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17. april 2020

## **Høringssvar til Kommissionens Public consultation on the review of the MiFID II/MiFIR regulatory framework**

Den danske Fondsmæglerforening takker for Finanstilsynets invitation af 26. februar 2020 til at komme med input til brug for et dansk høringssvar vedrørende ovenstående høring. Som oplyst ved e-mail af 30. marts 2020 har Fondsmæglerforeningen besluttet at afgive sit høringssvar direkte over for EU-Kommissionen.

Foreningens svar på udvalgte dele af spørgsmålene i Kommissionens høring vedlægges som bilag til orientering.

I høringssvaret har foreningen givet udtryk for følgende overordnede synspunkter:

### ***Nye byrder på virksomhederne skader konkurrencen***

MiFID II har betydet en væsentlig forøgelse af omkostningerne for markedsdeltagerne, hvilket navnlig er mærkbart for de mindre virksomheder, som foreningen repræsenterer. En kommende revision bør tage sigte på at undgå unødige nye byrder på markedsdeltagerne, herunder ved konsekvent anvendelse af proportionalitetsbetragtninger for mindre virksomheder. I modsat fald vil det føre til yderligere koncentration i branchen og dermed mindske konkurrencen og produktudbuddet til skade for kunderne.

COVID-19 pandemien har ført til betydelige fald på børserne med drastiske fald i allokerede midler og AuM til følge. Dette vil lægge et indtjeningsmæssigt pres på branchen, og myndighederne bør derfor være tilbageholdende med at tilføre yderligere byrder, der kan have konsekvenser for virksomhedernes overlevelse.

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### ***Investorbeskyttelsesreglerne bør gennemgås***

Det bør sikres, at investorbeskyttelsesreglerne udfylder et behov, der modsvarer de byrder, der påføres virksomhederne. MiFID II har navnlig i henseende til reglerne om inducements og product governance betydet nye væsentlige administrative byrder for virksomhederne, hvilket igen har medført en reduktion i det faktiske udbud over for kunderne. Navnlig i forhold til de af foreningens medlemmer, der distribuerer/forvalter kollektive investeringsordninger, vurderes det, at MiFID II i visse tilfælde har betydet en forringelse af adgangen til distribution til skade for konkurrencen mellem forskellige produktudbydere.

### ***Kvalitet i reguleringen skal sikres***

Visse nye dele af MiFID II var præget af retsusikkerhed for virksomhederne på tidspunktet for ikrafttræden. Dette førte til øgede compliance-risici og omkostninger i virksomhedernes implementering. Fremtidige ændringer bør være mere gennearbejdede, og implementeringstiderne bør være længere.

Foreningen står til rådighed, hvis Finanstilsynet har spørgsmål til høringssvaret afgivet over for Kommissionen.

Med venlig hilsen

Marianne Settnes  
bestyrelsesformand

**Public consultation on the review of the MiFID II/MiFID regulatory framework**

Topic/Question		Answer
Question 1	To what extent are you satisfied with your overall experience with the implementation of the MiFID II/MiFIR framework?	1 - Very unsatisfied <u>2 - Unsatisfied</u> 3 - Neutral 4 - Satisfied 5 - Very satisfied Don't know / no opinion / not relevant
Question 1.1	Please explain your answer to question 1 and specify in which areas would you consider the opportunity (or need) for improvements:	<p>The implementation of MiFID II has been a substantial regulatory burden on investment firms and is a barrier of entry for new market players. Our members are among the smaller players in the market which do not benefit from the economy of scale of larger firms. In our view, MiFID II is a driver towards concentration which ultimately weakens competition.</p> <p>Certain parts of the changes introduced by MiFID II (such as the rules on product governance and inducements) were characterised by regulatory uncertainty at the date of application in member states, leading to confusion and inefficiency in market participants' implementation processes. A longer transition period might have been beneficial.</p>
Question 2	Please specify to what extent you agree with the statements below regarding the overall experience with the implementation of the MiFID II /MiFIR framework?	
	The EU intervention has been successful in achieving or progressing towards its MiFID II /MiFIR objectives (fair, transparent, efficient and integrated markets).	3 - neutral
	The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	2 - rather not agree

