Review of the Markets in Financial Instruments Directive

BBVA's answers to the 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**
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?	The references in Directive Articles 2.1.(d)(iii) and 2.1.(i) to *"dealing on own account by executing client orders"* could be misleading. What the legislator intends is to exempt firms just dealing on own account from MiFID requirements. The key element is whether the firm dealing in own account is also providing to its clients other investment services or not. If the firm is providing other investment services then the exemption should not apply.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	We support the proposed regulation related to trading of emission allowances. The only structured deposits that should be caught by MiFID should be those that are not capital-guaranteed at maturity, as these are not really "deposits" and, therefore, banking rules are not appropriate for them.
	3) Are any further adjustments needed to reflect the inclusion	Although it could make sense to include custodian and

	of custody and safekeeping as a core service?	safekeeping as investment services, important care should be taken in not requiring custodians to comply with all MiFID rules. These services, in fact, differ substantially from the trading and distribution of the financial instruments that are targeted by MiFID regulation.
	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?	As of today, any third country entity willing to provide investment services in the EU have to comply with MiFID and other national legislation as far as they provide such services to EU investors. We believe that harmonization of rules is key to the development of international financial markets. International dialogue should continue to avoid the negative effects of extraterritorial rules and clarifying the concept of "equivalence of rules and supervision". We also suggest the EU authorities to think about reciprocity rules in case of negative effects deriving from extraterritorial effects from foreign rules. We believe that third country entities forming part of financial group and dealing only with their affiliates in the EU should be exempted.
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	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and	We understand that, the only difference between a MTF and an OTF is that the former should not set discretionary rules for

and trading	from systematic internalisers in the proposal? If not, what changes are needed and why?	bringing together multiple third parties' buying and selling interest, while the latter can. There is not much clarity on the degree of discretion an OTF may have. We think that , instead of banning the operator to act against its own capital, rules should make explicit the degree of discretion permitted. Because of its role, it is impossible to to think of OTFs in which operators are not providing quotes and indication of interest not only based against their own capital. There is a lack of clarity about whether a firm, operating a system similar to an OTF against its own capital, would be subject to the ban or, alternatively, would neither be considered an OTF nor require any authorisation. The fact that OTFs are going to be able to determine and restrict access to their facilities is too relevant to be left in a Recital; it should be included in the OTFs definition. As a result of this, if an OTF restricts a firm access to the facility, and there is a trading mandatory requirement imposed pursuant to MiFIR Article 24 which could only be fulfilled through this OTF, the relevant firm would be expelled from the market. We suggest to remove OTF from Article 24. Additionally, current MiFID draft includes several issues that should be corrected: (i) When MiFID 2 Article 19.1 states that *"non-discretionary rules for the execution of orders in the system"* shall be established, the reference to

		"execution of orders" is misleading, as what typically should be non-discriminatory are the rules by which buying and selling interests are brought together, and not the rules by which a participant in the MTF executes orders from its clients. (ii) In the context of this lack of clarity, Article 20.4 should replicate the same wording applicable to MTFs in Article 19.5. Otherwise, there is a lack of clarity about the entity that should ensure compliance of all transactions concluded on an OTF with arts. 24, 25, 27 and 28 when these rules only apply if the participants in the OTF are acting on behalf of their clients by executing client orders through the OTF. Finally, regarding SIs, we support greater clarity on the definition, treatment and differentiation of this figure from OTFs and MTFs . SIs are supposed not to be trading venues and therefore, it makes no sense to talk about SI providing quotes to clients and receiving requests for quotes for non liquid and fungible instruments (please see answers to Q 20 and 21 below). If SIs are entities that execute client orders against their own account, it seems contradictory to required them in relation to non liquid nor fungible products to publish quotes upon request or to receive requests for quotes (this should be considered more as *"dealing on own account"* service) and at the same time to consider that they are executing an order on behalf of their counterparties. In this context, MiFIR Articles 13 and 17 are creating great confusion in the market and, as explained in detail in answers to Q 20 and 21, if someone is required to start

		providing firm quotes to its clients on a general basis, it starts to act as a trading venue, rather than as a SI.
	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?	OTC trading should be defined as trading that is not performed in or through a trading venue. OTF category will lead to the channelling of trades onto trading venues. We believe that regulation should not force all financial instruments to be traded as if they were shares. Use of trading venues should always be an option. Forcing the use of trading venues could impair market liquidity and could reduce the range of products available for investors.
	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 support additional risk control regulation.
	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?	They are appropriate, provided that dealing on own account is an investment service like any other. These requirements are already applicable pursuant to current article 25 of MiFID. Moreover, if deals are closed by phone, they should be recorded, kept and maintained during 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	While requiring mandatory clearing for certain transactions could be reasonable, forcing the use of trading venues could bring disadvantages in terms of liquidity, flexibility to end users

