Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP
completed by
Bulgarian Stock Exchange–Sofia

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?	-
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	We fully support the Commission's proposal to include emission allowances and structured deposits in the scope.
	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?	Yes, we fully support the reasons for different approach regarding third country access to EU markets – by establishing a branch or by registration under ESMA without establishing a branch. In our view it is appropriate to regulate third country access for a number of different reasons (protection of European investors, fair competition in the Single Market, etc). We support the Commission's proposal that 3rd country access should be based on equivalence and reciprocity. However, we believe that level 1 text needs to give more guidance to implementation.
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 do not believe that gender and age should be among the criteria for the selection of a management body. In our view the only criteria that are important in choosing a management body are introduced in Article 9, paragraph 1 and Article 48, paragraph 1. We welcome Article 65 of MIFID, and we do not think any changes are necessary. We believe that ethics are important in any business.
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?	In our reading of the current MiFID, an operator can bring together investors who want to buy and sell a financial instrument in a trading platform, either in a 'neutral' way (the operator is never a party to any trade, so the trading is 'multilateral') or based on the operator's own trading book (the operator runs an inventory of some instruments, so the trading is 'bilateral'). A multilateral platform can be operated by a market operator or broker, while the internalisation platform is run by a broker. The **market as a whole wants to be reassured that any liquidity pool set up in any financial instrument will result in properly priced trades, will be accessible to all investors, and will be monitored for market integrity**. While these concerns are

		common whether the platform is multilateral or bilateral, it is only in the case of the neutral platform that rules can be very stringent, because it is natural that a broker than runs his own inventory should not be subject to all the exchange rules as he is running the risk of the instrument going up or down in price. Hence, for example, both types of trading platforms should be subject to rules on pre-trade transparency to ensure proper pricing of instruments. But these need to be calibrated in the case of the bilateral (internalisation) platforms. Similarly, while all investors must have access to all multilateral trading platforms, it is accepted that a bilateral platform can take on board only its clients. Against this background, we believe that the introduction of an additional OTF category is against the spirit and letter of MiFID, as it will create a multilateral trading venue that is subject to less stringent rules than RMs and MTFs. Instead, t**he correct solution is to use the MiFID review to clarify the intention of MiFID and to draw a clear line between trading platform activity and OTC business.** With a limited number of clarifications, it should be possible to re-establish the line that MiFID intended to establish between trading platform and OTC business and to ensure that no trading activity (such as BCNs) fall outside the scope of trading platforms. Importantly, we believe that the existing MiFID equity venue classification is already sufficiently exhaustive to capture most types of BCN activity, which should fall under either the MTF or SI categories. Therefore MiFID does not need to be revised in any fundamental way to "capture" BCNs. The same intended definitions should be used, but improved by eliminating any

		wording that creates ambiguity. **<u>Practically, we recommend:</u>** • The OTF category as proposed **is not necessary to capture BCN activity or to implement G20 reforms**, but will instead add unnecessary complexity to the trading landscape; undermine the principle of 'same business, same rules'; and essentially downgrade the safety and quality of EU secondary market trading. • **Instead, we need revised and improved definitions of RM, MTF and SI:** The RM and MTF definitions should not refer to 'non-discretionary execution' and should focus only on defining the attributes of <u>multilateral</u> trading. The SI definition should be clarified to capture all systematic <u>bilateral</u> trading business. • **A clear definition in the main definitions article (not a recital) of the activities allowed in the OTC space):** As in the existing Recital 53 but this time in the main body of the text, OTC should be defined as bilateral, ad hoc, irregular, large trades with wholesale counterparties.
	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?	No, we believe that the OTF category will not channel all trades that are currently escaping MTF or SI rules. For this we need clearer MTF and SI definitions and a separate OTC definition. We agree with the vision of the original MiFID which stated that all the main trading venue requirements should apply to all platforms that bring together multiple buying and selling interests and that the only instances when such rules should not apply at all are when a broker is executing a large order for a wholesale client on its account on an occasional basis. Therefore

