

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 by **13 January 2012**.

Theme	Question	Answers
Corporate governance	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 Directive Article 65 to ensure that they are proportionate and effective, and why?	<p>The draft only takes the one-tier system into account and totally ignores the two-tier system with the separation of management and supervisory board. With the present proposal a new quality has occurred because not only is it difficult to squeeze European provisions into the dualistic system but this time it is impossible. This is not acceptable.</p> <p>In the light of the strong interference with corporate governance systems we wonder why the only real corporate governance issue of the one-tier system, the unity or division of the functions and duties of the chairperson of the board of directors and the chief executive officer are not dealt with one word in the proposal. We do not propose it, but wonder why.</p> <p>Finally, as there are various corporate governance structures</p>

		<p>across Europe we believe that the matter should be dealt with at national level to cope best with existing legal framework and practice.</p> <p>For our detailed proposal with explanations, please see our attached position.</p>
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MiFID and Corporate Governance

Deutsches Aktieninstitut's position to the EU-Commission's Proposal for a Directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (MiFID)

25 November 2011

Introduction

Deutsches Aktieninstitut welcomes the opportunity to comment on the European Commission's proposal for a new MiFID because awareness has to be raised that the proposal interferes with national company laws.

In the proposal there are some changes to the corporate governance aspects that already existed in the MiFID and some new topics are added. Deutsches Aktieninstitut is sceptic of the new approach. Both, the proposal for the CRD IV-Directive (proposal for a directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, 2011/0203 (COD)) and for the MiFID **introduce new definitions that even vary from the EU Commission's most recent Green Papers on Corporate Governance** ("Corporate governance in financial institutions and remuneration policies", COM(2010) 285, and "The EU corporate governance framework, COM(2011) 164 final), although in 3.4.5. of the explanatory memorandum the EU Commission states that the changes as regards corporate governance issues are in line with the Commission's work on corporate governance in the financial sector. Furthermore some definitions in the proposal of the CRD IV-Directive and MiFID vary.

Such inconsistencies show furthermore, that corporate governance is inseparably linked to company law. The regulation of this subject however is currently – and should remain also in the future – primarily within the responsibility of the member states according to the principle of subsidiarity as laid down in the contractual frameworks for the EU. If a European solution is indispensable it must be elaborated carefully and take into account different governance structures, the one-tier and the two-tier system. Deutsches Aktieninstitut wonders why the proposals take only one corporate governance system into account while mainly two systems prevail across the EU. Until recently the described principle has been respected by EU legislators. For example, sophisticated rules concerning company governance have been developed for the Societas Europaea (SE). Although the SE was supposed to mainly fol-



low the same rules in every Member State, the one-tier and the two-tier system are dealt with separately and can be chosen by companies. Also, EU Commission Recommendation of 15 February 2005 on “The role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board” (2005/162/EC) takes both the two systems into account. **Now, without explanation, this principle is not being followed anymore. As a matter of fact, the present proposal shows that the new approach with the one-tier system as a role model does not work which is especially problematic if not only EU directives, but EU regulations are supposed to become effective: the present approach only fits for the unitary system where there is one board!**

Against this background, Deutsches Aktieninstitut is concerned about an interference with the subsidiarity-principle in case that the EU Commission goes too far in harmonising the corporate governance of listed companies in a way that forces companies into the one-tier system. The European Commission has not presented evidence why the issues addressed in the present proposal could better be solved at the European level and why it is essential to only refer to the one-tier system and in such detailed and not abstract, way. Defining the tasks of a board still lies within the legislative power of Member States. Since 27 different company law regimes exist, Deutsches Aktieninstitut has a clear preference to have corporate governance questions decided generally on member-state-level also in the future.

1. Article 4 no. 27, 28, 29 – Definitions

Article 4 no. 27, 28 and 29 introduce new definitions as regards corporate governance. Although Deutsches Aktieninstitut keeps on hinting on the existence of the two-tier system of executive board and supervisory board prevailing in most of the Member States in its positions this fact has not been adequately reflected in recent regulatory proposals.

