those firms. This can be the responsibility of the collecting firm or of the firm the orders are transmitted to.

7.1.2. Application of MiFID to structured deposits

(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.

BEUC agrees with the Commission's suggestion that MiFID conduct of business and conflicts of interest rules should be extended to the advised and non-advised sale of structured deposits by credit institutions.

Research made by BEUC's UK member WHICH? has shown that structured deposits are distributed in the UK without sufficient information and that some types of structured deposits have historically delivered very poor value and some have never achieved the maximum returns they advertise.

⁴ Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective, Final Report; page 7
http://ec.europa.eu/consumers/strategy/docs/final_report_en.pdf

⁵ Consultation document, page 51 – 52 :
...the Commission services consider that, while it is appropriate for Member States to retain the possibility to exempt certain entities providing advice (with or without the subsequent reception and transmission of clients' orders) from the Directive, these firms could be subject, in national legislation, to requirements analogous to the MiFID ones in the following areas:
a) proper authorisation process, including the assessment of fit and proper criteria;
b) information to clients;
c) suitability test;
d) payments received from third parties (inducements);
e) reporting to clients and
f) duty to act in the best interest of the client when transmitting orders received from clients

The extension of the MiFID rules to the structured products is necessary to prevent loopholes in the field of structured investment products. If structured deposits remain out of the MiFID scope, it would be an incentive for the industry to sell structured products as a deposit in place of financial instruments (bonds, notes, UCITS) avoiding the MiFID requirements.

7.1.3. Direct sales by investment firms and credit institutions

(86) What is your opinion about applying MiFID rules to credit institutions and investment firms when, in the issuance phase, they sell financial instruments they issue, even when advice is not provided? What is your opinion on whether, to this end, the definition of the service of execution of orders would include direct sales of financial instruments by banks and investment firms? Please explain the reasons for your views.

BEUC considers that there is no reason that could justify that MiFID conduct of business or conflict of interest rules would not apply to direct sales by investment firms or credit institutions.

If there is any doubt about the applicability of MiFID in such cases, the Directive should be clarified to avoid those doubts.

- **Additional comment**

BEUC is concerned about the distribution of 'grey market investments' (in German 'Grauer Kapitalmarkt') instruments which are for instance financial participations in teak plantations, art objects, real estate projects, containers...). Those investment products are not considered as financial instruments and intermediaries selling those products would be out of the MiFID scope.

The best solution to tackle all malpractices related to the distribution of those investments (lack of reliable information, risk disclosure, conflicts of interest, fraud...) seems to include them in the scope of MiFID. Retail investor could then easily control if the distributor is controlled and sanctions could be applied if the intermediary is not compliant with conduct of business rules.

7.2. Conduct of business obligations

7.2.1. "Execution only" services

(87) What is your opinion of the suggested modifications of certain categories of instruments (notably shares, money market instruments, bonds and securitised debt), in the context of so-called "execution only" services? Please explain the reasons for your views.

(88) What is your opinion about the exclusion of the provision of "execution-only" services when the ancillary service of granting credits or loans to the client (Annex I, section B (2) of MiFID) is also provided? Please explain the reasons for your views.

(89) Do you consider that all or some UCITS could be excluded from the list of non-complex financial instruments? In the case of a partial exclusion of certain UCITS, what criteria could be adopted to identify more complex UCITS within the overall population of UCITS? Please explain the reasons for your views.

(90) Do you consider that, in the light of the intrinsic complexity of investment services, the "execution-only" regime should be abolished? Please explain the reasons for your views.

BEUC members ⁶ consider that the best and simplest measure to solve the complex / non-complex discussion is to abolish execution only services.

In other words, the appropriateness test as defined by article 19.5 of the MiFID Directive should be carried out for all investment services, except financial advice that requires the suitability test defined by article 19.4.

This doesn't mean that retail investors couldn't have access to investment services if they do not provide (enough) information to assess their knowledge or experience in the investment field; they will be warned that no appropriateness test is possible and that they act under their only responsibility.

This doesn't mean either that the retail investor could not invest in a product that is not appropriate to his/her profile. In that case, s/he will be warned by the investment firm.

The reasons why the execution only regime should be abolished are various:

1. Consumers are often confused about the true nature of their investment. This is one of the key findings of the 1st Behavioural Study on Retail Investment Services⁷. *In particular, investors, especially purchasers of pensions and structured products, are often uncertain whether or not they are exposed to the risks of stocks and shares. Nearly 40% of investors in stocks and shares (wrongly) believe their initial investment is protected*⁸. Industry generally considers that financial education is THE solution, but evidence shows that the improvement brought by financial education is relatively small^{9 10 11}.
2. There is evidence that credit institutions give investment advice over the counter or by phone but present the operation as 'execution only' by mentioning on the order document to be signed at the counter that the client took the initiative of the investment and did not receive any advice or by recommending to give the order via the 'execution only' internet site of the institution.