		we propose that the previous implicit definition of OTC is retained and strengthened. Moreover, the OTC definition should not be included as a recital but as a definition in the main text of the directive. In order to ensure that only those trades that should be conducted OTC are, we would advocate the inclusion of a further requirement for OTC trading. Unless the MTF and SI definitions are clearer and there is an explicit definition of OTC, there is no guarantee that the Commission's OTF proposal will solve the issue of OTC. We are concerned that in fact the Commission's proposal will not see business move from OTC to OTF, but instead <u>from MTF to OTF</u>. This could happen as certain venue operators will change their MTF licence to an OTF licence as this trading venue will be subject to lighter rules and will allow these venue operators to give a more favourable deal to their biggest clients. Furthermore, even if a certain amount of OTC trading mover to OTF, this will not be optimal for proper market regulation or fair competition since OTFs will be less regulated than RMs or MTFs.
	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?	**The Commission proposes mostly sensible solutions to reduce the systemic risks, counter potential of market abuse, and ensure fair treatment of clients.** We agree that all parties involved in high frequency trading – the high frequency firm, the investment firm, the trading venue – should put in place the necessary safeguards to counter the risks for the public. Of all the proposals, we find that only Article 17(3) (continuous

		quoting obligation) would have to be altered significantly to make it work. In this case, we believe that the market making mechanisms imposed by the trading venues would be a better way of meeting the Commission's goal, which is to ensure that high frequency traders remain committed to a market as much as possible. Moreover, these provisions should not apply to all algo trading but to HFT only. Concerning circuit breakers we would insist that these not be harmonised across platforms but take into account the different aspects of each particular market.
	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 Commission's proposals in this area.
	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 find these proposals appropriate for both properly functioning markets and investor protection.
	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 welcome the MiFIR proposal to oblige certain OTC derivatives to be traded in a well-regulated environment.** Given their link with the financial crisis, there are a number of different reforms needed to improve the functioning of OTC derivatives. In addition to reforms on risk management through post-trading and capital adequacy, it is also necessary to improve the transparency, safety and liquidity of standardised OTC derivatives markets by obliging standardised OTC derivatives to be traded on a RM or MTF. We therefore

		welcome the Commission's proposal to mandate these derivatives to be traded in a strictly regulated environment. Since we believe that the proposed category is not a sufficiently regulated environment, we believe that OTFs should not be included in Article 24 of 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?	We have no major objections to creating a special type of MTF for SMEs. Based on our general opinion hereby expressed, that the OTF category is not necessary as it would not serve the intended purpose, we believe that SME growth market should not be limited to MTFs only, but should be extended to regulated markets as well. The creation of a special label is not likely to change the main obstacle faced by SMEs, the lack of scale to attract institutional investors. However, as long as this MTF label is not mandatory and is designed flexibly, we have no objection to it.
	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?	**We believe that the potential consequences of these provisions with respect to risk, market fragmentation and the competitiveness of EU markets are not yet known.** This is especially the case for derivatives markets. Earlier this year, the European Parliament and European Council warned against such risks in the context of the EMIR legislative proposal and suggested doing further research before making such a proposal. In addition, it should be highlighted that the Commission did not consult on these provisions publicly. In particular we believe the following potential consequences should be taken into account: o **Danger of market fragmentation**: Derivatives markets are different from other markets (i.e. equity) in that their

		o**Danger of loss of competitiveness**: Such provisions could not only increase the risk in derivatives markets but also drive business away from the EU towards third-country jurisdictions (e.g. US and Asia) where those provisions do not apply. o**Link between trading and clearing**: Such provisions do not take into account the fact that trading and clearing are very closely aligned in the development and trading of listed derivatives markets. Risk management at a CCP is enhanced by connection to a trading platform operated on the same basis.