With the present proposal a new quality has occurred because not only is it difficult to squeeze European provisions into the dualistic system but this time it is impossible. According to no. 27 “<<Management body>> means the governing body of a firm, comprising the supervisory and the managerial functions”. The provision states that there is one body with both of these functions. Deutsches Aktieninstitut would like to stress that such “one” body does not exist for German capital companies and companies in a lot of other countries.

Also, sentences we find in other proposals such as “*This Green Paper has no bearing on the roles assigned to different company bodies and board-level employee participation under national law*” (see fn 18 of the Green Paper “The EU corporate governance framework”) are missing in the present proposal as well as in the CRD IV Directive proposal. This brings up the question if no. 27 does really mean that the EU Commission gives the unitary system a priority, chooses the anglo-saxon system as a role model and that countries with dualistic or mixed systems are supposed to change their corporate governance systems. DAI wonders about such an approach because superiority of one system over the other has never been proven. It has to be accepted that in the

dualistic system members of the supervisory board have different competences compared to directors in monistic systems. In Germany supervisory board members are accountable not individually but jointly as a body, as well as are members of the management board. This automatically leads to additional internal control procedures within both boards compared to monistic systems. So, any legal measures have to allow for the interdependencies and synergies within such systems and must not just regard the stated lack of one or the other “best practice”.

In our opinion, the proposals of the EU-Commission have to be checked against different existing legal systems which is not an impossible task as the SE Statute (Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) shows.

We would propose the following:

no. 27: “Management organ” means the body responsible for managing the firm in the dualistic system.

no. 28: “Supervisory organ” means the body supervising the work of the management organ in the dualistic system. This definition has no bearing on the provision under national law to require authorisation of the management organ by the supervisory organ under certain circumstances.

no. 29: “Administrative organ” means the body managing the firm in the one-tier system. “Administrative organ in its supervisory function” means the administrative organ acting in its supervisory function of overseeing and monitoring management decision-making.

Also, the definition of senior management compared to the management body is in our view problematic. On the one hand the management body shall include persons who effectively direct the business, on the other hand senior management exercises executive functions and is responsible for the day-to-day management. This raises (at least) the question if “effectively directing” excludes “day-to-day management” and what “executive” is compared to “effectively directing”. Anyway, there is no need for the definition as senior management needs not be addressed in the MiFID (please see the last paragraph of “How to manage a firm” on page 8).

2. Article 9 “Management body” – “Responsible Organs”

Title of the Article/Addressees

According to what was stated above, we would propose to call the Article “responsible organs”.

*“1. Member States shall require that all members of the management ~~body~~, **supervisory or administrative organ** of any investment firm shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties. (...)”*

Time Commitment

The proposal states furthermore that “Member States shall ensure that members of the management body shall, in particular, fulfil the following requirements:

“(a) Members of the management body shall commit sufficient time to perform their functions in the investment firm.”

We believe that also this provision needs differentiation. On behalf of managers or executive directors committing enough time for their job is indispensable for their performance, but needs no regulation.

The paragraph reads furthermore: *“They shall not combine at the same time more than one of the following combinations:*

(i) one executive directorship with two non-executive directorships

(ii) four non-executive directorships.”

We oppose numeric restrictions like the present ones.

With respect to mandates in supervisory boards or non-executive directorships we agree in principle that possible time commitment is an appropriate aspect for the restriction of multiple mandates. Of course it makes a difference if an active manager holds additional four directorships or if a person without such function holds non-executive mandates exclusively. There also is a difference if this includes holding the chair of the supervisory board or e.g. audit committee or holding a normal mandate without being member of a committee.

The possibility to combine several mandates, taking into account individual circumstances and the nature, scale and complexity is in our view a sensible approach. We oppose that competent authorities should examine and authorise this procedure, though. As authorities do not want to take any responsibility or even be implicated if the non executive director/member of the supervisory board fails, we suppose such authorisation will never happen.

In our view the number of mandates which a director may hold should not be limited by EU legislation. Therefore the number of mandates should be handled as flexible as possible within the rules of a code. German Law and the German Corporate Governance Code address this topic already as it is addressed in other Member States. For financial institutions and insurance companies there is a restriction to 5 mandates, for other companies to 10 mandates. Due to no. 5.4.5. of the German Code members of the management board of a listed company shall not accept more than a total of three supervisory board mandates in non-group listed companies or in supervisory bodies of companies with similar requirements.

