Associazione Categoria Brokers

bipar
The European Federation of Insurance Intermediaries

Subject : Trialogue discussions of MiFID II

Dear Antonio Tajani

ACB is the national association of insurance/financial intermediaries, member of BIPAR, the European Federation of Insurance and Financial Intermediaries. BIPAR groups 51 national associations in 32 countries.

MiFID has as a reference point large institutions. The proposed recast of the Directive on markets in financial instruments (MiFID II), currently under discussion in trialogue, makes this regulatory framework, developed for large institutions, applicable to small to micro-type intermediaries, who are often dealing with small investors. Only proportionate requirements which take full account of the size of these firms, will allow them to continue to give advice and offer choice to the often smaller investment consumer.

The proposed ban on commission will result in a situation where the smaller investor will have no more access to choice.

We believe that it is in the interest of clients and of SME firms alike to leave the choice to the consumer to decide in a transparent dialogue, together with the intermediary, about the nature of remuneration (fee or commission).

Attached you will find a list of further specific issues that we have commented on in the course of the legislative process of MiFID II until now. We hope these points will get your attention during your discussions in trialogue.

These comments focus on the following articles and points:

1. Advice – Article 24

BIPAR is against a ban on commission, which will lead to a decrease in the number of small firms and will lead to less choice for the consumer. Leave the choice of remuneration. “Best” interests or acting “honestly” are unclear terms.

2. Scope of the proposed Directive – Article 1

Cumulative impact of MiFID, PRIPs and IMD has not been duly assessed. Insurance investment products are insurance products and should remain under IMD, not MiFID. Whoever sells, intermediates or advises on insurance investments has to be registered as insurance intermediary or insurer.

3. Optional exemptions – Article 3

Need for opt-out in order for SME intermediary firms to continue to exist and give advice to small investors. Full MiFID regime or similar is too heavy for small firms and will mean the end of advice provided by them. Analogous requirements have to be limited and proportionate. ESMA and Member States should take into account the size, risk profile and legal form of the firms when implementing or developing follow up to the Directive.

4. Initial capital endowment – Article 15

Clarification needed that opt-out firms indeed do not need initial capital

5. Telephone conversation recordings – Article 16

Need for proportionality – recordings make no sense for certain types of transactions / activities

We thank you for taking these points into consideration when discussing the trialogue compromises and remain at your disposal to provide further information on these points.

Yours sincerely,

[redacted]

Consigliere - Giunta Esecutiva

[redacted]

Memo

26/08/2013

1. Advice – Article 24

BIPAR is against a ban on commission, which will lead to a decrease in the number of small firms and will lead to less choice for the consumer. Leave the choice of remuneration. "Best" interests or acting "honestly" are unclear terms.

a) Ban on commission

With regard to the provisions on independent advice and the ban on commission in the three texts, we believe that such a **ban is not proportional and not necessary** when considering all the other extra rules (including full transparency) which will come into place. It hinders the free entrepreneurship in this regard and would result in **higher costs and less choice for the consumer**.

It is therefore in the interest of clients and of SME firms alike that this ban on commission is removed from the text.

We furthermore have the following questions related to the "ban on commission" :

Question 1: Why reduce choice for the consumer?

Why not leave the choice to the consumer to decide in a transparent dialogue, together with the intermediary, about the nature of remuneration (fee or commission)? It is recognized that a ban would have unwanted side effects in terms of extra costs for the consumer (and the smaller intermediaries). Will a ban be proportional (macro-economically? at national level, at European level? in terms of jobs? SME policy? …).

Question 2: Why reduce choice for the Member States?

Why should such a ban, which will clearly have side effects, be imposed at European level? Why not leave the choice to Member States to introduce it or not. The investment intermediation and advice market is still very different in one Member State compared to another.

Question 3: Will all other new measures in the MiFID II not be sufficient to improve consumer protection?

Question 4: Has there been sufficient impact assessments and cost-benefit analyses in relation to the unwanted side-effects of a ban on commission?

b) Advice on an independent basis **or not**

The Council text states that the investment firm has to tell the client whether the advice is provided on an independent basis or not.
We would promote the deletion of this requirement and stick to the Commission or Parliament wording. It would indeed be very confusing for the consumer when at every time all the conditions for this "independent" advice" are not met, the investment firm would have to tell the client that it is

"giving advice not on an independent basis". We believe that the client has to be well informed about the service that he can and will receive and about the range of products from which a product is recommended but that a negative statement is not going to be helpful.

c) "Best" interests – acting honestly

BIPAR believes that the concept of **"best" in "best interests" is unclear** and could lead to legal interpretation problems. The wording also disregards the possibility of having aligned interests.
With regard to the requirement to act "honestly and fairly", we obviously agree that every person, every citizen should act and behave in a fair and honest way. We believe however that from a legal perspective, such wording could lead to **legal uncertainty**.