		o **Against the draft EMIR texts**: the final EMIR texts agreed by the Parliament and the Council recognise that it is appropriate at this stage to restrict the scope of interoperability arrangements to cash securities, given the additional complexities and the additional risks to financial stability that derivatives CCPs would incur upon if linking through interoperability agreements. **In addition, we believe that the provisions on non-discriminatory access will have a negative impact on the activities of small European capital markets as Bulgaria**.
	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?	EU regulated markets currently have different 'position limit' regimes which are tailored to the needs of their markets: position management, delivery limits and lending guidance. Hence, **we welcome the proposal to oblige trading venues to apply position limits or similar arrangements** to market members or participants in order to support liquidity, prevent market abuse and support orderly pricing and settlement conditions. The proposed Directive also gives power to competent authorities to impose position limits or alternative regimes in extreme situations. The regimes currently in place in EU Regulated Markets could be described as follows: o **Position Management**: Ongoing system that allows intervention when appropriate or necessary, in particular as the settlement time of physically settled commodities approaches. This mechanism is intended to prevent settlement squeezes while not interfering with the legitimate

		○ **Delivery limits**: Systems that limit the quantity of physical commodities that can be delivered on expiry and the size of the associated positions that can be held in the weeks approaching that expiry. ○ **Lending Guidance**: Specific tool to the LME to deal with LME's daily settlement requirements (other regulated markets have monthly or less frequent contract settlement) which relieves short-term pressure on the delivery mechanism. • **Regulated markets are in favour of increased transparency** ○ An important step is to build an adequate trade repository regime. ○ Position reporting is the most important first step - today, it is still difficult for regulators to know who is trading. The CFTC is working towards developing 'legal entity identifies' and 'unique counterparty identifiers'. The EU should be involved in any discussion setting global standards. ○ Regulators should have access to all relevant information. ○ We should consider if a **more granular transparency** regime (i.e. similar to the CFTC Commitments of Traders Report) is appropriate. ○ Transparency requirements should extend to OTC markets

		○ Certain transparency requirements could also improve the underlying physical market; however, this needs to be done on a global level. • **Regulated markets are in favour of well-organised oversight; there should be appropriate systems to limit the scope for price distortion through market abuse and/or pressure on the delivery mechanism** ○ We agree with the EU Commission that **strong oversight** of positions in derivatives is essential, especially commodity derivatives, as well as harmonisation in order **to avoid any regulatory arbitrage** and ensuring a level playing field within the EU. ○ We agree that regulated markets should have objective and transparent mechanisms which are designed to prevent settlement squeezes. The chosen mechanism for each market will need **to be tailored to the specific characteristics of that commodity/market**. Depending on the market concerned, it might be appropriate to apply delivery limits, LME-style lending guidance or US-style blunt position limits. **The EU should not simply opt for a regime based on US-style 'position limits' alone,** because this is only one of several equally valid methods and it will not be suitable for each and every market. Furthermore, the introduction of such a mechanism into well-established markets may significantly undermine their effectiveness by reducing the existing trading activity and liquidity, resulting in higher operating costs for

		market users which will in turn be passed on in the form of higher costs to consumers or lower prices to producers.
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 believe that organisations such as the CFA Institute or EuroInvestors are better qualified to respond to this question and defer to their assessment.
	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 support the Commission's proposal.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	In general, we believe that the crisis has shown that all clients and counterparties need better protection.
	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 Commission's proposal.
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in	**See question 22**

	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?	**Bonds:** We believe that pre-transparency should apply to all type of bonds and we do not support any change in the provisions of Level 1. **Derivatives:** We believe that pre-transparency should apply to all type of derivatives and we do not support any change in the provisions of Level 1.
	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?	**Bonds**: We welcome pre-trade transparency for bonds as far as it prevent the level playing field. However, we believe that it should be calibrated properly depending on different market specificities. We welcome this technical calibration to be done in level 2 of the legislation, with appropriate guidance from Level 1. We agree the waivers' outline proposed by the Commission. **Derivatives:** With regard to **derivatives**, **we welcome the pre-trade transparency** proposals by the Commission. They are in line with the G20 objective of providing further transparency to the OTC derivatives markets which should eventually benefit end investors. We agree with the proposed measures and with the following obligations:

		• **Trading venues to publish**: i) Bid and offer and ii) Depth of trading interests • **Investment firms to publish**: Quotes (only if asked by the client and agreed by the bank). A review clause is foreseen in the next two years • **Publication will be offered** in real time at a reasonable costs and 15 minute data will be free • **Two waivers** are proposed based on i) liquidity and ii) type and size of orders We **welcome the suggestion to calibrate** transparency regime **by type of derivative product/market/commodity** as we consider that some calibration may need to be performed because products/markets are very different from each other. We welcome this technical calibration be done in Level 2 of the legislation, but with clearer guidance from Level 1.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	We do not believe that trading venues should be exempted from transparency entirely. It should be specific types of orders or trading that is exempted.
	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)?	Articles 65, 66 and 67 of the MiFID proposal should be explored in more detail as we do not support a cumbersome regime for CTPs which may keep some firm providers away from the business. We do not support any requirement for non-equity as we think it will not work at this point. We welcome the technical standard to be defined in level 2. In our view additional explanations for the establishment of

		Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs) are needed.
	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?	With regard to **derivatives**, we welcome the post-trade transparency regime proposed by the European Commission. This regime is in line with the G20 objective of providing further transparency to the OTC derivatives markets. Nonetheless, as with bond markets, it is inappropriate to envisage a mere extension of requirements from one market to another. We agree with the proposed measures and with the following obligations : • **Trading venues**: Price, volume and time of executed transaction • **Investment firms**: Price, volume and time of executed transaction on derivatives which are clearing eligible, reported to trade repositories or admitted to trading on RM or traded on MTF or OTF. For Bonds: (i) Price, volume and time of the execution (ii) Deferred publication will be based on the type of the transaction • **Deferred publication** by type and size of the contract • **Publication will be offered** in real time at a reasonable costs and 15 minute data will be free We **welcome the suggestion to calibrate** such a transparency regime **by type of derivative product/market/commodity** as we consider that some calibration may need to be performed because products/markets are very different from each other.
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?	1. **ESMA resources**: The proposal should ensure that adequate resources are given to ESMA in order to perform the substantial number of tasks that are proposed in MiFID and MiFIR. ESMA's current resources are very limited. ESMA staff accounts for about 100 persons compared to 2,000 for other European national supervisors.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	1. **Interaction with proposed Regulation on OTC derivative transactions, central counterparties and trade repositories ('EMIR')**: 1.1. **Eligibility**: CCP clearing eligibility (EMIR) and obligation to trade on a RM, MTF or OTF (MiFID). In our view ***all CCP clearing eligible contracts should be eligible for trading on RM, MTF or OTF*.** 1.2. **Reporting**: Interaction between reporting to Trade Repositories (EMIR) and position and transaction reporting (MiFID and MiFIR).
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Interaction with United States' **Dodd-Frank Act** is relevant. However, we cannot seek to align our legislation with 3rd country legislation. Our circumstances and legislation are different.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	Yes, we think so.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	No, we believe that too much is left to Level 2 on many issues. This has to be readdressed by adding more guidance and clear decisions to Level 1.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article 52:	According to Article 52, paragraphs 3 and 4 of the Proposal for a Directive regulated markets are required to establish and maintain effective arrangements to verify that issuers of transferable securities admitted to trading on the regulated market comply with their obligations in respect of initial, ongoing or ad hoc disclosure. That obligation creates significant imbalance between the different participants and is disadvantageous for regulated markets compared to all other platforms, respectively increasing their fixed costs.
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	