

Division Bank and Insurance  
Austrian Federal Economic Chamber  
Wiedner Hauptstraße 63 | P.O. Box 320  
1045 Vienna  
T +43 (0)5 90 900-DW | F +43 (0)5 90 900-272  
E [bsbv@wko.at](mailto:bsbv@wko.at)  
<http://wko.at/bsbv>

## 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.

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?	Seems to be reasonable

	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	Yes.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	<p>Annex I of MiFID II qualifies the "<i>safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management</i>" as investment service and not as ancillary service, as this is presently the case under Directive 2004/39/EC (MiFID).</p> <p>This broad definition may also be interpreted as to include the service provided by Central Securities Depositories (CSDs) which, for the following reasons, would not be required in order to ensure the Directive's main purpose, <i>i.e.</i> the protection of investors:</p> <p>First, the service provided by CSDs is strictly limited to the sub-custodianship of securities (financial instruments) and does not involve any kind of pricing, distribution, market making, marketing or trading of financial instruments.</p> <p>Second, investment orders are not addressed to CSDs but to commercial banks (or other financial institutions) acting as custodians for their clients which pass on such orders to CSDs for execution. Thus, CSDs execute orders which have been "already issued". They do not maintain any kind of relationship to ordinary investors. Commercial banks acting as custodians are clients of CSDs. The reason for which an instruction is given by a commercial bank to a CSD is not known to the CSD and, in any event, irrelevant.</p>

		<p>Third, both MiFID II (Articles 39, 40, 57 and Art 75 para 1 alinea w) and MiFIR (Articles 1 no. 1 alinea d, 25, 28, 29 and 30) contain rules on the services provided by Central Counterparties (CCPs), as well as on clearing and settlement institutions, aiming on the enforcement of competition in the clearing of financial instruments. Pursuant to the concept of MiFID II and MiFIR, the services provided by CCPs are considered special cases which are otherwise exempt from the application of both, MiFID II and MiFIR: Article 1 of MiFID II defining its scope of application does not explicitly refer to the CCPs. Failing to acquire ownership in the financial instruments traded through CCPs, the services provided by CCPs does not qualify as "dealing on own account" (Article 4 no. 5 MiFID II). Moreover, "execution of orders on behalf of clients" (Article 4 no. 4 MiFID II) is not applicable, as CCPs do not "conclude agreements" on behalf of investors - they are part in the trading of securities at an exchange where agreements have already been concluded.</p> <p>As the services of CCPs may only be provided in respect of financial instruments kept in sub-custodianship by CSDs, it seems that MiFID II contains a non-intended deficiency in not explicitly excluding the services provided by CSDs from its scope of application, which, like CCPs, are part of the capital markets' infrastructure.</p> <p>For the purpose of clarification, we request to include an explicit exemption for services provided by CSDs in Article 2 ("Exemptions") of MiFID II.</p>
--	--	---

	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?	Yes it is appropriate and the principle of reciprocity shall be stressed here.
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?	No changes required, since the provisions are detailed enough.
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?	The purpose and the rationale and added value of such OTFs do not seem to be clear
	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?	It is doubtful if this intention can be realized.
	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?	We welcome the European Commission's intention to regulate algorithmic trading (Article 4 para. 30, Article 17 and Article 51), as it is seeking to strengthen the supervision of high-frequency trading. This is, in our view, an understandable aim and we regard most of the requirements for algorithmic trading as reasonable.
	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?	n/a

	<p>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?</p>	<p>Not appropriate since it causes a substantial increase of fixed costs and do not benefit the investors.</p> <p>We furthermore strongly oppose to the requirement of recording of telephone conversations since it is doubtful regarding data protection.</p> <p>A mandatory obligation at the European level would be a very costly burden for many banks. The purchase of recording facilities and the respective maintenance would imply very high costs for them. The Commissions' assumption in its Impact Assessment, that only for 4.6 to 5.8 per cent of the financial sector employees would need to be fitted with a fixed line recording, is in our view much too low. The Impact Assessment is based on the situation in the UK which differs considerably from the situation in a lot of other Member States with distinctive retail-focused businesses. Even the Commission's Impact Assessment shows that especially the one-off costs for small companies would be much higher than for medium companies and once again multiple times higher than for large companies (see SEC(2011) 1226/2, page 200 ff.). Following this line of thought, imposing mandatory provisions at the European level could lead to smaller and medium-sized banks not being able to offer the reception of orders and/or investment advice via telephonic means any longer. This would then lead to a reduction of investment service providers, which is a development against the interest of the end-investor who would have less choice in institutions he could entrust his investments with.</p>
	<p>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?</p>	<p>n/a</p>