Code provisions leave room for exemptions that are to be explained in the corporate governance statement of the company. Regulation by law would not allow this flexibility. In our view a code provision is sufficient.

Over all, in our view there are already two aspects that are eligible to restrict mandates without regulation.

Firstly, shareholders should have a vested interest in voting for a member of a supervisory board who is possibly able to fulfil the function properly, so does not hold too many positions.

Secondly, in the German jurisdiction as in probably all Member States, admitting to accept a mandate knowing that it cannot be fulfilled due to time or due to lack of skills is basically contributory negligence and can lead to enhanced liability. So, it is the duty of the possible board member to assess his personal time resources carefully, regarding all his or her other dedications, not only other board memberships.

Although this has been true also before, we believe that the financial crisis has led to more awareness of shareholders and non-executive directors/members of the supervisory board.

(Finally, we would like to indicate that the terms “executive” and “non-executive director” have not been defined in Article 4.)

Knowledge and ability

Also as regards to lit. (b) we propose not to mix management and supervisory functions.

“(b) The management body shall possess adequate collective knowledge, skills and experience to be able to understand the investment firm’s activities, and in particular the main risk involved in those activities.”

It is a question of entrepreneurship to elaborate the adequate skills needed in order to manage a company appropriately, e.g. decide if an executive director/member of the management organ with experience in one or another subject is needed. We do not believe that a regulator can do that instead of companies.

Challenging the decisions of others

“(c) Each member of the management body shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management.”

Here again, the differences between the one-tier and the two-tier system become obvious. In the two-tier system the supervisory organ supervises the management organ. The management organ actually manages the company and is the ultimate authority for all others in the hierarchy. “Senior management” has no legal significance in such systems, and could be considered as the “first line” below the management organ. So, to make sense for both systems the provision would have to be, e.g.: *“Each member of the administrative or supervisory organ shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management or management organ.”*

Anyway, we believe that “independence of mind” to challenge management decisions is a strange provision if executive directors are the final hierarchy for such decisions in the one-tier system. Is this not only applicable for supervisory aspects? So, we would propose: *“Each member of an organ shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the ones it has to supervise”.*

Finally, we wonder how the provisions of honesty, integrity and independence of mind should be further defined via regulatory standards. Should there

be examples for behaviour with integrity? We would advise the EU Commission to leave that at an abstract level.

Training

Due to (c) para 2 “*Member States shall require investment firms to devote adequate resources to the induction and training of members of the management body.*”

We wonder if this provision is suitable for the two-tier system because introducing new members of the management organ to the firm is a prerequisite to direct the business and is self evident. If any, this should better be a reminder for non-executive directors or members of the supervisory board.

Nomination Committee

Due to para 2 “*Member States shall require investment firms (...) to establish a nomination committee to assess compliance with the first paragraph and to make recommendations, when needed, on the basis of their assessment. The nomination committee shall be composed of members of the management body who do not perform any executive function in the institution concerned.*”

In the German system, the task would be fulfilled by the supervisory board. Although the establishment of nomination committees that are composed of supervisory board members is quite common, we wonder why companies should be forced to establish one and the tasks cannot be fulfilled by the supervisory board as a whole. We find no explanation of the EU Commission for that and would like to mention that a similar exemption was introduced in the 8th Company Law Directive (2006/43/EC): “*Member States may determine that the functions assigned to the audit committee or a body performing equivalent functions may be performed by the administrative or supervisory body as a whole*” (recital 24).

“*Where, under national law, the management body does not have any competence in the process of appointment of its members, this paragraph shall not apply.*”

Here, an exemption for different corporate governance systems has been inserted. We wonder why this has not been done for other issues.

Diversity

The German Corporate Governance Code addresses selection of members of the supervisory body and has been changed recently due to the public debate on diversity and the discussion on how to increase participation of women in boards: according to the Code selection of supervisory board members should be based on knowledge, ability and expert experience required to fulfill their tasks. The supervisory board shall set objectives regarding board composition, taking into account the company’s international coverage, potential conflicts of interest, age limit and diversity. Reference should be made, in determining these objectives, to an appropriate degree of female representation.

