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.**

Responses by BME Spanish Exchanges. 13 January 2012.
Contact: internacional@grupobme.es

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?	CSDs should be added to the list of exempted entities under Article 2, as long as custody and safekeeping are considered core investment services. See also the answer to question 3.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	We recognise part of the advantages of including allowances as financial instruments, namely its harmonisation across Europe. Directive Article 2 is focused to exempt ETS compliance traders (owners or operators of installations falling within the scope of European legislation on emissions trading) from MIFID legislation. However, the approach taken to avoid the application of MIFID is complex. MIFID 2 should provide for a clear statement of who and when is or not subject to MIFID when carrying out services in relation to allowances.

		In addition, the combination of allowances qualifying as securities and custody reclassified as a core service may produce some impact on current National Registries of the European Trading Scheme and the Union Registry set up in Regulation 1193/2011.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	The inclusion of “safekeeping and administration of financial instruments” in the list of investment services (Annex I section A of the directive) should be adjusted by the exemption of the Central Securities Depositories (CSDs) safekeeping services. Although securities account provision is one of the most important functions of a CSD (as part of its safekeeping function), today most CSDs do not fall within the scope of MiFID because they are neither investment firms nor organised trading venues. This should remain the case in the future given the nature of CSD activities, which do not fit with the objectives of the MiFID and which are to be fully (core and ancillary services) regulated under upcoming European legislation on CSDs. Overlapping regulations should thus be avoided, not only because duplication could lead to inconsistencies in implementation, but also because the proposed reclassification of the safekeeping and administration of financial instruments services as investment services would not lead to a stricter authorization and supervision regime.
	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?	We welcome the equivalence of corporate governance requirements between investment firms (IF) and regulated markets (RM) as a way to promote a level playing field. However, we miss a provision regarding the handling and managing of conflicts of interest by IF operating MTFs and OTFs as, contrary to RMs, their neutrality when managing such platforms may be compromised by the fact that they trade in the same trading venues

		they also manage. We agree with the corporate governance provisions of Directive Article 65.
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?	We do not support the creation of OTF as long as, in our view, there is not case enough for introducing a new fourth venue category. As a matter of fact, the introduction of the OTF regime is against the European Parliament Report, published in November 2010, on regulation of trading in financial instruments – 'dark pools' etc., which called "*for thorough enforcement of the provisions in MIFID in order to ensure that BCNs that are carrying out activities equivalent to an RM, MTF or SI are regulated as such*". Besides, according to MiFID wording and spirit, any facility which could be classified as OTF as per the proposed OTF regime should be classified as one of the existing MiFID venues, in particular MTF or SI. There is not a trading functionality different enough to deserve a specific regulatory treatment other that the exhaustive framework depicted in MiFID. We believe the introduction of the OTF category, as it is defined, will cause a flow from MTF category to OTF –rather than from OTC to OTF, as originally intended– because it enjoys a beneficial regulatory treatment as: i) It is far less cumbersome than MTF's, ii) It allows the OTF's operator to act on a discretionary basis with regards to both clients' orders execution and access. We understand it not only drives to a lack of level playing field as the MiFID's functional approach (same business, same rules) would be broken, but also add risk and deteriorate the quality and integrity of the EU securities markets as a whole. Furthermore, as long as every single trade can currently happen under

		one or more of the MiFID venues, the introduction of the OTF figure would imply adding a new layer of complexity to the system, making it even harder to survey, at the detriment mainly of investor protection and the level playing field.
	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 that the OTF category will not channel all trades that are currently escaping MTF or SI rules, i.e., OTF will not make trading volumes move from OTC to OTF, but instead from MTF to OTF, which would not benefit the integrity and safety of the European market. Over-the-counter trading plays a relevant role in securities markets. Provided it happens under regulated exceptional circumstances, it contributes to the efficiency of the markets and avoid unnatural impact on price formation. On the contrary, where trading activity that should take place in the regulated space is done in the OTC, as it has been widely experienced in the European markets over the last years, OTC becomes detrimental for the integrity, efficiency and risk of the market. A lot of research has been delivered on this issue, e.g., "MiFID – Spirit and reality of a European Financial Markets Directive" by Peter Gomber from Goethe University Frankfurt and Axel Pierron from Celent, published in November 2010. Therefore, we believe that only when the conditions pointed out in recital 53 of the Directive (executing a large order for a wholesale client on the broker's own account on an occasional basis) are duly met and verified, trading could keep on being classified as OTC. To this aim, the OTC definition should not be included as a recital but as a concrete definition in the main text of the directive or the regulation. To better shape a proper OTC definition, clearer definitions for MTF and SI are needed. If such an exercise is properly executed, which is to say that the current MiFID framework is duly enforced, the existence of the OTF category would remain unnecessary.

