# 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 |
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| 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 answer |
| | 2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way? | No answer |
| | 3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service? | It is very important that custody and safekeeping not be categorised as a core service, but remain as an ancillary service. It is important that MiFID continue to cover ***pre-settlement*** investment service activities such as portfolio management, dealing and broking and receipt and transmission of orders.<br><br>***Post-trade activities***, including settlement and custody services, have different characteristics and legal consequences, and should be covered by appropriately targetted legislation, including the Securities Law Directive, the CSD Regulation, as well as more generally banking regulation. |

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| | | Categorising custody and safekeeping as a core service would therefore create conflicts with other legislation, would mean that entities providing safekeeping services will be faced with overlapping, and possibly inconsistent, regulation and will lead to requests by entities providing safekeeping services for exemptions from the MiFID requirements.<br><br>The proposal to categorise custody and safekeeping as a core service is designed to cover a perceived regulatory gap. Using MiFID is not the right way of plugging this gap, and will lead to multiple problems. Using MiFID for this purpose is also unnecessary and redundant, as the future Securities Law Directive will regulate the provision of custody and safekeeping services, will impose obligations on intermediaries with respect to the provision of such services, and will enhance investor protection by giving investors certainty of legal ownership and the ability to exercise rights associated with securities.<br><br>It is, however, appropriate and valuable that custody and safekeeping be treated as ancillary services under MiFID, as this addresses the key implications of investment firms having authority to hold or place client money and assets either with themselves or with third parties; this ensures that such money and assets are not commingled or confused with money and assets of the relevant investment firm in the course of carrying out ***pre-settlement*** investment service activities.<br><br>To ensure legal coherence (i.e., horizontal harmonisation across bodies of relevant legislation), it is urged that custody and safekeeping arrangements continue to be regulated as ancillary activities under MiFID so that Securities Law Directive be |

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| | | allowed to do its work on a non-discriminatory basis across all "account providers" (as the term is defined in the proposed Securities Law Directive) regardless of whether these account providers are MiFID Investment Firms or not.<br><br>Separately, we note that the proposed definition of safekeeping and administration is very wide and potentially unclear, i.e., "safekeeping and administration of financial instruments for the account of clients, including custodianship and related service, such as cash collateral management". All other core services are much more clearly and closely defined. If "custody and safekeeping" are to continue to be proposed as "core" activities, either the definition should be more narrowly circumscribed or exemptions should be allowed – or possibly both – so as to ensure the definition is not overbroad. |
| | 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? | EU clients and counterparties need to have access to markets and providers outside the EU. At the same time, it is appropriate to seek to ensure appropriate protection of EU clients and counterparties by requiring some level of equivalence. The key is to find an appropriate balancing of these goals. As proposed, the legislation may well choke off important access to global markets and service providers through extraterritorial prescription of demanding equivalence requirements. Strict "equivalence" is not realistic or necessary. An approach that requires some level of internationally recognised standard of regulation (with reference to OECD states) continues to be appropriate in light of G20 commitments as they relate to OECD states. Indeed, market access for EU banks to countries that have committed to a common set of regulatory principles for financial services reform (i.e. the members of the G20) should remain a primary policy objective.<br><br>More specifically, the proposed legislation, if applied literally, |

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| | | could mean that any delegation to by an EU MiFID firm to third party non-EU provider - or even the mere use of non-EU brokers and service providers in the context of trading, execution and settlement activities - could require the latter to comply with the third country requirements. In many important ways, this may result in the unintended consequence that such non-EU third parties may not be accessible to EU MiFID firms and their clients if they do not satisfy the equivalency requirements. Moreover, in the case of retail clients, use of such third parties would be cut off entirely (we note there has been some suggestion that these requirements might extend not just to , retail clients but also to "professional" clients (e.g., an EU investment management firm itself).<br><br>By way of example, if custody and safekeeping are to be considered "core" activities, questions would arise as to whether sub-custodians or other local custodians could continue to be utilised since it is highly unlikely the proposed equivalence requirement will be satisfied in all cases. This result may operate to close off access to certain markets outside the EU.<br><br>We also note that no mention of extension of the cross-border passporting regime to professional clients is made in the proposed text. We believe this is an oversight which should be corrected.<br><br>On a separate note, we also encourage careful harmonisation on third-country impacts with other current and forthcoming legislation. The AIFM Directive (AIFMD) contains provisions in relation to third country "Alternative Investment Fund Managers" and their delegates as well as non-EU funds falling within scope of the directive and their service providers. Care |