	make the requirement practical to apply?	needs and to innovation. Many of the derivative products are, by their nature, bespoke, and the obligation to trade on regulated market, MTF or OTF, should not limit the capacity of market participants to enter into tailor made contracts that could better suit their needs. As mentioned in Q 6, wording should take into account that mandatory trading should not be required as far as only OTFs trade a particular class of derivatives. The risk is that, a firm, not being allowed to access such OTFs, would not be able to operate in such class of derivatives. Additionally, any imposition to trade derivatives on trading venues should be conditional upon a CCP been capable of clearing such contracts. This principle must be clearly stated as it would be critical if Article 17 of MiFIR applies to trading venues where no CCP exists, when a firm is forced to close transactions with third parties, thereby assuming credit risk with them
	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 welcome the possibility for SMEs to access capital markets if adequately supported by a regulation that will protect investors.
	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?	Non-discriminatory access is critical if the use of CCPs, TR and trading venues is *imposed* for a particular class of derivatives Non-discriminatory provisions should extend their scope to the use of local Master Agreements, thereby permitting their use in local languages at least when one of the counterparties of the

		transaction to be cleared, reported or traded is not an ECP.
	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 believe that the imposition of position limits or similar provisions would not help market stability and investor protection.
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?	Banning fees, commissions and monetary benefits provided by third parties could be seen as an implicit recognition that rules on inducements and conflicts of interest do not work. The regulators should impose as much transparency as necessary for investors to take informed decisions, but banning is not the correct way to achieve this goal. Such a prohibition could result in these services being charged to the final clientsreducing the range of clients benefitting from the services or its economic usefulness. We believe that a clarification on the boundaries of the investment advice service is needed. It is of the essence that legal texts provide certainty in respect of the parties' right to freely decide on the kind of services they wish to provide and receive, as well as the right to do so in writing and the right to abide by what they have so agreed. In order to bolster legal certainty in respect of the requirements the investment service must meet, a rule should be laid down, pursuant to which the parties should be free to expressly agree that investment advice shall NOT be provided in respect of a financial instrument, provided certain requirements are also met. That rule would

		clarify the boundaries of what constitutes "investment advice", and would differentiate it from other investment services (such as non-personal recommendations or recommendations not presented as suitable), and from other non-investment related services (such as marketing). It would also differentiate "investment advice" and the ancillary service of "advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings" (Directive 2004/39/EC, Annex I, Section B(3)).
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	All instruments which incorporate a derivative are stigmatized, when understanding the functioning of such derivative could be very easy and accessible even to retail non sophisticated investors. This approach is too simplistic, and in lieu of it, it would be better to focus on the difficulty of the product (for instance, it is not complex at all a bond whose interest incorporates a collar) The concept of complexity it's subject to one's interpretation, skills and knowledge and it's not an objective parameter. Additionally, the uncertainty on what *"a structure which makes it difficult for the client to understand the risk involved"* means should be clarified.
	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?	The requirement in article 27.5 to make public on an annual basis, for each class of financial instrument, the top five execution venues where firms executed orders, is construed on the basis that all firms will have five execution venues to use, when this is not always the case. The word "five" should be removed.
	18) Are the protections available to eligible counterparties,	Yes, they are under current MiFID text.

	professional clients and retail clients appropriately differentiated?	The problem with local public authorities and municipalities is similar to the one of corporates. As an example the assessment capacity of the city council of Paris or Madrid and the capacity of the city council of a small village are far from being comparable. Therefore, objective criteria could be established to classify these entities as retail investors, professionals or even ECP (a possible criteria being population). Regarding the new wording in article 30.1, it is reasonable to require all kind of entities (including ECP) to act honestly, fairly and professionally, but we deem unnecessary to require compliance with Articles 24.3 and 25.5. If any ECP and professional want more protection (and ECPs are very well positioned to make this assessment), they can opt out from the current classification.
	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?	We think that the provisions of Articles 3 and 4 in MiFIR (Pre trade transparency) could only be applied in liquid markets and to fungible financial instruments. For MTFs and OTFs trading non-liquid products, is the provisions are burdensome and of minor importance. However, the major problem, from a conceptual perspective, is on Article 13 (requirement for SIs to publish a firm quote in