	The different components of the framework operate well together to achieve the MiFID II/MiFIR objectives.	3 - neutral
	The MiFID II/MiFIR objectives correspond with the needs and problems in EU financial markets.	4 - rather agree
	The MiFID II/MiFIR has provided EU added value.	3 - neutral
Question 2.1	Please provide qualitative elements to explain your answers to question 2:	<p>The integration of markets has generally benefited from the use of regulations instead of directives, leaving less room for differences between member states, an important exemption being the rules on inducements.</p> <p>MiFID II has been a cost driver, especially for smaller market players such as our members. We do not think that the right balance between investor protection and the cost of regulation has been struck in all instances.</p>
Question 3	Do you see impediments to the effective implementation of MiFIDII/MiFIR arising from national legislation or existing market practices?	<p>1 - Not at all</p> <p>2 - Not really</p> <p>3 - Neutral</p> <p><u>4 - Partially</u></p> <p>5 - Totally</p> <p>Don't know / no opinion / not relevant</p>
Question 3.1	Please explain your answer to question 3:	In certain areas regulated by directives, investment firms experience impediments to cross-border activities. This is particularly the case in relation to the rules on inducements where national transposition and practices differ. E.g. firms purchasing research for the purpose of portfolio management in several jurisdiction may need to apply the highest common denominator on the regulatory side.
Question 4	Do you believe that MiFID II/MiFIR has increased pre- and posttrade transparency for financial instruments in the EU?	<p>1 - Not at all</p> <p>2 - Not really</p> <p>3 - Neutral</p> <p><u>4 - Partially</u></p> <p>5 - Totally</p> <p>Don't know / no opinion / not relevant</p>

Question 4.1	Please explain your answer to question 4:	Please refer to our answer in relation to the EU consolidated tape.
Question 5	Do you believe that MiFID II/MiFIR has levelled the playing field between different categories of execution venues such as, in particular, trading venues and investment firms operating as systematic internalisers?	1 - Not at all 2 - Not really <u>3 - Neutral</u> 4 - Partially 5 - Totally Don't know / no opinion / not relevant
Question 5.1	Please explain your answer to question 5:	
Question 6	Have you identified barriers that would prevent investors from accessing the widest possible range of financial instruments meeting their investment needs?	1 - Not at all 2 - Not really 3 - Neutral <u>4 - Partially</u> 5 - Totally Don't know / no opinion / not relevant
Question 6.1	If you have identified such barriers, please explain what they would be:	Regulatory burdens to firms.
Question 6.1	Please explain your answer to question 6:	The costs related to investor protection regulation, in particular with respect to product governance, lead firms to exclude financial instruments from their product range available to clients. Please refer to our answer regarding investor protection.
<b>The establishment of an EU consolidated tape</b>		<p>The Danish Association of Asset Management and Investment Firms strongly supports looking into the possibility of an EU consolidated tape.</p> <p>For our members, the costs of getting access to the market data necessary to carry out services to our clients and fulfilling regulatory requirements are substantial. The supply of market data is characterized by few dominant players, a lack of competition and unfair pricing models which ultimately increase costs to our clients.</p> <p>In the construction of a future model for a consolidated tape, the following should be taken into account:</p> <ul style="list-style-type: none"> <li>• In carrying out their business, investment firms and credit institutions have a need for data not only concerning financial</li> </ul>

		<p>instruments traded or listed within the EU but also concerning markets outside of the EU. Unless this aspect is addressed, excessive data prices will continue to hamper the functioning of the markets and damage both the industry and end users of investment services.</p> <ul style="list-style-type: none"> <li>• The need for data is not limited to equities but does also include other types of financial instruments within the scope of investment services and activities.</li> </ul> <p>In relation to transparency, a well functioning Consolidated Tape is also important in the Non-equity space, where the transparency haven't improved at all after the implementation of MiFIR/MiFID II. This is mainly due to the granting of waivers, which should be a part of this review as well, even though there are no direct questions in relation to this.</p> <ul style="list-style-type: none"> <li>• In order not to be counterproductive, new administrative requirements implying costs to investment firms delivering data should be calibrated in close dialogue with the industry.</li> </ul>
<b>Investor protection</b>		
Question 31	Please specify to what extent you agree with the statements below regarding the experience with the implementation of the investor protection rules?	
	The EU intervention has been successful in achieving or progressing towards more investor protection.	3 - Neutral
	The MiFID II/MiFIR costs and benefits are balanced (in particular regarding the regulatory burden).	2 - Rather not agree
	The different components of the framework operate well together to achieve more investor protection.	4 - Rather agree