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| | | should be taken to not require authorisation or equivalency where this would conflict with requirements under the AIFMD.<br><br>Similar concerns arise in respect of European Markets Infrastructure Regulation (EMIR): recently proposed text under EMIR relate to equivalency criteria for non-EU CCPs and other providers of services (such as trade repositaries). Care should be taken to ensure harmonisation with EMIR to avoid unintended consequences or inconsistencies. |
| 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? | While harmonised rules on corporate governance are a worthwhile goal, they should remain principles-based. Otherwise, there is a risk they may conflict with individual EU member state corporate law, which raises Pillar 3 concerns (inconsistency with member state civil law regimes). Moreover, it is important to ensure horizontal consistency with CRD IV. |
| 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? | Potential conflicts of interest between the OTF operator and clients in transactions should not be banned outright but be subject to appropriate management and disclosure under MiFID's conflict of interest requirements: it should be kept in mind that the OTF operators duties to other participants may also place their interests in conflict with the interests of those for whom they are facilitating a particular transaction. |
| | 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? | We believe G20 objectives will be met in this regard through EMIR. We do not envision that creation of OTFs will in itself lead to "channelling of [OTC] trades onto organised venues", however, we believe it is a positive development if the availability of OTFs represents increased flexibility to select market infrastructure providers. |
| | 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 | New organisational safeguards and risk-controls seem appropriate for investment firms engaged in "algo" trading. These should reflect existing market best practices. The |

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| | involved? | European Commission's proposals for market safeguards seem appropriate.<br><br>However, the imposition of "market-making"-type obligations on all of "algo" traders may impair liquidity in the market by deterring the provision of liquidity: algo traders currently act voluntarily. Moreover, a "one-size-fits-all" may not be appropriate in view of the diversity of "algo" strategies used. |
| | 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? | No answer. |
| | 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? | We believe that the recording obligation set out at Article 16.7 of the draft Directive (imposing a 3-year retention period) is in conflict with the maintenance period imposed for transaction data under Article 22 of the Regulation (5 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 make the requirement practical to apply? | We believe that the G20 commitments in relation to reduction of systemic risk will be served mainly through EMIR. We do not think it is appropriate or desirable that "all" sufficiently liquid and standaridised derivatives "must" be traded on a regulated market, an MTF or an OTF. We believe that market participants should retain a choice between executing via a trading facility or OTC, to reflect their particular needs. |
| | 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? | We do not believe MiFID is the appropriate legislation or regulation to deal with access to funding for SMEs or market abuse issues. For the sake of horizontal harmonisation, these issues should be addressed in appropriate legislation such as the Prospectus Directive and the Market Abuse 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?<br>If not, what else is needed and why? Do the proposals fit | We strongly support measures to open up access to markets and to market infrastructure, and to break up closed vertical silos. We believe that there need to be solutions at all levels; this means specifically that there need to be solutions not only at |

