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.**

Name of the person/ organisation responding to the questionnaire	**Oesterreichs Energie (Register ID number: 80966174852-38)** **Association of Austrian Electricity Companies** **Österreichs E-Wirtschaft** **Brahmsplatz 3** **1040 Vienna** **Austria**

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?	No, it should be made clear that the exemptions are cumulative. For example, a treasury company within a group may provide investment services to other group companies covered by article

		2(1)(b) but also deal on own account to hedge the group's business risks in ways that would otherwise be covered by article 2(1)(i), therefore any limitation included in one exemption should not interfere with the applicability of any other exemption. **Amendments to MiFID II:**
		Proposal for a new Article 2.1a: ***<u>1a. An exemption in paragraph 1 that is limited to persons providing particular investment services or performing particular investment activities shall apply to a person even if that person provides investment services or performs investment activities covered by another exemption.</u>***
		Article 2.1(d): As regards this exemption, the definition in (ii) has experienced a major transformation resulting in the far-reaching restriction that a person cannot make use of this exemption in the event of its membership of or participation in a regulated market or MTF. As far as we have been informed, the specific wording was exclusively chosen to capture computerised, algorithmic traders who should be subject to the financial regulation under MiFID/MiFIR in any case. This intention was reportedly confirmed by the Commission in a Council meeting. We explicitly support the reported Commission's position in this

		regard. However, the current wording does not reflect this intention. Being too extensive to address these specific needs, we suggest the exemption being amended to reduce the scope of its application appropriately.
		Proposal for the revision of Article 2.1(d): (d) persons who do not provide any investment services or activities other than dealing on own account unless they (i) are market makers; (ii) are a member of or a participant in a regulated market or MTF ***and engage into algorithmic or high-frequency trading***; or (iii)deal on own account by executing client orders; This exemption ~~***does not apply to persons exempt under***~~ ***does not affect the applicability of*** Article 2(1)(i) ***for persons*** who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof;

		Article 2.1(i): The financial markets regulation should pay attention to the already existing sector specific EU regulatory regimes, which govern wholesale transactions intended to culminate in physical delivery. In cases where a commodity has been included in a tailor-made regime, which already offers a market oversight framework and imposes transaction reporting requirements, systemic risks in markets in that commodity are likely to be already reduced. Therefore, a person mainly engaged in the production or physical supply of such a commodity and active in the relevant spot or physical forward markets should not be exposed to the additional burden of regulation pursuant to MiFID. As far as financially settled derivatives are concerned, such a person will also be subject to regulatory reporting requirements for standard derivative transactions in such a commodity by virtue of provisions of EMIR, while its activities in derivative trading through organised marketplaces will be overseen by virtue of MAD/MAR. If both obligations (i.e. under a tailor-made specific regime and under other financial regulations) are in place, the additional regulatory measures imposed through MiFID would indeed constitute an additional burden and which is likely to outweigh its incremental benefits for the market. It thus needs to be questioned.

		Amendments to MiFID II:
		Proposal for revision of Article 2.1 (i) ***<u>(i) persons which provide investment services or perform investment activities, and which are part of a group that conducts a business of producing and/or supplying a commodity, which is, when considered on a group basis, predominantly of a physical character, and:</u>*** ***<u>a) are subject to regulatory oversight and to regulatory reporting obligations by virtue of any binding rules applying throughout the EU specifically to spot and physical forward transactions in that commodity, and</u>*** ***<u>b) are subject also to regulatory reporting obligations in respect of standard derivative transactions in that commodity by virtue of [EMIR]</u>***
		Article 2.1(k): An alternative way to avoid disproportionate burdens for non-financial traders of derivatives is to clarify the structure of the former exemption Article 2.1 (l) (due to the deletion of the former Article 2.1(k), the respective exemption moved to its current position).