		equity like instruments admitted to trading in a trading venue for which there is a liquid market). As SIs are defined as those firms which, *"on an organised, frequent and systematic basis*" deals on own account by executing client orders outside a trading venue, it could be found reasonable to apply the same requirements to publish quotes as currently foreseen in Article 27 of MiFID. However, while Article 27 of MiFID establishes a pre-trade transparency requirement for SI in shares listed in regulated and liquid market, Article 13 presents the following problems, if the financial instruments are not liquid enough: (i) Is the qualification as SIs going to be voluntary? (ii) How could a firm provide quotes *"on an organised frequent and systematic basis"* or, as stated in MiFIR Article 14, *"on a regular and continuous basis"* for non liquid instruments? In fact, in these instruments, SI (if a firm merits this qualification) will only provide quotes if they are previously requested to do so and, if so, Are firms really providing an execution of orders service or just a dealing on own account one (please note that the requirement to publish quotes in MiFID Article 27 is due to the need to compare among different prices (the one on the regulated market and the one provided by SI) for executing an order)?.

		With regards to SIs we believe there could be inconsistence in Article 13 and Article 14: if MiFIR forces firms providing quotes in non-liquid instruments to become SIs and to provide quotes on a continuous and regular basis or upon request, this firms will become "pseudo-trading venues", blurring the distinction between SIs and trading venues (a trading venue which is not a regulated market, nor a MTF and that can not become an OTF – as the operator is banned to act against its own proprietary capital-).
	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?	Pre-trade transparency only makes sense in liquid and fungible financial instruments. What, in the current proposal, makes these instruments subject to pre-trade transparency is not clearly indicated[1].. We believe that there is an additional alck of clarity regarding the treatment of SIs. Article 17 creates a new figure of trading venue, the SI, in which: (i) the operator (the SI) can deal against its own account, (ii) "participants" are admitted "in an objective non-

[1] For instance, there are bonds listed, but which liquidity is close to nil and for which pre-trade transparency will arise when a request for quote is made to the issuer or arranger of the issue: in this cases pre-trade transparency gives no advantage to anybody, as the only interested party is the one requesting the quote. The fact of having a prospectus published will capture all bonds and structure finance products, making again the requirement to provide pre-trade transparency too broad and too useless. And for derivatives, the arguments are equivalent

		discriminatory way" (article 17.2 and 17.3), (iii) quotes are firm in certain cases (article 17.3), and (iv) sometimes, no other trading venue is available (as article 17.1 applies to emission allowances and derivatives which are clearing-eligible and not necessarily admitted to trading in a trading venue). In respect of the scope of post-trade transparency, it is difficult to find out the reason to require post-trade transparency for: (i) trades completely OTC for all investment firms, in which the equity like financial instrument is not being traded in a trading venue; (ii) trades in bonds and structured products in which a prospectus has been published but which are not traded in a trading venue; (iii) all derivatives not admitted to trading which are clearing eligible or ¡reported to trade repositaries (which means *all* derivatives, as *all of them* have to be reported to trade repositaries pursuant to EMIR)!.
	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?	See response to Q 20 and 21.

	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	No. See response to Q 20 and 21.
	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)?	The requirement for APAs to make public the information required under MiFIR Articles 19 and 20 *"as close to real time as is technically possible"* is too generic and could be interpreted in a very strict way. Provided that post-trade information is required for a new range of products (and, as explained in Q 21, in some cases for all product forming part of a category, as derivatives), the requirement should take into account that each firm will have its own technical capacities, and time limits should be flexible enough to permit all entities to comply with the new requirements in a smooth way. Again, post-transparency is required as if all instruments were shares listed in a regulated market, when this is far to be the case.
	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?	While authorities should always be receiving all post-trade information (in a reasonable time frame), there is still no clarity on why the whole market would be interested in knowing the price at which a bond held by a unique investor, for instance, has been repurchased by its issuer. Again, there is no real interest in having so much and so real time information for non-liquid products often not even being traded in a trading venue.
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?	
	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?	Level 1 is becoming a programmatic regulation while more frequently Level 2 is becoming the real place where the rule is defined. The legislative process is been delegated too often and in a too high extent in the Commission or ESMA, as if they were the legislative power of the European Union.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
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