	More investor protection corresponds with the needs and problems in EU financial markets.	2 - Rather not agree
	The investor protection rules in MiFID II/MiFIR have provided EU added value.	3 - Neutral
Question 31.1	Please provide both quantitative and qualitative elements to explain your answer and provide to the extent possible an estimation of the benefits and costs. Where possible, please provide figures broken down by categories such as IT, organisational arrangements, HR etc.	<p>The major changes in the field of investor protection from MIFID I to MiFID II are found within the rules on inducements, the product governance rules and the rules on best execution.</p> <p><u>The rules on inducements</u> have carried substantial administrative costs to the industry. We do not find these to be balanced towards the objective. The changes have pushed the industry to exclude especially smaller clients from access to services formerly provided to them. At the same time, the regulatory burdens have squeezed smaller providers, with a negative impact on the competition and ultimately the end clients. In this respect, the MiFID II inducements framework has turned out counterproductive.</p> <p><u>The rules on product governance</u> require a comprehensive governance set up for investment firms. We find that the initial goal of avoiding mis-selling of products could have been better targeted at specific types of financial instruments instead of the entire spectrum of financial instruments and by focussing on information to investors. The current set up seems disproportionate in its inclusion of plain vanilla instruments such as equity and units in UCITS. Furthermore, the rules have not sufficiently addressed the practical aspects of the exchange of information between product developers and distributors. As a result, many investment firms and credit institutions have reduced the product range available to clients.</p> <p>Both the rules on inducements and on product governance are still largely <u>regulated by Directives</u> instead of Regulations, leaving room for different transposition by EU member states and hampering cross border activities and competition of firms.</p>

		<p>Regarding the requirements to <u>execution reports</u>, the transparency requirements introduced by MiFID II are in our experience largely without value to clients as there is no actual demand for the reports on execution venues to be published.</p> <p>Finally, we note that <u>UCITS management companies and AIF Managers</u> providing individual portfolio management, investment advice and reception and transmission of orders are still regulated by MiFID I rules. This leaves clients with different levels of protection depending on the type of service provider. We therefore find that a level playing field should be re-established.</p>
Question 32	Which MiFID II/MiFIR requirements should be amended in order to ensure that simple investment products are more easily accessible to retail clients?	<p>Product and governance requirements: Yes</p> <p>Costs and charges requirements: No</p> <p>Conduct requirements: No</p> <p>Other: No</p>
	Please specify which other MiFID II/MiFIR requirements should be amended:	N/A
Question 32.1	Please explain your answer to question 32:	Please refer to our answer to question 31.1.
Question 33	Do you agree that the MiFID II/MiFIR requirements provide adequate protection for retail investors regarding complex products?	<p>1 - Disagree</p> <p><u>2 - Rather not agree</u></p> <p>3 - Neutral</p> <p>4 - Rather agree</p> <p>5 - Fully agree</p> <p>Don't know / no opinion / not relevant</p>
Question 33.1	If your answer to question 33 is on the negative side, please indicate in the text box which amendments you would like to see introduced to ensure that retail investors receive adequate protection when purchasing products considered as complex under MiFID II/MiFIR:	We would favour the simpler model.