	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 agree that all parties involved in high frequency trading should have the necessary arrangements to guarantee an orderly trading and rules to avoid possible market abuse practices as well as to counter any risk that might be created for the public. However, with regard to the proposed obligation set forth in Article 17.3 of the proposal of Directive for high frequency traders to be in continuous operation during trading hours, it must be noted that the nature of the service provided by HFT and market-makers very much differs each other. While market makers receive a mandate by an issuer or venue to ensure the liquidity, HFT does not need to be linked to market making. Therefore, where HFT has no agreement in place with an issuer or with a trading venue, we do not see the need to require from the high frequency trader any obligation to provide liquidity on an ongoing basis. In the case that it is decided to go ahead with this regime, it must be highlighted that the mentioned Article 17.3 does not introduce a realistic regime in light of past experiences, which demonstrate that under extreme market conditions liquidity providers used to almost disappear. Therefore it would need to be more precise and to specify the cases, circumstances and terms in which such obligation would be triggered, Regarding circuit breakers, they should be harmonized across all the venues where the same share, ETF or Depositary Receipts are traded. Otherwise, there might be a potential issue affecting market safety and efficiency as long as a race to the bottom could be started by some venues being tempted to reduce the circuit breakers to unduly attract more orders than the competitor venues. Concerning limit ratios for orders to executions, we understand they should not be harmonised across platforms but rather take a more

		nuanced approach that considers the different particularities of each market. On the tick size issue, although ESMA may be in charge of the enforcement of tick sizes, the industry should be entitled to decide on the application of concrete tick size tables.
	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?	We agree with the proposed regime.
	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 such regime is appropriate.
	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 very much welcome the regime proposed in MiFIR for certain OTC derivatives to be traded in the regulated venues framework as presented in article 24.1 of the proposal of Regulation, namely regulated markets and MTFs. As previously stated, and contrary to article 24.1, we believe there is not a real case for introducing the OTF category. In our view, there is still further adjustments needed in Title V of the Regulation proposal. In this sense, we would like to note that the regime presented in Article 25 needs to be amended in the following fields: i) In order to ensure the level playing field, Article 25 needs to clarify that the same obligation applying to regulated markets will apply to the venues presented in said article 24.1, ie, MTFs and eventually OTFs; and, ii) As presented in EMIR’s Title II –which defines the CCP clearing obligation procedure for which ESMA is responsible– the obligation to ensure that the provision in Article 25 is implemented should lie on ESMA rather than on the operator of the market as suggested in MiFIR.

	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?	The introduction of an SME growth market quality label for MTFs might be positive in order to further harmonize this segment of the market and increase visibility and, finally, provide SMEs with an enhanced access to funding. However, we believe that those positive effects may be limited as long as the main concern for funding these companies does not lie in the lack of well organised, regulated and supervised specific markets; in fact, there exists a number of SME markets across the EU which provide SMEs access to funding. In our view, the main problem for SME funding lies in three complementary factors: i) the lack of visibility of these companies, which in turn results in ii) a very minor, where not null, coverage by analysts, which affects the visibility and has an impact on iii) the low liquidity profile for SME's securities, a fact that in turn provides analysts with little incentive to cover them, as well as with low or none trading volumes for investors to find a buying or selling counterparties. Considering the above, we believe such quality label for SME growth markets must remain as an option for market operators rather than a compulsory regime.
	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?	Regulation Title VI is not systematic: Articles 28 and 29 complement EMIR while Article 30 deals with a different issue. Benchmarks included in Article 30 may be the result of long, costly and complex efforts, can be managed in very different ways and are frequently protected by intellectual property rights. Article 30 only envisages the cases where a commercial open policy is followed regarding benchmarks. But other possibilities exist and recommend a more careful approach, taking especially into account the sensitive