2. Scope of the proposed Directive – Article 1

Cumulative impact of MiFID, PRIPs and IMD has not been duly assessed. Insurance investment products are insurance products and should remain under IMD – not MiFID. Whoever sells, intermediates or advises on insurance investments has to be registered as insurance intermediary or insurer.

BIPAR regrets that in the development of MiFID II, due to the timing, the effects of the application of MiFID II to PRIPs, including PRIPs insurances, has not been taken into consideration.

Even though there has been some level of debate, this has never been targeted or nuanced as there is still no final and clear answer to the question of what the definition of a PRIPs is.
Nowhere in the process has the **cumulative impact of the combination of MiFID II, PRIPs and IMD II** been assessed either.

In respect to the above, we refer to the amendment by the European Parliament of Article 1 on the scope, point 3.a:

3a. The following provisions shall also apply to insurance undertakings and insurance intermediaries, including tied insurance intermediaries, authorised or registered under, respectively, Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance[1], Directive 2002/92/EC or Directive 2009/138/EC, when selling or advising clients in relation to insurance-based investments:

- *Article 16(3);*
- *Articles 23 to 26; and*
- *Articles 69 to 80 and 83 to 91, where necessary, for the purpose of allowing competent authorities to give effect to the articles referred to in the first and second indents in relation to insurance-based investments.*

BIPAR believes insurance based investments should not fall under MiFID. BIPAR recognises that insurance investment products are different from other insurance products. BIPAR can therefore understand that the European Commission, in its IMD II proposal, adds a chapter (VII) which deals

[1] OJ L 345, 19.12.2002, p. 1.

with some specific information and conduct requirements -based upon MIFID II proposed rules- specifically designed for insurance investment products. This being said, BIPAR is of opinion that **applying the full MiFID regime in terms of sales / conduct rules may be administratively overburdensome and not proportional** to the risk for some of the products which would fall under the category of insurance investment products as defined in the proposed "Regulation on key information documents for investment products".
Also for practical reasons (such as supervision, legal certainty, …) these products should not be regulated at European level under MiFID II.
Finally, there has been no Impact assessment with regard to this inclusion in MiFID II.

In any event, BIPAR is of the opinion that it should be guaranteed that **all those who intermediate advise or sell insurance investment products must continue to be registered as an insurance intermediary or insurer.** Although the insurance investment products may have an investment element, these products remain insurance products.

3. Optional exemptions – Article 3
Need for opt-out in order for SME intermediary firms to continue to exist and give advice to small investors. Full MiFID regime or similar is too heavy for small firms and will mean the end of advice provided by them. Analogous requirements have to be limited and proportionate. ESMA and Member States should take into account the size, risk profile and legal form of the firms when implementing or developing follow up to the Directive.

BIPAR believes that an **opt out regime as in MiFID II, article 3, should exist and continue to exist. It is observed that if the full MiFID regime would be applicable to those situations which are currently optionally exempt, many SMEs and micro-type operators would not be able to continue their activities due to the high cost of compliance. Such a situation would exclude many people (in particular the smaller investors) from access to any level of advice** or assistance in their search for an adapted investment product.

BIPAR recalls that financial advisers which are predominantly SMEs and micro-type operators were brought within the MiFID because of its coverage of investment advice. We welcome the choice made by the European Commission to keep the possibility to exempt some investment firms who give advice, under certain conditions, from the full MiFID regulation.
However, even if the opt-out regime of MiFID I continues to exist, the additional obligations brought by the current MiFID II texts make it no longer applicable to those firms that it should apply to. This in combination with the European Parliament's extension to insurance intermediaries will lead to the situation that full MiFID rules become applicable to a whole series of small enterprises.
We wish to refer in this respect as well to the opinion of the 3L3 Task Force in preparation of PRIPs, which referred to MiFID where "*the proportionality principle is a very important concept and should apply across the PRIPs regime to ensure a smooth implementation of its principles and rules, by providing flexibility according to the size, structure, complexity and nature of different firms and markets*. "

a) Analogous requirements for opt-out firms

We kindly ask the European Commission, the European Parliament and the Council to bear the above mentioned limited investment activity of intermediaries in mind, particularly if it comes to including

further requirements in relation to Article 3 exemptions. We believe that **some of the "analogous" requirements, both in the original Commission proposal and in the amendments from Council and Parliament, are not realistic under a national regime and do not sufficiently reflect proportionality and national market circumstances**. Imposing on SMEs and micro-type operators the same or "analogous" requirements as on larger institutions would go against the general policy of the European Commission and the EP which aims at promoting SMEs. It will lead to an increase of cost for consumers. Also no impact assessment has been carried out.

We note that the European Parliament has in this respect added that Member States should take into account the size, risk profile and legal form but at the same time has added extra requirements to the Commission proposal. However, since more specification will be brought to this Directive at Level 2, we believe it would be useful to also request this proportionate approach from ESMA and not only from Member States. Indeed, we believe it is important that in Level 2 regulation, **ESMA and the Member States bring the necessary adjustments/calibrations to the proposal so that the size and business model of the operators is taken into account**. This is in the interest of competition, consumer choice and accessibility to advice and services also for smaller investors.