	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?	No.
	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?	Not appropriate since it only causes a substantial increase of fixed costs and do not benefit the investors.
	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?	Such interventions go too far and shall not be part of any regulation.
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?	<ul style="list-style-type: none"> <li>• The usefulness of the distinction between “independent” and “dependent” advice is doubtful. Increased transparency requirements for “dependent” advice are more appropriate.</li> <li>• There is the danger that in the future non-independent advice is generally seen as low-quality advice, which is incorrect and devoid of any justification.</li> </ul> <p>In most cases non-independent advice is also based on the consideration of a wide range of financial products. In our view, the number of financial instruments under consideration should be the determining factor when assessing the quality of advice. The number should be</p>

		<p>disclosed to the client (in addition to information about inducements). We consider the notification about independency of advice and any related ban on inducements to be excessive.</p> <p>Advice provided may also be considered as "independent" if the training on the financial products is provided by a sufficiently large number of product providers and the consulting fee is received in the form of a commission due to the lack of payment by the customer.</p> <p>There are also massive concerns regarding a fee system from a regulatory point of view. In a commission system the costs of counselling are jointly borne. By contrast in the fee system only those having the appropriate financial resources will receive advice. All others will be forced to make investment decisions without any advice, due to economic considerations. A ban of commissions would jeopardize the adequate supply of financial products. This would not only have a plethora of negative macroeconomic consequences but also have a direct negative impact on customers.</p>
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	In terms of UCITS it only makes sense if exclusively structured UCITS are considered as complex products. This would be in line with the KID requirements and transparent for the investors.
	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?	We do not support the publication of the top five execution venues. The current best execution regime is sufficient and there is no need for additional requirements. We do not see benefit for accumulating information afterwards annually and would therefore ask for deletion of this paragraph.

	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	We do not agree on extending obligations with respect to information or reporting requirements to eligible counterparties (see Article 30 para. 1). This is due to the fact that eligible counterparties are a set of clients that are supposed to be on par with the investment firm itself. These eligible counterparties are investment firms themselves or similar institutes. Therefore these clients do not need and require these types of information or reports which are aimed at retail clients.
	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?	It is crucial that it is ensured that any product intervention does not lead to regulatory arbitrage.
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?	n/a
	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?	n/a
	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?	n/a

	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	n/a
	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)?	n/a
	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?	n/a
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?	Current proposals shall be sufficient.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	No.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	UCITS and AIFMD
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Any related US and Swiss legislation

	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	<p>We are particularly concerned about Art. 74, which imposes an obligation on authorities to publish sanctions, even if this publication can also be made anonymously. This practice however would be a significant infringement of the fundamental rights of those concerned. Due to the small market structure of some Member States even in case of anonymous publication the identities of the affected parties would be obvious to the public. Thus the anonymity stipulated by the Directive cannot be realized.</p>
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	<p>We assess ESMA's various authorizations without sufficient legal basis to be critical, especially in Art 25 (periodic communications). We believe that more signposting at Level 1 is necessary to ensure that important matters of principle are clear.</p> <p>We deem that Level 1 measures already must include the material scope that makes the future requirements discernible for all market participants. This is clearly the responsibility of the Parliament, Council and Commission as the European legislative bodies. Only "technical standards" should be left for implementation on Level 2 and therefore to the Commission and ESMA.</p> <p>Along those lines also the scope of the delegation for Level 2 measures has to be precisely drawn, meaning that it must already be clearly defined. Past experience with MiFID 1 has shown us that because of some unclear Level 1 provisions and/or far-reaching delegation for Level 2, the implementing Level 2 measures took some quite unexpected and different turns.</p> <p>In many instances, the scope of requirements for MiFID 2/MiFIR is not discernible for us in the Commission's proposals. The far-reaching delegations for Level 2 aggravate this situation.</p>

Detailed comments on specific articles of the draft Directive	
Article number	Comments
Article ... :	
Article ... :	
Article ... :	
Detailed comments on specific articles of the draft Regulation	
Article number	Comments
Article ... :	
Article ... :	
Article ... :	
Article .2(1) 11 MiFID..	It is crucial to define ETF in the sense that a fund can only then labelled as ETF if there is an actively reached agreement between the investment management company and a market maker that the respective fund is exclusively traded on a stock exchange. Moreover in such a case, all units of this fund have to be traded on a stock exchange. This would avoid the current misleading practice that in particular on some regional stock exchanges in Germany, certain units of investment funds are traded without the knowledge of the issuing investment management company.
Article ... :	
Article ... :	