⁶ Except WHICH?, BEUC UK member.

⁷ Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective, Final Report; page 7.

⁸ Ibidem.

⁹ Don't rely on financial education as a silver bullet. Financial literacy/education has relatively small impact.

Presentation by Nick Chater, University of Warwick, Roman Inderst, Goethe Universität Frankfurt Steffen Huck, UCL for the conference "Behavioural Economics, so What: Should Policy-Makers Care?" organised by the European Commission on 22/11/2010, page 19.

http://ec.europa.eu/consumers/conferences/behavioural_economics2/docs/decision_technology_22112_010_en.pdf

¹⁰ Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective, Final Report; Literature review, page 40.

¹¹ Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective, Final Report; Conclusions and recommendations, page 390:

Our result on the efficacy of financial education is mixed but more limited. More educated subjects, especially those who rated themselves as numerate and financially literate do indeed make better investment decisions. However, we do not know whether, or to what extent, it is possible to improve these traits through education or information campaigns. Our review of the BE literature showed that evidence on the success of financial literacy programmes is currently limited. Finally, while subjects who spent longer on their decisions made significantly better choices, the size of the effect was tiny, so we find no evidence suggesting that policy interventions intended to encourage consumers to take more time over non-advised investment choices would be effective.

3. The A option proposed by the Commission (restricting the definition of non-complex financial instruments to be allowed in the execution only regime¹²) does not bring improvement to the point 1 above. Discussions will remain to know if a financial instrument is complex or not.
4. The compulsory assessment of the knowledge and experience of the investor (this is what is necessary for the appropriateness test) cannot be considered as a restriction of one's personal freedom and is proportionate to the positive aspects of the measure. It would not be more restrictive than the compulsory use of the seat belt by car drivers. The investor keeps the possibility to invest in all investment products, even if they are not appropriate to their knowledge and experience.
5. It is common practice that credit institutions and investment firms systematically establish an investor profile for all their clients to avoid any legal risk when they address recommendations to their clients that could be interpreted as investment advice (subject to the suitability test). For those firms, applying the appropriateness test on client orders does not require heavy investments.

If the execution only is maintained (option A in the consultation document, page 54), it is necessary to clearly distinguish complex and non-complex financial instruments. In that case, we support greater supervisory action by regulators to police the boundary between 'execution only' and advised services.

In this context, BEUC is concerned about the UCITS III products, also called Newcits. Those products are quite more complex and less transparent than more classic UCITS and can absolutely not be considered as non-complex financial instruments.

7.2.2. Investment advice

(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.

BEUC supports the suggestion that, prior to the provision of the service, investment advisors should inform the client about the basis on which advice is provided. This would be in line with the disclosure of conflicts of interests.

However, we would only accept a definition of independent advisor which obliges firms to conduct a "comprehensive and fair analysis of the relevant market" and provide advice which is "unbiased and unrestricted". We believe that this is a more appropriate wording than "sufficiently large". We would define the relevant market as all retail investment products which are capable of meeting the investment needs and objectives of a retail client.

(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.

¹² See Consultation document, page 54 and 55.

BEUC has no strong opinion on this suggestion. Member states should have the option to adopt such a measure.

However, BEUC considers that intermediaries should not be able to use the written document to include any caveats or allow the intermediary to limit their liability by stating that certain information was not provided by the consumer. If the intermediary does not have sufficient information from the consumer to make a personal recommendation then they should not make any recommendation.

In Germany, were such a possibility exists, the quality of the records is less than poor. These records protect banks instead of consumers/investors; they are no evidence for consumers in case of wrong advice

(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.

If the service offered by the intermediary firm is an ongoing advice or portfolio management service then we support these requirements. If an ongoing advice service is provided, the intermediary should clearly confirm the details of the ongoing service, its associated charges, and how the retail client can cancel the service and cease payment of the associated charges.

In other cases, this new provision would be a golden reason for investment firms and banks to contact their client and suggest them making some unnecessary adaptations to their investments pretending to optimise the portfolio, but more certainly to earn some commissions – unless there will be a commission ban in place as supported by BEUC. Retail investors invest most of the time for the long term. If the initial analysis and strategy is good, there is no requirement to change the strategy or the investments every year. The benefits of frequent changes will often be lower than the costs related to it. A regular check up by an independent advisor makes sense but, like in the context of a person's health, it is not required every year.

