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**
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	1) The exemptions are not appropriate because: a. Energy trading companies deal on own account in financial instruments in order to be able to offer their customers a demand-based, reasonably priced and competitive supply of energy, to reduce the risks of purchasing and own-production, and to react promptly to volatile and changing market conditions. This also applies when trading is organised in municipal platforms solely for the customers of public utility companies. b. Restricting exemptions limits the room for manoeuvre enjoyed by the group of energy supply companies named. Their competitiveness would be reduced (also vis-à-vis banks engaged in energy trading) and in the

		final instance lead to a weakening of the competition on the energy markets as a whole. c. The activities particularly of medium sized energy trading/supply companies do not cause systemic risks on the financial markets. Arguing from the perspective of medium sized German energy companies it is therefore most crucial to exempt their energy trading businesses. It is a matter of uttermost importance that the text of the exemptions for ancillary activities is clear and continues to be applicable in a legally secure manner for a significant group of energy suppliers and their procurement platforms at the level of the consortium. In particular the use of trading instruments for companies engaged mainly in the generation of energy and the sale thereof to customers should not be inhibited.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	2) Buying emission allowances for electricity generation will become a business completely alike buying fuels to run the power plants. Therefore it is most important to retain emission trading in the energy (or co2-consuming) sector in order to prevent household and industrial customers from generation-price risks. Transforming emission trading into a straight financial instrument would endanger the purpose of emission trading which is capping the emissions and giving clear indications

		on the price of prevention technologies, because: - emission allowances differ from financial instruments as they do not confer financial claims against the drawer of such allowances; - emission allowances function like fuels - the inclusion of emission allowances into MiFID would cause a decreased liquidity on the trading market for such allowances, as the stricter requirements in the MiFID regime would limit the number of participants in such markets.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	
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?	
Organisation of markets and trading	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	No, the OTF-category is not defined appropriately. In our point of view, OTF should be legally defined (not only in the recitals but in the legal text of MiFIR/MiFID) as an **automated system** (e.g. algorithmic trading), where a high amount of trades could be operated at once. In recital 7 of the

		MiFIR Proposal OTF are described "*as internal electronic matching systems operated by an investment firm which execute client orders against other client orders. The new category also encompasses systems eligible for trading clearing-eligible and sufficiently liquid derivatives. It shall not include facilities where there is no genuine trade execution or arranging taking place in the system*." This should mean that the conclusion of the trading contract has to be made via the OTF-system. If "OTF" were to be defined in a wider manner, the physically settled forward products of energy supply companies would inadequately become financial instruments. However in the energy sector physically settled forward products are the core products to be covered by the exemption in Art 2 Para 1 Fig. i. For the consequences regarding the limited competitiveness and liquidity on energy markets if the exemptions are further reduced, e.g. if OTF will not be defined as an automated system, see our comments on question 1.
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	OTC should be defined as every trade that is not operated via energy exchange, MTF or OTF (in due consideration of the "OTF"- definition regarding our comments to question 6.)
	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	

	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in	We oppose the introduction of "position limits" in MiFID and MiFIR for the following reasons: - The definition of "position limits" is unclear - Position limits reduce the liquidity in energy trading markets,

	practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	while liquidity and therefore more competitiveness is one of the main purposes of current energy legislation. - As regards products used to reduce the risks of trading and own-production of energy supply, companies' position limits prevent an effective risk management.
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to	

	make them workable in practice? If so what changes are needed and why?	
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	
	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can	

	access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	
Detailed comments on specific articles of the draft Directive		
Art. 2 Para.	According to Art. 2 Para. 1 Fig. i it shall be possible in certain cases to provide investment services (known in Germany as	

1 Fig. i)	"financial services") without the need for a financial services provider's licence (bullet point 1 to bullet point 3), provided that the exempted activities are to be regarded as ancillary activities to the main business at company group level alongside a main business that is not itself the provision of an investment service. The intended sense and purpose of the revision of the MiFID is in particular an improved protection of the investors. This is why, in the assessment of the MiFID, financial services that are performed on one's own account are subject to less stringent requirements than those which are performed on behalf of third parties on a commissioned basis. This is correct insofar as the risks when acting on one's own account are borne not by the third party but by the provider of the financial service itself. However, the cases of exemption under the 1st and 3rd bullet point of Para. 1 Fig. i contradict this essentially correct assessment and thus result in the paradox that a commodity derivative for a client of one's main business – e.g. a gas customer – could be procured on that customer's account in the context of the exemption for ancillary activities, but that same commodity derivative could not be procured for the same customer on the energy supplying company's own account without falling under the scope of the MiFID. This is a result of the following considerations: • According to Art. 2 Para. 1 Fig. i, 3rd bullet point, persons are to be exempted from the scope of the MiFID who *"provide investment services, **other than dealing on own account**,"* in commodity derivatives or derivative contracts or emission allowances or derivatives thereof to the clients of their main business. Essentially that means that according to Art. 2 Para. 1 Fig. i, 3rd bullet point, commodity derivative transactions may be provided to clients of one's main business as an ancillary activity if these transactions are **not on one's own account**. • According to Art. 2 Para. 1 Fig. i, 1st bullet point, on the other hand, persons are to be exempted from the scope of the MiFID, who *"deal **on own account** in financial instruments, excluding persons who deal on own account by executing client orders"*. This means, however, that falling under the exemption for ancillary activities would be out of the question for persons who, when executing client orders, deal on their own account. The above differentiation is particularly difficult to comprehend in connection with the statements in Recital 14 of the MiFID. In the

	last sentence of Recital 14 it is stated that, by way of exemption, *"the execution of orders in financial instruments as an ancillary activity between two persons whose main business, on a group basis, is neither the provision of investment services (…) should not be considered as dealing on own account by executing client orders."* According to this wording, it should therefore be possible for an energy supply company (main business: sale of gas) to sell to its client (main business: sale of gas) a hedging contract (e.g. to safeguard the current gas price), even if the energy supply company does this on its own account.
Art. 2 Para. 3:	Art. 2 Para. 3 is intended to empower the European Commission to adopt delegated legal acts concerning measures with which the criteria for the definition of ancillary activities may be determined. In this regard, two elements have already been developed by the European Commission that shall be taken into account when establishing the criteria for determining whether an activity is ancillary to the main business. Since, by way of defining ancillary activities, the scope of the energy trading activities that are or are not subject to supervision may be determined and therefore major areas of the MiFID-revision are affected, the existing proposals need to be made more specific or extended, in order to do justice to the principle of democracy at EU-level. It should be possible to supplement further objective elements/criteria in the forthcoming legislative process.
Article 2 Para 1 Fig. b)	For energy supply companies that conduct their energy trading together with a number of partners through the agency of a common, non-consolidated subsidiary, the definition of "parent company and subsidiary" in Art. 4 para 1 b) Figs. 24 and 25 takes on relevance for the application of exemptions following the intended lapse of the exemption for commodities and commodity derivatives according to Art. 2 Para. 1 Fig. k. These companies would, according to the draft of the MiFID – depending on their specific constellation – no longer fall under any one of the exemptions because, owing to the lack of consolidation neither the exemption under Art. 2 Para. 1 Fig. b nor that under Fig. i, 2nd bullet point would take effect. What should be crucial for the applicability of an exemption, however, is the nature of the investment service and not the question of whether the subsidiary, through whose agency the energy trade was carried out, has a consolidated parent company or several (non-consolidated) partners. **In order to maintain a liquid energy trading market it is necessary that non-consolidated companies also fall under the**

	exemption rules, provided that the other preconditions are fulfilled.
Article ... :	
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	