		According to the comments on MiFID I, the exemption was associated with a rather restrictive interpretation. However, the current elimination of the former Article 2.1(k), the introduction of new recitals (particularly No. 88) and the emergence of the Regulation on OTC derivative transactions, central counterparties and trade repositories (EMIR) should have changed the former assessment considerably. Especially, this article constitutes the only exception making explicit reference to the terms 'hedging' and 'clearing'. Whereas the special requirements for the companies entering into financial instruments for hedging purposes is mentioned in the already stated recital 88, the clearing obligation is the main element of EMIR. However, the current structure of the respective exemption lacks clarity. The proposed slightly amended structure would clearly distinguish between two separate subcategories: dealing on own account as the first one and dealing for the account of others as the second category. The first subcategory includes all relevant investment services and activities for the sole purpose of hedging the respective person's positions. The second one focuses on the execution of customer orders on their behalf (and name) and introduces the additional requirement to include a form of (central) clearing. This is the same approach being implemented in EMIR for non-financial counterparties: As long as a derivative contract can be measured to be objectively linked to an underlying physical transaction (i.e. as long as such contract can be measured to be objectively linked to hedging purposes), a clearing obligation

		does not exist. However, the clearing obligation is imposed to address the additional risks of financial markets in any other case accordingly. A relatively minor adjustment could thus provide an appropriate method to address the specific needs of non-financial counter-parties and to maintain the consistency of the coming financial market regulation. **Amendments to MiFID II:** **Proposal for the revision of Art. 2.1 (k):** (k) firms ***(i)*** which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets ***or*** ***(ii)*** which deal for the accounts of other members of those markets or make prices for them ***and*** which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;
	2) Is it appropriate to include emission allowances and	No, as regards the emission markets, it is important to note that

	structured deposits and have they been included in an appropriate way?	there are participants in the market with considerably deviating intentions. These deviating intentions are based upon on the specific demand for emission allowances and other ETS compliance units. It should be an objective of proper and adequate market supervision that facility operators and their trading arms are not prevented from directly participating in the relevant markets. However, this can be the effect of a regulation regime which is focused on more restrictive regulations (e.g. for speculative trading operations) and which aims to extend these regulations to the whole market. Although EUAs do share some common features with other classes of financial instruments, such as transferable securities (e.g. dematerialised bearer bonds held in a clearing system), they are distinguishable from such types of financial instrument for several reasons. They do not confer financial claims against the public issuer of such allowances; they do not represent titles to capital or title to debentures or constitute forward contracts. Taking the still fragile nature of the carbon market into account, the diversity of participants and, consequently, the market's liquidity must not be harmed. The carbon market is specific in that, as thousands of SMEs are mandated as EU ETS operators to participate. Incomplete data security/integrity and an insufficiently precise admission (KYC) procedure are the main deficiencies of the carbon market in general which are not effectively addressed by MiFID/MAD. Consequently, the total inclusion of emission allowances in the financial regulation regime is not considered appropriate.
	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?	Generally, all EU market participants should have to respect the same rules.
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?	In the Q&A section of MiFID review page of the European Commission (MEMO/11/716), an Organised Trading facility is defined as a new type of platform that "captures all forms of organised trading not matching the existing categories […] in other words any trading which goes beyond ad hoc deals." Hence, an extensive interpretation of the term is suggested. However the impact assessment provided by the EU Commission together with the proposals fails to provide details and we believe that the potential impacts are underestimated. We doubt that the current definition of OTF is sufficiently clear. Especially the position of the operator of an OTF needs to be described in more detail. In particular, a clarification whether an OTF necessarily involves three parties is required. Generally, it is unclear what practical implication this new type of platform might have.

	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?	
	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 practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	
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?	The main financial services legislations that have interactions with MiFID/MiFIR 2 are the European Market Infrastructure Regulation (EMIR), the Capital Requirements Directive (CRD) and the Market Abuse Regulation (MAR). All these are currently in their legislative process. There are potential overlaps between parts of these legislative initiatives and this situation may lead to uncertainties for market participants/operators. In particular, we believe that MiFID should be based on provisions agreed in EMIR when defining rules for non-financial counterparties, otherwise the approach of

		the clearing threshold agreed in EMIR would be overtaken. Beyond the financial services, legislation interactions are foreseen with sector specific legislation in the energy market. In particular, the Regulation in Energy Market Integrity and Transparency (REMIT) recently entered into force that introduced a single oversight regime for gas and electricity markets and market participants across the entire EU. REMIT includes rules on registration of market participants, prohibition of insider dealing and market manipulation, transaction reporting, monitoring, and enforcement rules by National Regulatory Agencies supported by the Agency for Cooperation of Energy Regulators (ACER). We urge on the need to define clear boundaries between the legislation on discussion with a clear definition of their scope in order to avoid at any time that the same issue could be covered by several pieces of legislation.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	In particular, we emphasise the rules concerning the energy sector included in the Dodd-Frank Act approved in the US. We strongly support a better specification of which derivative contracts should be considered financial instruments to exclude all products with delivery in the future that are physically settled. This is the approach used in the US under the Dodd-Frank Act, any departure from this approach in the EU would create regulatory inconsistency. Please find our concerns outlined in the section on additional specific articles of the draft Directive (b. Definition of Financial Instruments) in more detail below.

	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

Article number	**Comments**
Article 4 (28), (29):	**Definition of Parent Undertaking and Subsidiary** The current definitions of parent undertaking and subsidiary do not pay attention to characteristic company structures in the energy sector, which have been created during the liberalisation of the respective markets. Trading activities have repeatedly been demerged and especially municipal utilities and other small and/or medium companies have established joint trading entities to survive on the market. They usually have chosen the form of a jointly affiliated group. This company structure needs to be addressed in the current proposal to guarantee well-balanced and fair regulation. The following must be noted in advance: It is the purpose of the cited article 32 of Directive 83/349/EEC to extend the provisions on consolidated companies to the group of joint ventures. In fact, the proposed amendment is meant as a clarification: in both situations, the subsidiary is effectively managed and controlled by the respective parent undertakings. In the case of common control by more than one parent company, there is no reason to assume a particular protection requirement in favour of these parent undertakings. They already have the control and the access to information they require to protect their respective (investor) interests. Consequently, there is no reason to treat jointly managed companies differently. In particular, this holds true as regards the application of the group exemption in Article 2.1 (b).

	For reasons of proportionality and equality, the relationship between jointly managed entities and their respective parent undertakings should be considered sufficient to be covered by Article 2.1 (b). **Amendments to MiFID II:** **Proposal for revision of Article 4 (28)** 24) ‘Parent undertaking’ means a parent undertaking as defined in Articles 1 and 2 ***<u>as well as a jointly managed undertaking as defined in Article 32</u>*** of Seventh Council Directive 83/349/EEC of June 1983 on consolidated accounts; **Proposal for revision of Article 4 (29)** 25) ‘Subsidiary’ means a subsidiary undertaking as defined in Articles 1 and 2 ***<u>as well as a jointly managed undertaking as defined in Article 32</u>*** of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;
Annex I, Section C (6), (7) :	**Definition of Financial Instruments:** According to the currently proposed version of MiFID, physical contracts are largely brought under financial market supervision. Currently, only spot contracts and strictly bilateral forwards remain outside the scope of MiFID. Basically it is important to state that the definitions in MiFID do not necessarily coincide with their customary interpretation. For instance, the term "forward" apparently covers all OTC derivatives, whereas all derivatives on regulated markets (including MTF and recently OTF) are defined as "futures". However, the terms do not include a specification whether they are financially or physically settled. As a consequence, the seemingly minor adjustment in Annex I, Section C, paragraph 6 (i.e. the addition of "OTF") causes serious consequences for the energy sector. All derivative transactions on regulated markets, MTFs and OTFs would qualify as financial instruments covered by MiFID. Concluding any of these transactions in its ordinary business, would bring an energy supplier under the application of MiFID. In particular, this broad understanding of financial instruments would render several exemptions in Article

2 (e.g. the exemption for ancillary activities) completely useless. In comparison, the respective draft law in the U.S. (i.e. Dodd-Frank-Act) uses another definition of financial instruments which excludes physically-settled derivatives expressively. To avoid the disadvantage of regulatory arbitrage, an adaptation of the definitions of financial instruments is highly required.

This situation is particularly inapprehensible for the energy sector since Regulation No 1227/2011 on wholesale energy market integrity and transparency has been published in the Official Journal of the EC on 8 December 2011 which is focused on physically settled derivatives. Therefore, we urge for a revised definition of financial instruments excluding physically settled derivative contracts at least for the energy sector (i.e. wholesale trading of power and natural gas).

Amendments to MIFID II:

Insert a new clause that explicitly states that (whether directly or indirectly) physically settled transactions are not classified as financial instruments.

Proposal for revision of Annex I, Section C, Financial Instruments (6):

(6) Options, futures, swaps, and any other derivative contract relating to commodities that ~~***can be physically settled***~~ ***are not intended to be physically settled*** provided that they are traded on a regulated market, an OTF and/or an MTF;

Proposal for revision of Annex I, Section C, Financial Instruments (7):

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, ~~***that can be physically settled***~~ ***that are not intended to be physically settled***, not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

	General Remarks The currently proposed revision of MiFID stands for an intensification of market regulation and expands the financial regulatory regime to non-financial sectors. Mainly the financial crisis in 2008 called the European Commission to prepare financial regulation in order to reduce systemic risk. But there is no comparable financial systemic risk in relation to non-financial counterparties such as energy firms. Energy trading companies: ▪ Are non financial firms that are generally "one-sided", having natural long or short positions in certain commodities depending on the underlying activity (production or supply of commodities). ▪ Deal on own account in financial instruments with the primary purpose of managing price risk related to the underlying physical business. ▪ Do not provide investment services to unsophisticated customers and therefore do not cause concern in relation to customer protection. Energy firms involved in trading energy derivatives pose a far lower systemic risk than banks and financial firms. This was the conclusion reached by CESR and CEBS in their October 2008 advice which was confirmed in July 2010.[1] Commodity and energy firms were largely unaffected by the financial crisis and performed well throughout and there is no evidence that such firms contributed in any significant way to the crisis. On the contrary, for commodities including power the extension of financial regulation bears the danger that the energy companies would be tied to financial markets and institutions in a new way, leaving them far more exposed to a crisis in the financial world than before. At present, the main risk that power companies face in a sovereign debt crisis is falling demand for their product if the crisis weighs on the economy. Even defaulting in energy trading has no effect on the supply of gas and electricity. In case of a financial default, the physical facilities will continue to ensure security of supply. But implementation of tighter financial regulation could expose energy companies to sovereign credit risk in the same way that banks are. Particularly forcing utilities to clear most of their trades

[1] CESR-CEBS advice 15 Oct 2008 (CESR/08-752), see under: http://www.cebs.org/getdoc/ee9b85fa-4d64-48dc-9f45-a7350881ddac/2008-15-10-CESR-CEBS-advice-on-Commodities.aspx , confirmed in "CESR Technical Advice to the European Commission in the Context of the MiFID Review and Responses to the European Commission Request for Additional Information" – 29 July 2010

would needlessly drag them into any next financial crisis.

The current approach to expand the scope of the MiFID particularly for the commodity derivative dealers would entail significant consequences for energy companies, including generators, electricity/gas suppliers, electricity trading units as well as network operators as they would have to face high costs to acquire the licence (plus recurring costs to maintain it) due to structural and operational and capital requirements.

In particular, with an extension of the scope of MiFID, the provisions of several further directives and regulations, such as the Capital Requirement Directive (CRD IV), European Market Infrastructure Regulation (EMIR) and Market Abuse Directive/Regulation (MAD/MAR) also become mandatory for those energy companies falling under the MiFID-regime. These regulatory provisions, however, are clearly aimed at and designed for the financial sector. This becomes clear when recognising that, for example, EMIR holds specific exemptions for non-financial market participants not exceeding a certain clearing threshold, explicitly considering the systemic relevance of the operation of such firms.

A framework that would not allow energy firms for an appropriate exemption would undermine the development of competitive, integrated and efficient European energy markets. MiFID requirements would be an additional barrier to market entry and would lead to the reduction in the number of market participants. As a result, liquidity would decline. The lack of liquidity in wholesale markets will affect also retail companies and end customers because the possibility to hedge the natural short position will be extremely reduced and as a consequence volatility in end users' prices will increase. Gas and electricity market development would be hindered and this runs counter to the objective of creating a single European energy market.

The unintended consequences for European energy markets would be relevant:

- **Fewer market participants.** Many market participants will leave the market and uncovered risk will be pushed into the real economy.
- **Lower market volumes, lower liquidity and higher risk management costs.** Trading volumes will be lowered given the additional equity and cash collateral required. Spreads will rise and market liquidity will inevitably fall.
- **Reduced competition and efficiency in product markets.** Less market liquidity will undermine the market's ability to provide signals of emerging oversupply and deficits.

	We believe that it is important to exempt firms which are not financial institutions or members of financial groups from regulations which are not designed for these institutions or not proportionate to the risks they are exposed. Therefore, appropriate exemptions must be maintained within MiFID. If banking-sector style rules are disproportionately applied to energy firms this will have the effect of reducing liquidity and increase entry barriers for new market participants. But precisely a large number of market participants of different sizes will be able to establish an efficient internal electricity market and to guarantee its integrity. Consequently, we share CESR/CEBS' recommendation that "in respect of own account dealing, the intention would be to have an exemption which enables entities trading on their own account as part of a primarily nonfinancial business to remain outside the scope of the Directive."
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	