	Please explain your answer to question 33:	We find that the current model to be complicated and difficult to apply. The model increases the costs and may as a result limit the range of products available to investors.
Question 34	Should all clients, namely retail, professional clients per se and on request and ECPs be allowed to opt-out unilaterally from ex-ante cost information obligations, and if so, under which conditions?	<p>Professional clients and ECPs should be exempted without specific conditions.</p> <p><u>Only ECPs should be able to opt-out unilaterally.</u></p> <p>Professional clients and ECPs should be able to opt-out if specific conditions are met.</p> <p>All client categories should be able to opt out if specific conditions are met.</p>
	Please specify what is your other view on whether all clients, namely retail, professional clients per se and on request and ECPs should be allowed to opt-out unilaterally from ex-ante cost information obligations?	We do not find an opt-out regime to be of particular value in the case of ECPs which should anyhow negotiate the terms applicable with the investment firm.
Question 34.1	Please explain your answer to question 34 and in particular the conditions that should apply:	In our view, the ECPs are capable of negotiating the terms with the investment firms and should not been protection in this field.
Question 35	Would you generally support a phase-out of paper based information?	<p>1 - Do not support</p> <p><u>2 - Rather not support</u></p> <p>3 - Neutral</p> <p>4 - Rather support</p> <p>5 - Support completely</p> <p>Don't know / no opinion / not relevant</p>
Question 35.1	Please explain your answer to question 35:	The current rules make it possible for firms to offer different solutions, both electronic formats and paper-based information. Even though most firms have a preference for providing information in an electronic format, flexibility will still be necessary to accommodate different situations (face-to-face meetings versus in a distance client relationship) as well as differences in client needs.

Question 36	How could a phase-out of paper-based information be implemented?	General phase-out within the next 5 years General phase out within the next 10 years For retail clients, an explicit opt-out of the client shall be required. For retail clients, a general phase out shall apply only if the retail client did not expressly require paper based information Other
	Please specify in which other way could a phase-out of paper-based information be implemented?	
Question 36.1	Please explain your answer to question 36 and indicate the timing for such phase-out, the cost savings potentially generated within your firm and whether operational conditions should be attached to it:	
Question 37	Would you support the development of an EU-wide database (e.g. administered by ESMA) allowing for the comparison between different types of investment products accessible across the EU?	<u>1 - Do not support</u> 2 - Rather not support 3 - Neutral 4 - Rather support 5 - Support completely Don't know / no opinion / not relevant
Question 37.1	Please explain your answer to question 37:	We are not confident that the additional regulatory burdens implied for firms when providing such information to a database would be justified by the actual use by and benefit to investors.
Question 38	In your view, which products should be prioritised to be included in an EU-wide database?	N/A
	Please specify what other products should be prioritised?	N/A
Question 38.1	Please explain your answer to question 38:	
Question 39	Do you agree that ESMA would be well placed to develop such a tool?	Not relevant
Question 39.1	Please explain your answer to question 39:	Please refer to our answer to question 37.
Question 40	Do you consider that MiFID II/MiFIR can be overly protective for retail clients who have	1 - Disagree 2 - Rather not agree

	sufficient experience with financial markets and who could find themselves constrained by existing client classification rules?	3 - Neutral 4 - Rather agree 5 - <u>Fully agree</u> Don't know / no opinion / not relevant
Question 40.1	Please explain your answer to question 40:	MiFID's distinction between retail and professional clients deviates substantially from the distinction applied in other EU rules such as the Consumer Credit Directive 2008/48/EC and the Consumer Rights Directive 2011/83/EU. In our view, other solutions should be explored.
Question 41	With regards to professional clients on request, should the threshold for the client's instrument portfolio of EUR 500 000 (See Annex II of MiFID II) be lowered?	1 - Disagree 2 - Rather not agree 3 - Neutral 4 - Rather agree 5 - <u>Fully agree</u> Don't know / no opinion / not relevant
Question 41.1	Please explain your answer to question 41:	Please refer to our answer to question 40.1.
Question 42	Would you see benefits in the creation of a new category of semi-professionals clients that would be subject to lighter rules?	1 - Disagree 2 - Rather not agree 3 - Neutral 4 - Rather agree 5 - <u>Fully agree</u> Don't know / no opinion / not relevant
Question 42.1	Please explain your answer to question 42:	Please refer to our answer to question 40.1.
Question 43	What investor protection rules should be mitigated or adjusted for semi-professionals clients?	<u>Suitability or appropriateness test</u> <u>Information provided on costs and charges</u> <u>Product governance</u> Other
	Please specify what other investor protection rules should be mitigated or adjusted for semi-professionals clients?	N/A
Question 43.1	Please explain your answer to question 43:	Please refer to our answer to question 40.1.
Question 44	How would your answer to question 43 change your current operations, both in terms of time and resources allocated to the distribution process?	Suitability or appropriateness tests would be more targeted and thus reduced in scope, both in terms of one-off resources and on-going.

