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.**

Cercle de l'Industrie represents 31 large French industrial companies active at European and global level. Most of its members are compliance operators on the EU Emission Trading System (ETS). In 2011, member companies of *Cercle de l'Industrie* had a turnover of more than 800 billion euros, and employed almost 3 million people worldwide (www.cercleindustrie.eu).

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?	*Cercle de l'Industrie* points out that **Article 2.3** needs clarification: the definition of "ancillary activity" is much **too vague**. As a result, it is not clear whether the exemption stated in **Article 2.1(i)** covers the Emission Trading System (ETS) compliance operators, who have a regulatory obligation to surrender Emission Unit Allowances (**EUAs**) within prescribed deadlines, in order to comply with emissions reduction requirements set out in Directive 2003/87/EC (around 13 000 installations in the EU).

	2) Is it appropriate to include **emission allowances** and structured deposits and have they been included in an appropriate way?	*Cercle de l'Industrie* insists on the fact that robust regulation and oversight of the carbon market are necessary. It supports a regulation of the carbon spot market that would play a key role in the price formation of emissions unit allowances (EUAs), and for ETS compliance operators. However, such regulation should duly take into account the **non financial nature** of EUAs. They are a fundamental tool for the EU's emission-reducing environmental policy. Therefore EUAs should not be classified as financial instruments. EUAs' classification as financial instruments would have **strongly negative consequences** on the functioning of the carbon market, *inter alia*: -it would undermine the link between the EUAs' market and the emissions resulting from the real economy and industrial projects. On markets similar to the carbon market (commodities) risks of speculation and of volatility have increased because of **financialisation**, thus making investing and trading decisions more complex; - the classification will entail a **cascade reaction** : legislations that are deemed to apply to the financial sector will cover ETS compliance operators without considering their specificities : this would be the case, inter alia, of the Capital Requirements Directive (CDR) and the European Market Infrastructures Regulation (EMIR) (See answer to Question 28). For these reasons, *Cercle de l'Industrie* advocates that EUAs be **removed from Annex 1 Section C**, and benefit from a **legal and supervisory framework taking into account their specificities** and those of the ETS compliance operators.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	No information to provide
	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?	No information to provide
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	No information to provide
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?	No information to provide

	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?	To a large extent, ETS compliance operators manage their compliance duties on the OTC market, which makes the OTC emission allowances market a competitive market channel, compared with organized market places. *Cercle de l'Industrie* understands and supports the Commission's goal to regulate and increase transparency on EUAs trading. However, it highlights the fact that imposing specific trading venues to ETS compliance operators must be envisioned without fragilizing current market functioning and efficiency, and without increasing the cost of ETS compliance. Therefore *Cercle de l'Industrie* considers that such measure should be taken in particular circumstances, when it is demonstrated that it would not jeopardize market functioning.
	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?	No information to provide
	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 information to provide

	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?	No information to provide
	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?	No information to provide
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	No information to provide
	13) Are the provisions on non-discriminatory access to market infrastructure and	No information to provide

	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?	
	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?	*Cercle de l'Industrie* underlines that any legal provision on position limits should take into account the situation of ETS compliance operators, and should not undermine their ability to manage their compliance cost effectively. This will be critical to preserving the stability and predictability of the spot carbon market. *Cercle de l'Industrie* believes that, given the commercial activity of ETS compliance operators, and the fact that those operators take positions precisely to reduce their risks exposure, flexible position management procedures are to be preferred for them, supported by appropriate position reporting. *Cercle de l'Industrie* considers that position limits may reduce the liquidity in carbon markets and affect competition. Any position limits with respect to EUAs should therefore only be set in such a way as to target very large speculative positions taken by companies other than those whose main business is related to that specific commodity.

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?	No information to provide
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	No information to provide
	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?	No information to provide
	18) Are the protections available to eligible counterparties,	No information to provide

	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?	No information to provide
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?	No information to provide
	21) Are any changes needed to the **pre-trade transparency requirements** in	As regards pre-trade transparency requirements for trading venues in respect of EUAs, *Cercle de l'Industrie* insists on the fact that requirements in terms of price publication, which are necessary, should be calibrated as to ensure an appropriate level of transparency, while avoiding deterring the European carbon market from its **environmental purpose**. As stated by the European

