

Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

AFTI CONTRIBUTION

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**.

The Association Française des Professionnels des Titres ("AFTI") is the French association of Securities Professionals representing the post-trade industry in France and within the European Union.

AFTI has over more than 100 members, all actors in the securities market and back office businesses: banks, investment firms, market infrastructures, issuers.

AFTI welcomes the opportunity to contribute to the consultation organised by the Rapporteur of the European Parliament on the review of directive 2004/39/EC.

In its submission, the response of AFTI to the questionnaire focus, on the one hand, on the general provisions of the proposals (MIFID2/MFIR) and ,on the other hand, on post-trade specific issues and much more particularly on topics related to custodians/account providers.

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?	AFTI agrees with AMAFI' views
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	AFTI agrees with AMAFI's considerations
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	<p>Account providers are an essential pillar for investor protection due to the nature of their functions: safekeeping and administration of the financial instruments.</p> <p>The European Commission proposal considers the safekeeping and administration of financial instruments as a core investment service but does neither specify how this concept should be understood nor propose specific provisions to address the rights and obligations of intermediaries and custodians regarding protection of clients financial instruments and the entire holding chain of securities. As long as these points are not clarified, the requalification of "safekeeping and administration of financial instruments" as investment service would lead to considerable legal uncertainties.</p> <p>Such reclassification is proposed without addressing the question of what kind of MIFID obligation is applicable to the custodians and their clients. In this respect, it should be stressed that</p>

		<p>account holding and custody services differ significantly from the trading and distribution of financial instruments targeted by MiFID. In general, these services are loosely associated with the investment decisions of clients. Consequently, this classification could potentially lead to uncertainties and additional costs also for the investors.</p> <p>AFTI recommends that before envisaging any obligation for the account providers to comply with any provisions of the MiFID, the European Commission shall submit an impact assessment for concrete legislative proposals aiming at :</p> <ul style="list-style-type: none"> • Specifying the scope of financial instruments that can be subject to safekeeping and administration (i.e. the list of financial instruments that can be held in custody) ; • Specifying the type of entities that can be authorised to license safekeeping/custodians services; • Clarifying and harmonising the obligations and rights of the account providers/custodians.
	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?	<p>AFTI is of the opinion that in a context of international financial globalisation to be stabilised through notably the G 20 reforms, it is appropriate to regulate third country access to EU markets.</p> <p>In this respect, the European Commission states that the new MIFID regime shall provide a passport for the access of actors based in third countries <i>“in order to overcome the current fragmentation into these countries”</i>.</p> <p>AFTI would like to recall that the role of the European Union as a global actor in international relations is also to export the</p>

		<p>“acquis communautaire” into legal frameworkss of third countries and promote EU standards and values abroad in order to create a comparable legal environment beyond EU frontiers. The European Commission should also ensure the effective existence of an equal treatment on access markets requirements between third countries actors operating in EU and EU companies operating in third countries</p> <p>Consequently, the adoption of mutual recognition agreements (MRA’s) between the EC and third countries is historically recognised as an efficient substantive method for exporting EU standards. In many occasion, the European institutions have claimed that the adoption of MRA’s is one of the Community’s strategies for pursuing its political objectives¹. It should be clearly stated that third countries will accept binding procedural means to implement the “acquis communautaire” into their own legal systems (i.e. the reciprocity rule)</p> <p>In this respect, the Lisbon Treaty has put in place a high representative of the EU for foreign political action in order to increase EU negotiating power, given the fact that, for example, the EU has opened up over 80% of its financial services markets while the other major developed economies have only opened up less than 30% of theirs (see for instance recent difficulties expressed by some European majors actors operating in the clearing of financial instruments to obtain the right to compete in the USA while respecting strict high- level requirements on risk</p>
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¹ Please also refer to the current debate under the public consultation launched in June 2011 by Commissioners Barnier and de Gucht relating to the access of third countries to the EU’s public procurement market.

		<p>mitigation, on capital funds and on supervision) .</p> <p>Considering that, AFTI strongly urges the European Parliament, the Council and the Commission to ensure more effective, strategic defence of the EU's interests in response to the call of the European Council² and asks for the inclusion of mutual recognition and reciprocity rules in the third countries provisions of MiFID/MiFIR.</p> <p>Furthermore, AFTI estimates that the third country regime, spread out between the Directive and the Regulation, is quite complex and not easy to understand. Simplification/clarification might be useful.</p>
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?	There should be a clear alignment between the corporate governance regime as provided by the CRD 4 and the corporate governance regime as specified by the MIFID.
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?	AFTI supports FBF response

² "to review the interface between industrial policy and competition policy in the light of globalisation and to promote a level playing field" See Competition Council of 10.12.2010 – Council Conclusions on an integrated industrial policy for the globalisation era: Putting competitiveness and sustainability at centre stage, point 15.