With regard to the specific requirements for opt-out firms, BIPAR proposes the **deletion** in Article 3 of the reference to articles **7, 8(a), 10, 2, 22, as well as the additional requirements that have been added by the Parliament and the Council.**

Although we can support the concept of some of these requirements, e.g. ongoing supervision, we wish to repeat that they have been drafted for large companies and are in their detail too far-fetched for small companies that fall under Article 3. In this respect, also the additional requirements to article 3 proposed by the Council (article 24.6 a and article 29) and Parliament (Article 23 and Article 16.3) further add to administrative burden for small firms and have not been subject to an impact assessment or cost-benefit assessment.

Finally, the European Parliament has added that "*Member States shall ensure that persons who are excluded from the scope of this Directive under paragraph 1 and who are selling financial instruments to retail clients or providing investment advice or portfolio management to retail clients, have to obey rules for investor protection which are equivalent to the provisions of Article 16(6) and (7) and Articles 24 and 25."*

This addition in particular brings legal uncertainty regarding the scope of the Directive. There is need for an impact assessment and a legal analysis to define what this would men in the scope of MiFID.

Article 3.1 in fine (last sentence) of the Commission proposal, obliges Article 3-exempted investment firms to be covered by an investors-compensation scheme or under a system ensuring an equivalent protection for their clients.
Operators providing investment services under the Article 3 "National Regime" are not allowed to hold money or to hold, administer or manage financial instruments on their clients' behalf. The risk for the client for not getting back his money from an opt out firm, working within its authorisation, is in our view nonexistent. It is therefore unclear when exactly an investor compensation scheme will provide coverage for clients of an opt out firm working within its authorisation.

Nevertheless, we understand that it is appropriate for reasons of consumer protection and confidence in the financial system to oblige all investment firms, including the opt out investment firms which only give investment advice and do not handle clients money, to contribute to a compensation scheme or to have an equivalent protection for their clients – such as insurance cover.

However, this limited authorisation of opt out firms should be reflected in the level of their contribution. We therefore propose to add to Article 3.1 in fine that, if opt out firms should contribute, they should only contribute with a proportionate annual fixed contribution or have an equivalent proportional protection for their clients.
The need for proportionality also applies to the need to take the specific obligations of the different actors in the process into account e.g. when creating a compensation scheme.
The Council and Parliament specifically foresee the option of having insurance cover instead of adherence to a compensation scheme. Also in this case, the proportionality principle should be applied.

b) Kind of services that opt-out firms can carry out:

Article 3.1, second indent of the Commission proposal states that an exempted firm *is not allowed to provide any investment service except the provision of investment advice, with or without the reception and transmission of orders in transferable securities and units in collective investment undertakings,...*
Under MiFID I it was explicitly possible to provide investment advice and to receive and transmit orders, as two separate services – which no longer seems possible in the Commission's MiFID II proposal.

BIPAR strongly opposes to such narrowing of the kind of services that opt-out firms can carry out. Therefore we believe that the amendments made by the Parliament and the Council, which again explicitly mention both types of services, are more in line with reality and we support such amendments.

4. Initial capital endowment – Article 15
Clarification needed that opt-out firms indeed do not need initial capital

Article 15 of the Commission proposal deals with the initial capital endowment. According to this Article, investment firms should have initial capital in accordance with the requirements of Directive 2006/49/EC on the capital adequacy of investments firms and credit institutions. As there is no reference to Article 15 in Article 3.1 regarding the specific requirements to be fulfilled in order to obtain exemption, it seems to be correct to conclude that investment firms falling under the opt-out national regime, are not obliged to have initial capital.
However, Article 3.1 regarding the specific requirements to be fulfilled in order to obtain exemption, includes a reference to Article 21. Article 21 requires that an investment firm complies at all times with the conditions for initial authorization established in Chapter I of Title II. Article 15 falls under Chapter I, so indirectly capital requirements could apply to Article-3 exempted firms.
No changes until today have been made by Parliament or Council so BIPAR kindly requests that it is now clarified that Article 15 of the proposal does not apply to investment firms falling under the scope of Article 3 of the proposal.

5. Telephone conversation recordings – Article 16
Need for proportionality – recordings make no sense for certain types of transactions / activities

According to the Commission's proposal in Article 16.7, investment firms working under a full MiFID license, shall record the telephone conversations of certain transactions. The European Parliament has included this obligation as something what opt-out firms have to comply with "equivalently" when dealing with retail clients.

BIPAR wishes to point out that for certain activities that possibly will fall under MiFID II, it makes no sense to require telephone recordings. The duty to make telephone recordings has to be seen in the context of the type of transaction, taking e.g. into account the complexity and type of products.