While in some companies general recruitment policies may be useful, others may develop different procedures to find adequate board members. The Code provision leads to more awareness within company boards and among share-

holders and provides guidance while leaving enough flexibility in the individual recruitment/proposal process.

Please be aware that in Germany and other Member States possible new members of the supervisory board are proposed by the supervisory board and sometimes shareholders. The annual general meeting is in charge of appointing directors and is not bound to proposals. These are the constraints of such policies inherent to the system of which we are convinced that they are in line with the concept of good corporate governance. Also, in German companies with codetermination it is also difficult to set up any policies for workers' representatives because they are selected by employee bodies and unions and are voted in a ballot in the AGM. All members of the supervisory board elected that way are fully responsible for their mandate as is any member appointed by the AGM, so it is in the vested interest of board members to also have adequate skills.

In Germany duties of directors on the management and supervisory board of all stock corporations are already provided by law, as probably are in all Member States with two-tier systems. We would like to stress that in Germany board members have to fulfil the duties of the board together and face a joint responsibility for that. A detailed legal provision regarding profiles could impede or jeopardize filling the open position at least in situations when persons with a certain profile (temporarily) cannot be found on the national, European or world market. If a candidate is found he or she would have to accept a payment which is low in the average international context but face increased personal liability for fulfilling the qualification profile.

So, no additional EU measures should be taken.

How to manage a firm

In our view, the old para. 1 was better than the new para. 6. In our view, the abstract rule that "*Member States shall require the ~~management body~~ **administrative or management organ** of an investment firm to ensure that the firm is managed in a sound and prudent way.*" We wonder why the firm should be managed "*in a manner that promotes the integrity of the market and the interest of its clients*" and not also in a manner that promotes the interests of the proprietors! Does the EU Commission really intend to instruct managers to leave out the interests of the proprietors?

Para. 6 reads furthermore: "*To this end, the management body shall:*

(a) define, approve and oversee the strategic objectives of the firm,

(b) define, approve and oversee the organization of the firm, including the skills, knowledge and expertise required to personnel, the resources, the procedures and the arrangements for the provision of services and activities by the firm, taking into account the nature, scale and complexity of its business and all the requirements the firm has to comply with,

(c) define, approve and oversee a policy as to services, activities, products and operations offered or provided by the firm, in accordance with the risk tolerance of the firm and the characteristics and needs of the clients to whom they will be offered or provided, including carrying out appropriate stress testing, where appropriate;

(d) provide effective oversight of senior management.”

We would propose to delete this because we do not believe that the governing body needs to be told on EU level that it is responsible of the firm, for setting the strategic objectives of a firm, or overseeing their employees, etc. This is dealt with on national company law level already.

Also, managing the company includes overseeing the own employees. So, the focus on senior management in lit. (d) is not appropriate, anyway.

Assessing the effectiveness of the organization

The article reads furthermore *“The management body shall monitor and periodically assess the effectiveness of the investment firm’s organization and the adequacy of the policies relating to the provision of services to clients and take appropriate steps to address any deficiencies.”*

Deutsches Aktieninstitut opposes the duty to periodically assess the effectiveness of the investment firm’s “organization” as this can include everything.

Finally, the management or administrative organ should be addressed here.

Chairman and CEO

In the light of the strong interference with corporate governance systems we wonder why the only real corporate governance issue of the one-tier system, the unity or division of the functions and duties of the chairperson of the board of directors and the chief executive officer are not dealt with one word in the proposal. We do not propose it, but wonder why.

In the German two-tier system composed of a management board (“Vorstand”) and a supervisory board (“Aufsichtsrat”) the separation of the roles of chairman and chief executive officer is legally codified. Any board member is either a member of the management board or the supervisory board as, by law, it is not allowed to be a member of both boards simultaneously. Hence, the chairman of the supervisory board is naturally distinct, independent from the management board.

However, as there are various corporate governance structures across Europe we believe that the matter should best be dealt with at national level to cope best with existing legal framework and practice.