	Please specify which changes are one-off and which changes are recurrent:	The costs implied to the disclosure of cost and charges would depend on the degree to which processes are automated at the level of each investment firm and on whether the firm renders services to retail clients.
Question 45	What should be the applicable criteria to classify a client as a semi-professional client?	<p><u>Semi-professional clients should possess a minimum investable portfolio of a certain amount (please specify and justify below).</u></p> <p>Semi-professional clients should be identified by a stricter financial knowledge test.</p> <p>Semi-professional clients should have experience working in the financial sector or in fields that involve financial expertise.</p> <p>Semi-professional clients should be subject to a one-off in-depth suitability test that would not need to be repeated at the time of the investment.</p> <p>Other</p>
	Please specify what other criteria should be the one applicable to classify a client as a semi-professional client:	
Question 45.1	Please explain your answer to question 45 and in particular the minimum amount that a retail client should hold and any other applicable criteria you would find relevant to delineate between retail and semiprofessional investors:	<p>We find that a new regime should be as simple as possible in order not to create new administrative costs for the industry.</p> <p>We propose a minimum amount of EUR 100.000.</p>
Question 46	Do you consider that the product governance requirements prevent retail clients from accessing products that would in principle be appropriate or suitable for them?	Yes.
Question 46.1	Please explain your answer to question 46:	Due to the administrative costs and compliance risks imposed on firms. Please refer to our answer to question 31.1.
Question 47	Should the product governance rules under MiFID II/MiFIR be simplified?	It should only apply to products to which retail clients can have access (i.e. not for non-equities securities that are only eligible for qualified investors or that have a minimum denomination of EUR 100.000).

		<p><u>It should apply only to complex products.</u></p> <p>Other changes should be envisaged – please specify below.</p> <p>Simplification means that MiFID II/MiFIR product governance rules should be extended to other products.</p> <p>Overall, the measures are appropriately calibrated, the main problems lie in the actual implementation.</p> <p>The regime is adequately calibrated and overall, correctly applied.</p>
Question 47.1	Please explain your answer to question 47:	We find the range of products in scope excessive compared to the actual mis-selling cases. Please refer to our answer to question 31.1.
Question 48	In your view, should an investment firm continue to be allowed to sell a product to a negative target market if the client insists?	<p>Yes</p> <p><u>Yes, but in that case the firm should provide a written explanation that the client was duly informed but wished to acquire the product nevertheless.</u></p> <p>No</p> <p>Don't know / no opinion / not relevant</p>
Question 48.1	Please explain your answer to question 48:	We find that the limitation should be dependent on the service provided. In case of portfolio management/investment advice, the service should not be provided if not suitable. In other cases, the client should be free to choose, subject to appropriate disclosures.
Question 49	Do you believe that the current rules on inducements are adequately calibrated to ensure that investment firms act in the best interest of their clients?	<p>1 - Disagree</p> <p><u>2 - Rather not agree</u></p> <p>3 - Neutral</p> <p>4 - Rather agree</p> <p>5 - Fully agree</p> <p>Don't know / no opinion / not relevant</p>
Question 49.1	Please explain your answer to question 49:	We find that the current rules have certain adverse effects on the market and on the investors. Please refer to our answer to question 31.1.
	Question 50. Would you see merits in establishing an outright ban on inducements	<p><u>1 - Disagree</u></p> <p>2 - Rather not agree</p>

