

Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (recast)’

COM(2011) 656 final — 2011/0298 (COD)

(2012/C 191/15)

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On 2 December 2011 the Council decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast)

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The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 17 April 2012.

At its 480th plenary session, held on 25 and 26 April 2012 (meeting of 25 April), the European Economic and Social Committee adopted the following opinion by 115 votes to 1 with 6 abstentions.

1. Conclusions and recommendations

1.1 The Economic and Social Committee (EESC) welcomes the proposal to recast Directive 2004/39/EC, known as MiFID, which establishes a regulatory framework for the provision of services in financial instruments, such as brokerage, advice, portfolio management, underwriting of new issues and the way investment and other banks operate, and for market operators’ transactions on regulated markets.

1.2 The overarching objective of the directive is to increase the transparency and efficiency of trading and limit market volatility, but also to increase the integrity of intermediaries and protection of investors and open European markets up to genuine competition in financial services provision. The EESC supports these objectives and sees the proposal as a whole as a step in the right direction.

1.3 In the light of the new Treaty, the EESC believes that the legal basis opted for by the Commission may be inadequate in that it fails to fully reflect the implications of the directive. Consumer protection and consolidation and development of the internal market, which are a key part of the directive, are underpinned by better-defined, more comprehensive legal bases and ensure a more effective role and involvement for representative bodies.

1.4 The proposal to recast the directive takes into consideration changes in legislation thus far and proposes new, better-defined solutions concerning operators’ responsibilities. The EESC supports the decision to opt for recasting because of the greater complexity of the financial market, developments in the market and technological instruments used, which have rendered certain previous provisions obsolete, and,

most importantly, because of the shortcomings of regulation for instruments as opposed to the securities market, which is managed by financial operators.

1.5 The EESC believes that the proposal achieves the goal of strengthening the EU financial market and making it more integrated, efficient and competitive, combining greater transparency with greater consumer protection, reducing areas of unbridled speculation – which is an end in itself irrespective of the economic and social context – in particular concerning instruments traded mostly over the counter (OTC).

1.6 Here, too, the EESC stresses that it is opposed to excessive, disproportionate use of delegated acts, as provided for by Article 94, which should govern limited, well-defined subjects for a given period of time. It calls on the European legislative institutions to offer clarification regarding the proper use of the instrument, subject to ex-post verification, and its consistency with the letter and spirit of the Treaties.

1.7 The EESC firmly supports the intention to strengthen the principle of independent advice, under which the operator has to declare in advance whether they are providing an independent service or one that is connected to a sales network. Savers will be able to choose the kind of advice they wish to receive on the basis of their needs.

1.8 The EESC had already in the past called for clear regulation of ‘sales against advice’, in other words banning financial undertakings from exerting commercial pressure on operators or sales networks to sell products. The proposal in question is

an initial step in the right direction, and the EESC welcomes the Commission's acknowledgement of the need to improve protection of investors and operators, who should operate *only* in the interests of clients, giving them appropriate advice and refraining from influencing them in any way.

1.9 The EESC recommends that the Commission include a further provision in the list of information, to regulate the quality of the information exchanged between data providers. The sensitivity and importance of this information mean that it should be mandatory to provide it, and this would clearly benefit the market in terms of transparency.

1.10 The EESC welcomes the new responsibilities conferred on ESMA, which will, *inter alia*, have to issue a series of mandatory technical standards, draft opinions, ban products and practices in emergency situations and coordinate the work of national authorities, and draw up guidelines on administrative measures and on penalties to be imposed in specific cases.

2. The proposal: the main innovations

2.1 While the proposal does not change the structure of MiFID, it does update it in the light of the provisions of subsequent directives and enhances its content with new elements, setting the following main objectives:

- promoting competition between operators and markets;
- promoting market efficiency and transparency;
- strengthening investor protection.

2.2 The means used to achieve these objectives concern the risks that have to be mitigated through various mechanisms. In the past, certain risks which had been anticipated materialised, revealing the weakness of the risk mitigation mechanisms previously provided for.

2.3 The main new elements introduced with MiFID II concern specifically:

- the exemption system and scope;
- new trading platforms;
- regulation of the activities of Community market operators and investment firms;
- rules applying to third-country investment firms;
- new powers for European Union Member States' watchdog authorities;
- delegated acts.

3. Comments

3.1 There are two parts to the reform: the first deals with the market structure, while the second focuses on transparency issues. As the text states explicitly, the main aim of the proposal is to ensure that all trading is regulated and completely transparent.

3.2 A key point of the directive is the introduction of independent advice. The EESC considers that the provision regarding independent advice has been well drafted. Under the new rules, intermediaries will have to make it clear to the saver what kind of advice they are about to give, whether it is independent or not, the nature of the advice and various other information.

3.3 This provision enables all investors, whatever their financial resources, to be given advice appropriate to their profile. The EESC welcomes this wholeheartedly.

3.4 The transparency principle introduced enables clients to find out who the adviser works for, ironing out current differences in the various Member States, increasing transparency, making the operators involved behave with more integrity, and therefore, ultimately, strengthening investor protection.

