

WilhelmGilliéron

AVOCATS



Auteur: Christophe Wilhelm | Le : 30 septembre 2015

How internal operations of investment firms and banks need to change under MiFID II

Me Christophe Wilhelm attended in Brussels on September 29, 2015 the MiFID II workshop organized by Markus Ferber of the ECON Committee of the European Parliament. This workshop is intended to give an in-depth insight into the regulatory goals of MiFID II and the implementation of those goals into practice. On September 29, 2015, the Workshop was attended to address the issues of **How Internal Operations need to change.**

According to Mr Ferber, each financial organisations, i.e. hereafter the Investment Firms, or Banks, or any Private Financial Institutions, has to place itself in the seat of the investors. The needs of the investors should drive the interests and the organisation requirements, the corporate governance and product governance of each Investment Firms governed by the new regulations of MiFID II.

The key principle is therefore:

Acting on the best interest of the Clients

This goal has to be followed on the three following directions:

- Consumer empowerment;
- Incentivizing good behaviour;
- Levelling the playing field;

• **As far as consumer empowerment is concerned**, this means that the consumer or the client, has to be considered as the weaker party and needs protections against the power of the Investment Firms. This consists also in dealing with the management of possible conflicts of interest.

• **Incentivizing good behaviour**, means that the culture of Investment Firms have to implement internal regulations promoting the good behaviour leading to act within the interests of the Clients. These regulations have to be consumer oriented.

• **Levelling the playing field** is oriented to the fulfilment of the three following elements that has to govern the requirements on internal organisation within each Investments Firms:

- (i) Good and appropriated corporate governance and product governance;
- (ii) Record keeping
- (iii) Safeguarding Client's Assets

1. Corporate Governance and Product Governance:

Improving corporate governance means to define the best interest of a client. This is a complex process that has to regulate and govern the internal organisation of each Investment Firms. However defining the best interest of a client may be a complex process. In this respect, MiFID II regulations are categorizing the Clients between “non-professionals or retailer” and “professionals”. An intermediate category as “semi-professionals” does not exist under MiFID II. However, as Mr Ferber confirmed, certain categories of “retailers” may ask to be treated as professionals if they meet certain criterias.

Acting on the best interest of the Clients means, in terms of corporate governance:

- managing and mitigating conflict of interests;
- managing and mitigating the impact of the remuneration and allowances offered to employees and officers of the Investment Firms.

An internal policy should be enacted by the Management Committee of each Investment Firms and submitted for approval to the regulator.

Product Governance is also key. This is necessary to insure that the right product is proposed to the right client.

Ideally a clear, transparent and well documented process should be set up for every product. This process should identify the “target market (s)” of each financial product. It is therefore a target market(s) driven process and not a sales driven process that should lead the principles of good Product Governance in accordance with the principles of MiFID II. Mr Ferber added that such a Product Governance be made even though the financial products are not manufactured by the investment bank if this firm is only distributing the product. In this case, it may well be that the distributing Investment Firms is defining the target market (s) even if it is not the same of the firm having manufactured the product. However, as Mr Ferber outlined, if a target market(s) has been defined by the manufacturer it is mandatory for the distributing firm.

Manufacturer and distributor should therefore be interactive. The manufacturer should make the market analysis, the product approval and the review of the product while the distributor should seek for obtaining adequate information, report experience and advise the most suitable and appropriate product for its clients based on the target market(s).

2. Record keeping

This is aimed to protect the Investment Firms, the Clients or the Customers. It helps to improve market surveillance. It also helps to incentivise good behaviour. According to Mr Ferber, record keeping should be considered has a chance and not as a burden for every Investment Firms.

Records must be kept a least five years or even seven years if the internal jurisdiction so requires. It should be kept in a safeguarded place in compliance with the applicable Data Protection Regulations. The recording should be retrieved instantly. Electronic communications and telephone communications should be recorded even if they only indirectly relate to a specific transaction. The test seems in this case to be that such communications should be recorded if there are “intended” to a transaction.

Mr Ferber confessed that from a technical view point this is extremely challengeable. This means that the Investment Firms has to carefully define in advance what kind of communications process is acceptable for technical and legal reasons in the specific case of the considered Investment Firms. Here again, Investment Firms should develop internal policy in writing, adapted to the size of the firm, about the record keeping policy. This has to be regularly adapted and updated. Of course Investment Firms have to comply with these records keeping requirements even if their headquarters if the Investment Firms are located outside the UE.

3. Safeguarding Client's Assets

In this respect, the requirements set forth by MiFID II are not very different from the one existing already under the MiFID I. A special officer should be appointed to be responsible for safeguarding Client's Assets. This officer would be responsible to liaise with relevant policy authority such as domestic regulator, supervisor, central bank etc....

The next block of the MiFID II workshop organized by Mr Ferber for the ECON Committee will take place on October 20, 2015 and will address the issues of transparency for investors.

Christophe Wilhelm - October 1st, 2015

Source :

<https://www.wg-avocats.ch/actualites/droit-des-contrats/how-internal-operations-of-investment-firms-and-banks-need-to-change-under-mifid-ii/>