NORDIC SECURITIES ASSOCIATION

2020-09-30

NSAs reactions to the European Commission's proposals regarding changes to MiFID II as part of the post-COVID-19 recovery

The Nordic Securities Association ("NSA") welcomes the European Commission's initiative to improve market conditions to allow capital markets to manage the challenges and support the recovery from the Covid-19 pandemic.

Many of the proposals relating to changes in MiFID II are in our view a step in the right direction, such as the alleviations for eligible counterparties and professional clients, the move towards digital disclosure of information and the temporary suspension of RTS 27 reporting requirements.

However, we do consider that some of the proposals require further consideration as they do not fully address the legal uncertainties and implementation challenges identified by market participants. Thus, it must be ensured that this "quick fix" is not considered by the co-legislators to be the final word on all investor protection rules in MiFID II and that it will be possible to further analyze some of these topics in the context of the wider MiFID Review starting in 2021.[1] The NSA will of course stand ready to assist the co-legislators in this continued process.

Please find below more detailed comments to the proposals.

Cost & Charges Disclosure The NSA supports the proposals to alleviate cost & charges requirements for eligible counterparties and professional clients.[2] However, in our view the proposals do not go far enough. In order to make the rules more proportional and less complex we propose that also professional clients should be fully exempted from the requirements and that this should apply to all investment services, i.e. also investment advice and portfolio management. Moreover, as stated in our response to the Commission's consultation on MiFID Review, we consider that a review of the criteria in Annex II, which allow more experienced retail clients to request treatment as professional clients, is appropriate.

End of day loss reporting The NSA supports the Commission's proposals which exempt eligible counterparties and professional clients from ex post loss reporting requirements.[3] However, considering the complexity of these rules and the limited benefits they bring from an investor protection perspective,

[1] See NSA response to the Commissions consultation on MiFID Review: https://www.nsa-securities.com/files/7815/9048/2566/Public_consultation_on_the_review_of_the_MiFIDII_MIFIR_regulatory_framework.pdf

[2] NSA interprets the proposal to include ex ante, ex post and retail clients which have opted-up as professional clients.

[3] NSA considers that it should be clarified which reporting requirements are covered by the Commission's proposal, noting that the end of day loss reporting is only included in the delegated act and not MiFID II directive.

we consider that there is reason to go even further and remove these requirements from MiFID II. In particular we see a danger that the loss reporting rules create a risk for “panic sales” and/or harmful “herd behavior” amongst retail investors.

Best execution reports The NSA supports a temporary postponement of RTS 27 reports until 2022. We consider that the requirements regarding execution quality reports are not fit for purpose and that it should be analyzed further in the MiFID Review to either abolish RTS 27 or make these technical standards subject to an in-depth revision taking different types of instruments and market participants into account. In that connection, it could also be considered if any targeted amendments are needed to RTS 28. Moreover, in order to reduce legal uncertainty as regards the legal obligation to produce and/or consider RTS 27 reports until the amendments on temporary suspension enter into force, we believe that ESMA should issue a non-action letter to supervisory authorities.

Product governance The NSA does not object to exempting bonds with make whole clauses from product governance rules in MiFID II but considers that the proposal does not go far enough to address the problems related to application of the product governance rules to primary market transactions. In our view, the exemption should, in addition to bonds with make whole clauses, cover non-complex products referred to in article 25.4 a MiFID II, such as plain vanilla shares and bonds (sometimes referred to as “execution only” products). We also fully support the proposal to exempt bonds with make whole clauses from PRIIPs scope.

Digital Disclosure of information The NSA supports the Commission’s proposal that electronic communications to clients should be allowed by default and consider this to be in line with EU digitalization and sustainability action plans. We consider that similar proposals should be introduced in other EU legislation in the financial area. However, it is important to ensure that this shift does not have unintended consequences for existing clients, noting that the level of digital knowledge varies across Member States. Therefore, we think that the proposal should be amended so as to include a phase-in period during which it should be left to investment firms to decide how to best implement the proposals taking into consideration the needs of their particular client-base. Moreover, we believe that the EU-legislation should not prohibit investment firms from having electronic communication-only as a business model, provided it is made clear to clients when onboarding that the firm does not offer paper based information at all (i.e. no opt-in). Finally, after a firm has taken a decision to shift to electronic communication and this has been properly communicated to existing clients, we propose that the firm should be able to charge a reasonable fee for paper based information thereafter since this will create an incentive for clients to make the digital transition.

Implementation time. The NSA notes that some of the proposed amendments will require changes to IT-systems and internal procedures. In order to avoid putting additional strain on investment firms in a time where their organizations are already under a lot of stress due to the COVID-19 crisis, it is important to ensure sufficient time for implementation. We therefore propose that the implementation time for Member States is shortened to 6 months (instead of 9 months) which will allow firms an extra 3 months to prepare.

On behalf of the Nordic Securities Association,

Swedish Securities Market Association sara@fondhandlarna.se, +46 70 774 17 40
Finance Finland, satu.wennberg@finanssiala.fi, +358 50 613 70
Finance Denmark, kva@fida.dk , + 45 3016 1102
Norwegian Securities Dealers Association, sindre.stoer@vpff.no; + 47 916 30 383