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| | appropriately with EMIR? | the levels of trading venues and of CCPs, but also at the levels of CSDs and of collateral management systems (CMSs). A member of a trading venue needs access to a CCP, but also needs access to a CSD (both to settle securities trades, but also to hold securities that can be provided as collateral to a CCP) and needs, or would benefit greatly from, access to a CMS provider (who manages the provision of that collateral to the CCP). Restrictions on access at any level have an impact on the cost and the provision of services at all levels.<br><br>We support the provisions on non-discriminatory access set out in Title VI, but believe that they will have to be complemented by further legislative measures that grant access rights and support interoperability at the levels of CCPs, CSDs and CMS providers. |
| | 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? | We strongly discourage imposition of position limits as proposed as impossible to implement meaningfully and likely counterproductive. Instead, we agree with proposals to require firms to manage their positions dynamically (i.e. to adjust them in relation to the changes in the volumes of contracts traded at a specific price level, while balancing risk and reward). |
| 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? | We support the proposition that investors should be able to have access to the best possible advice. We accept that investment advice may be affected by the interests of the party providing the advice, and that these should be disclosed so the investor is given a fair and meaningful opportunity to take the advisor's disclosed personal interests into account. Of course, the sophistication of the client is relevant to his or her capacity to reach an informed judgment where conflicts of interest are disclosed. |

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| | | None of this precludes conflicts of interest. Conflicts of interest should be expected to be disclosed and managed and only prohibited where they impair the investment firm's performance in the interest of its client.<br><br>As a result, we continue to endorse the work of the Committee of European Securities Regulators (CESR) in clarifying the types of entity behaviour that European securities regulators encourage (good practices) and discourage (poor practices) in the context of inducements. |
| | 16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why? | We believe that it is not possible to inflexibly list specific products that can or should be sold on an execution-only basis. We believe that elements – risk, complexity and liquidity – is should be considered in order to determine the appropriate selling regime for a product. We agree with proposals that ESMA may be the best-placed to do this from time to time. |
| | 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 believe the rule as proposed is too inflexible: there are likely to be cases where financial instrument asset classes are not available or traded via five or more venues. |
| | 18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated? | We believe these are broadly acceptable and sensible, except we remain concerned that individual member states may prescribe different classification results if they are able to assess client categorisations individually. |
| | 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? | We support the continued dynamic involvement by government and regulators so that they can respond to market conditions and events flexibly. We would discourage inflexible, top-down rule-making that does not recognise the ways in which markets and products evolve over time to meet current needs and expectations of clients and investors. |
| Transparency | 20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, | No answer. |

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| | 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? | The scope of non-equity instruments to which pre and post trade transparency requirements would be extended should be narrower. We agree with proposals to define the scope of transparency requirements based on product liquidity that would provide for narrower and more appropriate application of the requirement. We also agree with other proposals to define pre and post trade transparency requirements in a way that could be adjusted and calibrated in a harmonised manner based on: (i) the specific type of instrument, (ii) the main features of their relevant markets, (iii) the size of the transactions and the type of operators and investors. |
| | 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? | Please see above. |
| | 23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why? | We support proposals to require competent authorities to inform ESMA of any local use of waivers so that the latter has increased authority to determine compatibility of a local authority proposal of a waiver with level 2 requirements. |
| | 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)? | No answer. |
| | 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 | No answer. |

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| | 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? | We believe a key issue is sufficiency of time to make and consult on rulemaking. This in itself is leading to significant uncertainty, inconsistency and conflicts in certain other legislative efforts, which in turn is detrimental to financial markets and investors. Consultation timeframes in respect of other initiatives have been very challenging. |
| | 27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately? | No answer. |
| | 28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2? | The following initiatives:<br>• European Regulation on Market Infrastructures (EMIR),<br>• Market Abuse Directive,<br>• Forthcoming Central Securities Depositories regulation,<br>• UCITS Review on structured UCITS and the depositary consultation (UCITS V),<br>• AIFMD (both in respect of the third country regime and custody and safekeeping duties of depositaries),<br>• Forthcoming Directive on legal certainty of securities holding and transactions (SLD) on requirements on investment firms providing safekeeping and administration of securities services. |
| | 29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why? | • Coordination with IOSCO/G20 commitments and rulemaking is critical. |
| | 30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive? | No answer. |
| | 31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2? | We believe more clarity is required at Level 1 in order to ensure understood requirements for effective Level 2 implementing measures. |