		questions arisen by the intellectual property rights. Considering the above, Article 30 goes far beyond the natural scope of the legislation on markets in financial instruments, and thus invades and has relevant legal implications over several different EU and national regulatory provisions. Therefore, we strongly call for this issue should to be carefully revisited in the proposed Directive and in any other relevant legislation.
	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?	In certain markets, position limits play a relevant role in fostering liquidity, orderly pricing and settlement conditions as well as it contributes to prevent market abusive practices. We welcome any enhancement of market oversight and increase of transparency in this regard as it would contribute to a safe and efficient market. Notwithstanding the above, we would like to note that it might eventually be the case that a trading venue does not have access to the information/data needed to comply with the regime for position limits real-time supervision. Such obligation becomes even harder to fulfil on a fragmented trading venue scheme as produced by MiFID.
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?	We find that the price should be the only reference for the best execution or, at least, the most important one, as it is an objective, measurable and easy to compare factor while the others are undetermined and difficult to measure and to compare.
	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?	We support the transparency requirements laid down by articles 3, 4 and 13 of MiFIR. With regard to Art 4, the key is how the Commission specifies the size and type of orders as well as the market models that may benefit from a pre trade disclosure waiver and a uniform application of those criteria by ESMA when issuing an opinion of any waiver submitted by Competent Authorities.
	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?	We support the transparency requirements laid down by articles 7, 8 and 17 of MiFIR, as the main problem in the markets for those instruments is a lack of transparency that leads to mispricing, unlevel playing field and higher costs for end investors. In this regard, we emphasize the need of accurate pre-trade transparency that allows for a timely monitoring of the evolution of the markets. However, as per the current drafting of Regulation's articles 7, 8, 17, the requirements set fort apply only to organised trading venues, whereas we think pre-trade requirements need to be extended to all bonds trades independently how they are executed. Hence, in this vein, we do not support any difference in the treatment of pre-transparency regime as to keep the level playing field. In our view, higher priority should be given to bonds and derivatives instruments due to its systemic importance, regardless of the method and the venue in which they are traded. Amongst them, in turn priority should be given to bonds or securities that have been distributed mainly to retail investors.
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured	We welcome pre-trade transparency for bonds as far as it fosters the level playing field.

	products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	As stated in the previous question, the key to Article 8 is how the Commission specifies the details of the waivers. In this regard, we are not sure of what is meant by "the specific characteristics of trading activity". Given that said Article 8 allows for waivers based on the size and type of orders, liquidity as well as the market model, there is risk that "the specific characteristics of trading activity" may become a sort of "miscellaneous" under which to justify waivers that may debase the obligations under article 7.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	In our view, the granting of waivers should be restrictive in order to preserve a level playing field and given that there is no proof that transparency may hinder the liquidity of a market (rather the contrary). In this regard, when granting a waiver Competent Authorities and ESMA should calibrate whether it is justified to grant a complete waiver (i.e. not pre trade transparency at all) or a partial one (e.g. waive the disclosure of the size of an order but not of the price of such order). Besides, as stated in questions 20 and 22, we believe of the essence a uniform application by ESMA of the different criteria to be defined in Level 2 when issuing opinion of waivers submitted by Competent authorities. Finally, more concretely, we support a large in scale waiver. However, we would like to note that it is not clear whether it covers the iceberg orders. We think this type of orders increases the depth of the market and have existed in the European electronic markets for years, encouraging the introduction of the entire limit order in the market and, therefore, increasing liquidity.
	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)?	We see very positive the definition of the roles of APAs, CTPs and ARMs and the corresponding organisational requirements. Nonetheless, ESMA regulatory technical standards that will determine common formats, data standards and technical arrangements to facilitate information consolidation are essential for the industry to start to work on the set up of such systems, and we

		have noted that there is still no deadline for the publication of such standards. It needs to be noted that the main obstacle to transparency in the EU markets is the long lasting lack of availability, quality, reliability and granularity of the OTC data. We disagree with the Commission interfering in the commercial arrangements of the parties in a market subject to competition by defining "what constitutes a reasonable commercial basis". In our view this is against the liberalizing spirit of MiFID.
	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?	We welcome the post-trade transparency regime proposed. In our view, it is necessary to properly calibrate the waivers allowed by MiFIR and to apply them quite restrictively. Moreover, enforcement of the revised MiFID would be essential if we are to avoid the problems that arose since the implementation of MiFID. It should be noted that the Industry has been working during last year in solutions which improve the capacity of data consolidation, namely the Market Model Typology initiative. This is a very first step in the way we see MiFID review process is dealing with this issue. We think that empowering MMT initiative as a very first step for post trade data harmonization is the right way to follow.
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?	Beyond interactions with EMIR, CSD Regulation has to be taken into account: CSDs should be exempted from MIFID in the provision of custody and safekeeping as already explained in answers to questions 1 and 3. For the same reason, interactions between MIFID legislation and any other piece of European legislation that may affect CSD (as

		the projected Securities Law legislation) must be carefully weighted. The inclusion of emission allowances as financial instruments obliges to focus on current European financial legislation, such as Market Abuse Directive, Settlement Finality Directive, the projected Securities Law Directive, etc. in order to avoid inconsistencies or overlapping regulations.
	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?	Sanctions or measures imposed for minor breaches should not be published.
	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**
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