	to improve access to independent investment advice?	3 - Neutral 4 - Rather agree 5 - Fully agree Don't know / no opinion / not relevant
Question 50.1	Please explain your answer to question 50:	The bans introduced in MiFID II have had adverse effects on the market and on the investors. Please refer to our answer to question 31.1.
Question 51	Would you see merit in setting-up a certification requirement for staff providing investment advice and other relevant information?	<u>1 - Disagree</u> 2 - Rather not agree 3 - Neutral 4 - Rather agree 5 - Fully agree Don't know / no opinion / not relevant
Question 51.1	Please explain your answer to question 51:	It is the responsibility of each firm to provide appropriate advice to its clients. It should be possible for firms to tailor they solutions to each product provided.
Question 52	Would you see merit in setting out an EU-wide framework for such a certification based on an exam?	<u>1 - Disagree</u> 2 - Rather not agree 3 - Neutral 4 - Rather agree 5 - Fully agree Don't know / no opinion / not relevant
Question 52.1	Please explain your answer to question 52:	Certifications vary substantially across the EU due to different traditions in the member states. Changing current set up without having clearly demonstrated a need to do so would entail unnecessary costs to firms and impact in relevant staff.
Question 53	To reduce execution delays, should it be stipulated that in case of distant communication (phone in particular) the cost information can also be provided after the transaction is executed?	1 - Disagree 2 - Rather not agree 3 - Neutral 4 - Rather agree <u>5 - Fully agree</u> Don't know / no opinion / not relevant
Question 53.1	Please explain your answer to question 53:	It is important that MiFID does not hinder the normal course of business and the provision of services to clients. Alternative measures should be explored.

Question 54	Are taping and record-keeping requirements necessary tools to reduce the risk of products mis-selling over the phone?	<u>1 - Disagree</u> 2 - Rather not agree 3 - Neutral 4 - Rather agree 5 - Fully agree Don't know / no opinion / not relevant
Question 54.1	Please explain your answer to question 54:	According to current rules, it is up to firms to demonstrate that they have made suitability tests and appropriateness tests to each client as applicable and that they have in place appropriate product governance procedures. A new record-keeping requirement would therefore go beyond what is necessary to protect clients.  We also note that additional administrative costs to firms due to additional record-keeping will ultimately be borne by clients.
Question 55	Do you believe that the best execution reports are of sufficiently good quality to provide investors with useful information on the quality of execution of their transactions?	<u>1 - Disagree</u> <u>2 - Rather not agree</u> 3 - Neutral 4 - Rather agree 5 - Fully agree Don't know / no opinion / not relevant
	Please explain your answer to question 55:	We do not find the rationale behind the obligation to report on top five venues clear. From our experience, this reporting is also not in demand from clients. As a regulatory cost without any obvious benefit to clients it should be considered removed.
Question 56	What could be done to improve the quality of the best execution reports issued by investment firms?	Comprehensiveness (irrelevant) Format of the data (irrelevant) Quality of data (irrelevant) Other (irrelevant)
	Please specify what else could be done to improve the quality of the best execution reports issued by investment firms:	N/A
Question 56.1	Please explain your answer to question 56:	Please refer to our answer to question 55.
Question 57	Do you believe there is the right balance in terms of costs between generating these best	<u>1 - Disagree</u> 2 - Rather not agree

	execution reports and the benefits for investors?	3 - Neutral 4 - Rather agree 5 - Fully agree <u>Don't know / no opinion / not relevant</u>
Question 57.1	Please explain your answer to question 57:	Please refer to our answer to question 55.
<b>Research unbundling rules and SME research coverage</b>		
Question 58	What is your overall assessment of the effect of unbundling on the quantity, quality and pricing of research?	The quantity/availability of research has clearly diminished. Due to the lesser availability and thus choice, the quality to firms using research has also in certain cases been reduced. From our experience, the overall pricing has been reduced - however accompanied by a rise in the price of certain execution services.
<b>X. Foreign exchange (FX)</b>		
Question 92	Do you believe that the current regulatory framework is adequately calibrated to prevent misbehaviours in the area of spot foreign exchange (FX) transactions?	1 - Disagree 2 - Rather not agree 3 - Neutral 4 - Rather agree 5 - Fully agree <u>Don't know / no opinion / not relevant</u>
Question 92.1	If you do not believe that the current regulatory framework is adequately calibrated to prevent misbehaviours in the area of spot foreign exchange (FX) transactions, which recommendations would you make to improve the robustness of the regulatory framework?	N/A
Question 92.1	Please explain your answer to question 92:	We are not aware of the background for this question and do not have any particular experience with misbehaviour in FX spot trading in the Danish market.  Moreover, we do not find FX spot to be a product easily adapted to the MIFID regulatory framework in its current form.



		Any considerations of regulating FX spot should explore alternative "stand alone" solutions such as e.g. the benchmark regulation.
Question 93	Which supervisory powers do you think national competent authorities should be granted in the area of spot FX trading to address improper business and trading conduct on that market? Please explain your answer:	N/A