	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?	AFTI agrees with FBF answer.
	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?	AFTI supports FBF approach.
	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?	AFTI agrees with the requirements proposed by the Commission.
	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?	AFTI agrees with the general purpose underlying the reporting obligations which is to offer an efficient tool to monitor possible market manipulation. However, these requirements will add significant burden and cost with no evidenced added value regarding the initial reporting transactions regime as adopted through the MiFID. At minimum, it should be clarified the scope of the obligation to keep telephone conversations and electronic communications during three years.
	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	AFTI supports FBF approach.

	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?	AFTI supports FBF views.
	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?	AFTI fully support the rationale in favour of non discriminatory access to market infrastructures and fair competition rules. In this respect, AFTI agrees with the EC proposals and support the requirement that CCPs provide non-discriminatory clearing access for financial instruments regardless of execution venue. AFTI specifically welcome the fact that this covers access to the associated margin pool within the CCP. Stating that, European legislators should ensure consistency between EMIR and MIFID provisions to make sure that there is a strong level playing field between instruments subject to EMIR and those not.
	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 practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	AFTI supports FBF approach.

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?	AFTI supports FBF approach.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	AFTI supports FBF approach.
	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?	AFTI supports FBF approach.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	AFTI supports FBF views.
	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?	AFTI supports FBF views.
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?	AFTI supports FBF views.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all	AFTI supports FBF views.

	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?	AFTI supports FBF views.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	AFTI supports FBF views.
	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)?	AFTI is strongly supportive of an approach consisting to create a European Consolidated Tape (ECT) for post-trade transparency. The comprehensive consolidation of all trades on a single consolidated tape will offer market users, be they sell-side or buy-side firms, investors or issuers, an effective and efficient access to post trade information helping to overcome market fragmentation. The European Consolidated Tape will also represent a significant step towards a more integrated pan-European market.
	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	AFTI supports FBF views.

	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?	AFTI supports FBF views.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	AFTI supports FBF views.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	<p>AFTI would like to call attention of the Rapporteur on the potential interaction of the MiFID/MiFIR with the AIFMD and the EMIR on aspects related to post-trade issues. For instance, in the AIFMD there are provisions on the safekeeping of financial instruments by the depositaries that may potentially interfere with the debate on the need to clarify the role and duties of account providers before any decision to reclassify the safekeeping and administration of financial services as a core investment service.</p> <p>More generally, there are third country proposals from part of MiFID/MiFIR, the AIFMD and EMIR.</p> <p>In this respect, it is fundamental to avoid overlapping and to guarantee consistency between the definitions across the different texts.</p>

	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	AFTI would draw the attention on the rules and prescription of the Dodd Frank act in the US and the risks created by the some aspects of the Vockler Rule, notably an unequal standing of mutual funds vs their regulated non-US counterparts.
	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?	At this stage, we do not consider the proposals observe a good balance between level 1 and level 2 as too much has been left to Level 2 implementation with certain technical standards not due to be implemented until the end of 2016. This can create uncertainty. It is quite important to ensure that technical measures are provided only where there is a need for further clarity and legal certainty.
Detailed comments on specific articles of the draft Directive		
Article number	Comments	
Article 16 alinea 10... :	AFTI does not share the Commission proposal and is of the opinion that any prohibition or restriction on title transfer collateral (hereafter TTC) or security arrangements with rehypothecation/re-use rights, with retail customers, is likely to increase costs and/or decrease availability of products to retail clients, because credit institutions will hedge risk with market counterparties under arrangements requiring collateral to be provided either under TTC or security arrangements; the credit institutions will have to fund such collateral requirements if they are unable to use	

	<p>collateral received from retail customers for this purpose. Moreover, independently of the client classification such prohibition seems to go against :</p> <ul style="list-style-type: none"> (i) local ownership rights which give the owner the right to dispose of its properties; (ii) provisions of the Collateral Directive which achieved an important harmonisation and securitisation of collateral agreements in financial operations across Europe. <p>As for retail clients, in practice, the collateral agreements they are involved with are usually out of the scope of the Collateral Directive and thus do not involve a full transfer of ownership. A reinforcement of the retail clients assets could be reached by strengthening compulsory/information requirements when retail clients enter into transactions involving provision of collateral. AFTI is of opinion that an obligation of "clear, full and accurate" information would appear to be a better solution.</p>
Article ... :	
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Detailed comments on specific articles of the draft Regulation	
Article number	Comments
Article ... :	
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