3.5 In addition, with the exception of the specific activity of portfolio management, the directive allows existing networks of advisers (both employed and independent) to co-exist, but requires them to declare their nature. The EESC welcomes this provision in terms of protection of both competition and investors, as the directive puts clients in a position where they can choose what kind of advice they prefer.

3.6 In general, the Commission document protects clients and paves the way for healthy co-existence of operators in the financial advice sector, including banks, financial promotion networks and fee-only advisers.

3.7 The EESC proposes that the definition of advice be clarified and provision of advice made mandatory in all investment services (including general investment services). The EESC feels that restricting the activity to specialists in the sector could further strengthen the principle of investor protection.

3.8 It should be made clear that advice consists of recommending a product that fits a client's profile, and that the integrity of the behaviour lies in the appropriateness of the recommendation. The EESC believes that this provision also has an educational aspect, whatever the organisational model. Integrity does not depend, or at least not wholly, on whether the recommendation takes the form of vertical or multi-brand integration, or a fee-only service or brokerage. The number of products available is no guarantee of whether the recommendation made to the client is appropriate.

3.9 The proposal leaves the element of client self-classification introduced by the old MiFID largely unchanged (intermediaries classify their retail clients on the basis of the investment knowledge and experience they say they have). ESMA provides a list of guidelines for drafting the questionnaire to be given to clients. More specifically, different categories of client are identified: retail, professional and eligible counterparty.

3.10 The EESC welcomes the improvement made, in that intermediaries are now in a position to classify clients effectively, but points out at the same time that the directive does not give the market suitable tools for protecting clients at all levels.

3.11 The system will enable clients to be 'educated' by properly trained staff on the spot. Nevertheless, the EESC feels it is quite ambitious to expect a retail client to be able to accurately and correctly assess their own financial abilities, given, not least, the lack of financial education and how overdue the financial education programmes planned at European level are. The EESC therefore suggests revising the procedures laid down in the directive, maybe providing for external support to be brought in to 'educate' the client.

3.12 The directive introduces a new model for the payment of independent advisers. Independent advice will be paid for directly by the client, while non-independent advice will not.

3.13 The EESC believes that this new payment scheme will enhance the quality of the service provided, increase protection and help to ensure that professionals behave honestly. In this connection, the EESC suggests making a distinction between 'advice' and 'sale'.

3.14 Moreover, since genuine provision of advice has a cost, it can reasonably be assumed that advice regarding more complex products costs more. The EESC therefore calls for thought to be given to whether less-complex products could be promoted and more widely distributed in that they are cheaper.

3.15 Many of the new provisions are intended to ensure that banks behave honestly and with integrity; this will oblige them to overhaul their commercial practices. The EESC welcomes this provision because it will bring greater investor protection. At the same time, the EESC urges the Commission to pursue a policy of making financial undertakings accountable rather than clients.

3.16 Another important new element introduced is the proposed specific stock market segment for small and medium-sized enterprises, with lower regulatory compliance requirements. The EESC welcomes this particular innovation as it will raise the profile of the segment in question.

3.17 However, the EESC has some doubts regarding ability to implement the provision. It is not a new proposal: for over 20 years attempts have been made to develop a wider market for SMEs, but it has never become operational and effective. The EESC therefore suggests laying down specific provisions and measures which will enable it to be implemented efficiently and effectively.

3.18 Generally speaking, the directive sets out clearer operating rules for all trading activities. Trading platforms must ensure that, in the context of a transaction, all information is freely utilisable for a period of 15 minutes and disseminated in real time at a cost established by the Commission on a 'reasonable commercial basis'. This measure would be a step forwards in achieving transparent price-setting.

3.19 The EESC supports the process whereby each platform is required to use specific intermediaries to disseminate data relating to trading. However, it feels that this provision relies too heavily on spontaneous exchange of information between operators and suggests that the Commission include a specific point regulating the quality of the information exchanged by data providers.

3.20 With regard to commodity derivatives MiFID II aims to prevent unbridled speculation as an end in itself. One way in which the Commission plans to achieve this objective is to restrict the number of contracts that an investor can enter into in a certain period of time. As it has already reiterated on several occasions, the EESC believes that speculation is not necessarily a bad thing for the financial markets, as it increases their liquidity and boosts their growth. Measures are certainly necessary to counter highly-speculative transactions that affect consumer end prices, but at the same time the EESC calls for the measures to be carefully balanced and weighed up so as to avoid harmful effects on the market.

3.21 Moreover, the EESC considers that although the new regulation pursues the principle of harmonisation between countries, it does not seem to propose specific coordination between Europe and the United States. The EESC supports the principle of harmonisation pursued, but at the same time draws attention to the additional costs that players on the various markets may have to bear as a result of the different rules applying, for example, on the derivatives markets.

3.22 The EESC is in favour of extending the transparency principle to pre-trade relating to securities and structured products. However, it suggests that the sizeable differences between the equity and non-equity markets be taken into account. Pre-trade transparency is more important for order-driven markets (such as the share market), while post-trade transparency is more suited to quote driven markets (such as bond markets). The EESC therefore believes it would be advisable to distinguish between markets when it comes to applying the pre- and post-trade transparency principle.

Brussels, 25 April 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON
