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).

EUROFER welcomes Markus Ferber's initiative to consult stakeholders on the revision of MiFID/MiFID and is happy to provide with this paper its contribution in the most constructive way.

EUROFER is a Brussels-based business association representing 100% of the European iron and steel industry.

Contribution sent to econ-secretariat@europarl.europa.eu **on 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?	In order to achieve effective regulatory measures, industrial companies must be clearly differentiated from players active on the market for speculation purposes. The purpose of such legislative framework is to restrain speculative effects in particular on the power, gas, raw materials, emission allowances and currencies markets in order to improve the market conditions of the underlying assets. Including derivative business by industrial companies that does not pose systemic risk due to the underlying exposure would therefore be counterproductive. Industrial companies' activities on the markets have nothing to do with speculation, but are intended to secure physical procurements and risk hedging. On the contrary financial companies must be covered

		by the Directive. As far as exemptions are concerned, EUROFER welcomes the initiative but deem it as insufficient. The exemption for group companies is not covering all important situations. Further exemptions on the applicability for energy intensive industries are necessary in order to avoid that energy intensive industries may need a financial services license or a banking license for their hedging needs for power, gas, raw materials and emissions in a number of specific situations. Such a license would be required e.g. if energy intensive industries would purchase raw materials, power, gas, emissions allowances or their derivatives for third parties in the following instances: • Leased plants: energy intensive industries may have leased plants. They do not own them but they are purchasing power, gas and emissions for these leased plants. • Third parties on factory premises: third parties which do not have their own connection to a power or gas network as they are located on factory premises of another company may purchase their power and gas through the owner of the larger site. Energy intensive industries often purchase power and gas for these third parties located on their factory premises. • Sale of group companies: From time to time group companies are sold which have been part of a group's power and gas purchasing portfolio. From the moment of the sale becoming effective they become third parties. However it is difficult to stop a structured purchasing straight away because existing hedges may extend several years into the future. There should be an exemption to allow continuing purchasing for former

		group companies. In many cases the new owner wishes existing power and gas contracts to continue and the new owner does not have the capacity to reorganize power and gas purchasing as a first priority. We think that a time frame of 4 years is an appropriate time for a transition.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	EUROFER believes that power and gas OTC Forwards and Futures and CO2 emission rights should be generally excluded from the scope of MiFID. Instead these products should be dealt with in an amended REMIT version. Thereby a coherent regulatory framework for power and gas products and CO2 for energy producers, traders, and consumers with one regulatory authority (at EU level) instead of several will be created. A bespoke treatment of these products would however be possible with MiFID as a second best option provided that the right exemptions are put in place for companies using these products for hedging and compliance purposes. In particular for emissions allowances, it has to be recalled that the primary objective of the EU ETS is to mitigate CO2 emissions in a cost-effective manner. In this regard, the inclusion of the ETS sector in MiFID would to higher transaction costs and higher administrative burden. It would be particularly counter-productive as the ETS already entails direct and indirect CO2 costs and a significant administrative burden (monitoring and reporting) and would undermine further the EU business competitiveness towards third countries.
	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?	Article 22 MiFID Regulation in connection with EMIR may lead to the prohibition of bilateral telephone trading which is currently market standard for energy intensive industries. We propose to drop the approach for a prohibition of bilateral telephone trading.
	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?	Article 22 MiFID Regulation in connection with EMIR may lead to the prohibition of bilateral telephone trading which is currently market standard for energy intensive industries. We propose to drop the approach for a prohibition of bilateral telephone trading.
	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?	Regarding transparency requirements in the new draft of MiFID there is a risk that in markets with limited liquidity (e.g. exotic currencies or infrequently traded metals) transparency on derivative trades could lead to the disclosure of the concerned company. This in turn would lead to the disclosure of the hedging strategy (also opposed to competitors) with potentially increasing hedging costs for the respective company. Therefore disclosure of information to the regulator has to be subject to stringent confidentiality provisions and any disclosure of information to the public has to be prohibited.
	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?	Article 22 MiFID Regulation in connection with EMIR may lead to the prohibition of bilateral telephone trading which is currently market standard for energy intensive industries. We propose to drop the approach for a prohibition of bilateral telephone trading.
	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	ESMA and the responsible authorities should be placed in a position to demand a reduction in derivative instruments and also to define upper limits for derivatives in advance to protect 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?	functioning of the markets. This would permit the activity of speculative financial market players to be reined in and better monitored. As far as communication is concerned, extensive transparency at least towards regulators/authorities is necessary but could in turn be an issue in terms of competition. Should hedging positions of steel makers be made public, it would allow inference on production and raw materials exposure.
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?	Regarding transparency requirements in the new draft of MiFID there is a risk that in markets with limited liquidity (e.g. exotic currencies or infrequently traded metals) transparency on derivative trades could lead to the disclosure of the concerned company. This in turn would lead to the disclosure of the hedging strategy (also opposed to competitors) with potentially increasing hedging costs for the respective company. Therefore disclosure of information to the regulator has to be subject to stringent confidentiality provisions and any disclosure of information to the public has to be prohibited.
	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?	The Commodities Futures Trading Commission in the USA also wants to introduce position limits for raw material derivatives. Intensive discussions should be carried out here. Such talks have already been initiated at the level of the G20 and should be resolutely continued.
	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	
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