7.2.3. Informing clients on complex products

(95) What is your opinion about obliging intermediaries to provide clients, prior to the transaction, with a risk/gain and valuation profile of the instrument in different market conditions? Please explain the reasons for your views.

Barring some exceptions, retail investors are usually not able to understand or evaluate the probability of gain or losses of structured products.

For marketing reasons, structured products are often structured to offer a high maximum return, even if it is quite unlikely to happen.

The retail investor should be informed about the risk/gain and valuation profile of the instrument in different market conditions and about the probability of those market conditions.

(96) What is your opinion about obliging intermediaries also to provide clients with independent quarterly valuations of such complex products? In that case, what criteria should be adopted to ensure the independence and the integrity of the valuations?

(97) What is your opinion about obliging intermediaries also to provide clients with quarterly reporting on the evolution of the underlying assets of structured finance products? Please explain the reasons for your views.

(98) What is your opinion about introducing an obligation to inform clients about any material modification in the situation of the financial instruments held by firms on their behalf? Please explain the reasons for your views

BEUC considers that if the reimbursement of the initial investment is not protected or guaranteed, quarterly evaluations should be provided to the retail investors. The retail investor should be informed about any material modification in the situation of the financial instrument held by the firm.

BEUC is particularly concerned about the UCITS III products, also called Newcits, whose assets may be invested in derivatives for a relatively large part and not only for protection purposes. Those financial instruments are complex and quarterly valuation should be provided to retail investors.

(99) What is your opinion about applying the information and reporting requirements concerning complex products and material modifications in the situation of financial instruments also to the relationship with eligible counterparties? Please explain the reasons for your views.

BEUC has no strong opinion on this question.

(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?

The ethical or socially oriented character of an investment should be defined on a harmonised base. Any change in that ethical or socially oriented character of an investment should be made public by the issuer and transmitted by the investment firm to the investor.

7.2.4. Inducements

(101) What is your opinion of the removal of the possibility to provide a summary disclosure concerning inducements? Please explain the reasons for your views.

(102) Do you consider that additional ex-post disclosure of inducements could be required when ex-ante disclosure has been limited to information methods of calculating inducements? Please explain the reasons for your views.

The current situation is not satisfactory. In general, the only disclosure is a discrete short ex-ante summary and it is difficult to obtain more information, even when asking for.

BEUC supports the Commission's suggestions to ban summary disclosure and to introduce an ex-post reporting obligation in all cases when the ex-ante disclosure can not be detailed.

(103) What is your opinion about banning inducements in the case of portfolio management and in the case of advice provided on an independent basis due to the specific nature of these services? Alternatively, what is your opinion about banning them in the case of all investment services? Please explain the reasons for your views.

BEUC supports a ban on inducements for all investment advice services, including those provided by independent advisers, portfolio management and all sorts of restricted advice (advice that is based on a less than independent analysis of the market for products and services). The key principle should be that product providers should play no role in determining the remuneration of the investment adviser and should be prohibited from paying commission or providing any other type of service which might influence the advice provided by the intermediary.

The business model for the remuneration of intermediaries in the retail financial industry is currently based on inducements (entrance fee, kickbacks, and soft inducements). The financial instruments' cost structure takes those inducements into account. If less charged financial instruments to be distributed by fee based advisors do not exist, independent advice for retail investor cannot emerge.

The evidence from the UK is that merely disclosing inducements (but allowing them to continue) does not lead to the appropriate degree of consumer protection.¹³

7.2.5. Provision of services to non-retail clients and classification of clients

(104) What is your opinion about retaining the current client classification regime in its general approach involving three categories of clients (eligible counterparties, professional and retail clients)? Please explain the reasons for your views.

(105) What are your suggestions for modification in the following areas:

a) Introduce, for eligible counterparties, the high level principle to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading when informing the client;

b) Introduce some limitations in the eligible counterparties regime. Limitations may refer to entities covered (such as non-financial undertakings and/or certain financial institutions) or financial instruments traded (such as asset backed securities and nonstandard OTC derivatives); and/or

c) Clarify the list of eligible counterparties and professional clients per se in order to exclude local public authorities/municipalities? Please explain the reasons for your views.

(106) Do you consider that the current presumption covering the professional clients' knowledge and experience, for the purpose of the appropriateness and suitability test, could be retained? Please explain the reasons for your views.

¹³ http://www.fsa.gov.uk/pubs/other/CRAreport_menu.pdf

(104 – 106)

BEUC has no strong opinions regarding those questions.

7.2.6. Liability of firms providing services

(107) What is your opinion on introducing a principle of civil liability applicable to investment firms? Please explain the reasons for your views.

(108) What is your opinion of the following list of areas to be covered: information and reporting to clients, suitability and appropriateness test, best execution, client order handling? Please explain the reasons for your views.

BEUC considers that the liability regime must be improved to offer the retail investor a real possibility to be compensated when it is justified.

It is particularly difficult for retail investors to be compensated when they suffer damage due to negligence or fault from their investment firm. Currently, the bad information or advice consequences are quite often negligible for the firm providing services. The distribution of financial instruments guaranteed by Lehman Brothers is a good example of it: infringements are difficult to be proven by consumers and individual action is almost impossible. In Belgium, only the large inquiry by the inspection services of commercial practices and consumer protection made it possible, due to numerous collated cases, to prove the malpractice and aggressive sales of those structured products. In other countries like Germany, different courts have pronounced different judgements on same type of facts.

Financial service products are long-term products and BEUC would oppose any blanket restriction on consumer access to ADR schemes based only on a time limit relating to when the original advice was given rather than when the consumer first became aware of their grounds for complaint.

BEUC considers also that if there is an increased possibility for retail investors to get compensation when justified, it would be an important incentive for the industry to improve the quality of its financial services.

Therefore, BEUC strongly supports that

- burden of proof must be on the side of the investment firm. This can be more efficient than other detailed provisions;
- really independent ADR procedure must exist in each Member State,
- collective judicial redress must be put in place.

7.2.7. Execution quality and best execution

(109) What is your opinion about requesting execution venues to publish data on execution quality concerning financial instruments they trade? What kind of information would be useful for firms executing client orders in order to facilitate compliance with best execution obligations? Please explain the reasons for your views.

(110) What is your opinion of the requirements concerning the content of execution policies and usability of information given to clients should be strengthened? Please explain the reasons for your views.

The retail investor with sufficient knowledge and experience should have the possibility to check if his/her firm is compliant with the best execution rule. But it should be the responsibility of the financial market supervisor to effectively control if the investment firms and credit institutions are compliant with conduct of business rules, including the best execution duty. The retail investor should be able to be confident that the firm is compliant with the best execution rule.

BEUC considers that all data required for an efficient control must be available. The fact that those data are available will naturally stimulate the firms to improve the quality of orders execution.

7.2.8. Dealing on own account and execution of client orders

(111) What is your opinion on modifying the exemption regime in order to clarify that firms dealing on own account with clients are fully subject to MiFID requirements? Please explain the reasons for your views.

(112) What is your opinion on treating matched principal trades both as execution of client orders and as dealing on own account? Do you agree that this should not affect the treatment of such trading under the Capital Adequacy Directive? How should such trading be treated for the purposes of the systematic internaliser regime? Please explain the reasons for your views.

BEUC has no strong opinion on those topics.

7.3. Authorisation and organisational requirement

7.3.1. Fit and proper criteria

(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.

BEUC has no strong opinion on this question.

7.3.2. Compliance, risk management and internal audit functions

(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.

BEUC considers that the functions of compliance, risk management and internal audit are essential for investor protection by improving the compliance with conduct of business rules but also by improving the soundness of the firm itself and of the financial markets.

BEUC supports the modifications suggested by the Commission reinforcing the requirements and the working of those functions.

7.3.3. Organisational requirements for the launch of products, operations and services

(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?

BEUC welcomes and fully supports the measures suggested by the Commission in the consultation document under "Organisational requirements for the launch of products, operations and services", in particular:

- assessing the compatibility of the product, service or operation with the characteristics and needs of the clients to whom these products would be offered;
- stress testing the products and services as appropriate;
- ensuring that staff possess the necessary expertise to understand the characteristics and risk of products and services provided and receive the appropriate training when new products are offered.

Those measures seem to be an adequate reaction to miss-selling practices revealed by the financial crisis. It would prevent that salespeople not knowing the exact nature of a structured product which is issued by a third party could recommend it to consumers without correct suitability test.

The foreseen assessments would prevent that too complex or too risky products are proposed to retail clients. It prevents the dissemination of too complex products and could restore some confidence of consumers in the financial sector. The financial stability will be one of the first beneficiaries if the right investment products is proposed to the retail investor.

7.3.4. Specific organisational requirements for the provision of the service of portfolio management

(117) Do you consider that specific organisational requirements could address the provision of the service of portfolio management? Please explain the reasons for your views.

BEUC has no strong opinion regarding this question.

7.3.5. Conflicts of interest and sales process

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

BEUC fully agrees with the Commission's view that "*the key element of this framework is the management and the avoidance of conflicts – not just disclosure. ... For instance, it would be very difficult for a firm which creates strong incentives for its sales staff to sell certain products, e.g. through internal bonus structures, to be able to manage the conflicts of interest thereby created. It is unlikely that such a firm could, in this situation, demonstrate compliance with MiFID*"¹⁴.

Remuneration structure and sales objectives are two important reasons why too many salespeople don't act honestly, fairly and professionally, even if they want to.

BEUC considers that compliance officers should assess the risk of non-compliance with the MiFID obligations due to the remuneration of salespeople and their sales objectives. Financial markets supervisors should actively control those aspects. If the remuneration or sales target structures set by the advisor's management lead to consumer detriment then the supervisory authority should take enforcement action (including levying fines and prohibitions against working in the industry) against those senior management personnel responsible for setting these structures.

The application of those provisions must be convergent across the EU and, if required, implementing measures should be adopted for a more uniform application.

7.3.6. Segregation of client assets

(119) What is your opinion of the prohibition of title transfer collateral arrangements involving retail clients' assets? Please explain the reasons for your views.

(120) What is your opinion about Member States be granted the option to extend the prohibition above to the relationship between investment firms and their non retail clients? Please explain the reasons for your views.

(121) Do you consider that specific requirements could be introduced to protect retail clients in the case of securities financing transaction involving their financial instruments? Please explain the reasons for your views.

BEUC considers that segregation of clients' assets is the best protection measure to protect those assets against bankruptcy of the firm.

BEUC acknowledges that it is not easy, for the retail investors, to fully understand the risks linked to the use of their instruments by the firm or in case of stock lending. Those activities should not be allowed if the customer doesn't fully understand the operation of the investment and its risks and the knowledge or experience of the client should be assessed before he/she may agree with such operations.

(122) Do you consider that information requirements concerning the use of client financial instruments could be extended to any category of clients?

BEUC has no strong opinion regarding this question.

¹⁴ See Consultation document, page 70.

(123) What is your opinion about the need to specify due diligence obligations in the choice of entities for the deposit of client funds?

BEUC agrees with the suggestion that investment firms should exercise all due care and diligence in the selection and review of the institutions they choose to place their clients' funds. Diversification in the placement of client funds should be one of the criteria of conducting the due diligence.

BEUC considers that clients' fund should be protected by the Deposit Guarantee Scheme when placed into accounts opened with a credit institution. The identity of the credit institution or institutions chosen should be communicated to the consumer.

7.3.7. Underwriting and placing

(124) Do you consider that some aspects of the provision of underwriting and placing could be specified in the implementing legislation? Do you consider that the areas mentioned above (conflicts of interest, general organisational requirements, requirements concerning the allotment process) are the appropriate ones? Please explain the reasons for your views.

BEUC has no strong opinion regarding this question.

8. Further convergence of the regulatory framework and of supervisory practices

8.1. Options and discretions

(8.1.1. Tied agents)

8.1.2. Telephone and electronic recording

MiFID leaves to Member States the possibility to require firms to record telephone and electronic communications involving client orders. Most Member States have used this option. However, the wide discretion introduced by MiFID has led to different approaches between Member States, ranging from the lack of any obligations to very detailed rules in this area.

The Commission services consider that a common mandatory regime for telephone and electronic recording across the EU would be beneficial, in view of improving the detection of abusive and manipulative behaviours affecting the integrity of the markets. Such a regime would notably benefit supervisors but also firms (who would be able to demonstrate more easily their behaviour). This requirement should be in accordance with EU data protection rules.

(129) Do you consider that a common regulatory framework for telephone and electronic recording, which should comply with EU data protection legal provisions, could be introduced at EU level? Please explain the reasons for your views.

(130) If it is introduced do you consider that it could cover at least the services of reception and transmission of orders, execution of orders and dealing on own account? Please explain the reasons for your views.

(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.

(132) Do you consider that the relevant records could be kept at least for 3 years? Please explain the reasons for your views.

BEUC supports the harmonisation of telephone and electronic recording of all contacts with retail clients that lead or could lead to giving personal recommendations (financial advice) or to collect orders. Recording helps to prevent market abuse practices and conflicts between retail investors and investment firms or credit institutions. When those practices or conflicts are not prevented, recording helps to prove the first ones and to solve the latter.

It happens too often that consumers trapped in a conflict with a bank are unable to lift the burden of evidence about the information or the advice that was given before the investment decision. Nowadays, when conversations are recorded by a firm, the records will only be used by the firm if it is in their own interest.

All phone conversations should be recorded with adequate protection of privacy in place and all meetings should be documented on paper or other durable medium. The recordings and documents should be kept for at least 5 years.

END.