	Regulation Articles 7, 8, 17 **for all <u>organised trading venues</u>** 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?	Commission, "the efficiency of the emissions trading scheme relies on a clear carbon price signal to achieve abatement of greenhouse gas emissions at least costs." (Regulation 1031/2010). -Furthermore, EUAs' price and trading interests reflect to a large extend the volumes of CO^2 emissions in the EU, which are linked to the industrial activities of ETS compliance operators. *Cercle de l'Industrie* underlines that transparency requirements should not weaken **the confidentiality of industrial and business plans of those operators.** *Cercle de l'Industrie* demands that Article 7, which foresees a publication on a continuous basis of EUAs price and of "the depth of trading interests at those prices", be duly reviewed accordingly. Article 8, on waivers, may also be reviewed to address the specific situation of ETS compliance operators on the spot carbon market, if need be. *Cercle de l'Industrie* is currently analysing more in detail, the forseeable impact of MiFIR 2 requirements in terms of pre-trade transparency requirements on ETS compliance operators.
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for **<u>trading venues</u>** 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 answer to Question 21

	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	See answer to Question 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)?	No information to provide
	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?	See answer as to Question 21 also for post-trade transparency requirements. *Cercle de l'Industrie* is also currently analysing more in detail, the forseeable impact of MiFIR 2 requirements in terms of post-trade transparency requirements on ETS compliance operators.

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	No information to provide
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	*Cercle de l'Industrie* believes that the European spot carbon market needs to be regulated and supervised at European level. Indeed, it is crucial for the ETS and its compliance operators that the carbon market is preserved from frauds and abuses. At member state level, *Cercle de l'Industrie* has suggested that such supervision be carried out by the financial regulator in coordination with a sector-regulator (which could be the energy regulator, given the similarities among carbon and whole energy markets). At European level, *Cercle de l'Industrie* welcomes the competence of ESMA, which will be in charge of overseeing transactions on financial instruments. However, ESMA, as a financial authority, should not overlook the specificities of the ETS compliance operators. In this respect, *Cercle de l'Industrie* sees a positive signal in Article 83(6), which foresees cooperation between financial regulators and authorities in charge of supervising the ETS under Directive 2003/87/EC "in order to acquire a consolidated overview of EUAs markets".
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	*Cercle de l'Industrie* notes that there are numerous key interactions between MiFID and other financial services legislation. If EUAs are classified as financial instruments, those legislations may automatically apply to ETS compliance operators, without taking account of their specificities. In certain cases, this is likely to burden ETS compliance operators in a disproportionate or inappropriate way.

		Cercle de l'Industrie, believes that more work is needed to assess the relevance of EU provisions relating to a qualification as financial instrument, and consequently to apply to EUAs and ETS compliance operators only those provisions that would be relevant to them. In order to avoid any systematic or undesired application of EU legislation to EUAs and ETS compliance operators, EUAs should not be qualified as financial instruments. In making that assessment, special attention should be given inter alia to the following: -the proposal for a Market Abuse Regulation (MAR, due to replace the current MAD directive), which defines insider dealing on financial markets, and which would apply to the carbon spot market. The MAR proposal assumes that ETS compliance operators are the only participants in this market that possess « privileged information ». However, this is not the case, experience has showed that the regulatory information held by member states' public authorities are much more sensitive and likely to have a significant impact on prices. The MAR proposal, as it stands, would create a legal framework against market abuses that would be inefficient and unjustly focused on ETS compliance operators. -Another example of legislation which is not adapted to compliance operators is the EMIR regulation: if EUAs are classified as financial instruments, ETS compliance operators who have succeeded in decreasing their CO^2 emissions, and consequently who are able to sell EUAs on the spot market, will have to abide by disproportionate obligations in terms of clearing, whereas they do not represent any significant systemic risk. -Another example is the Capital Requirements Directive: the CRD IV proposal foresees the review of the exemption benefiting commodity traders at the end of 2014. If this exemption were to be more restrictive, industrial companies active on energy and carbon markets could have to back significant amounts of assets, even though their activities are far from the traditional financial sector. Such a "sliding" towards greater financialisation could be facilitated by the classification of EUAs as financial instruments in MiFID2.

		Furthermore, *Cercle de l'Industrie* points out to the fact that the MiFID/MiFIR2 proposals do not take into account the regulation (not published in the OJ yet) of November 18th 2011 establishing a Union Registry for the trading of EUAs post 2012. Its Chapter 5 on EUAs transactions sets up specific which are not explicitly considered in the current MiFID/MiRIR2 proposals. To conclude: *Cercle de l'Industrie* believes that there is a pressing need first, to declassify EUAs as financial instruments, second, to make sure that ETS compliance operators are indeed exempted from the general application of MiFID/MiFIR2, third to adapt the proposals to the specificities of ETS compliance operators on the spot carbon market, fourth, to neutralize the cross referencing system which entail the application of financial legislations that are not deemed to apply to ETS compliance operators.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	No information to provide
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	No information to provide
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	No information to provide

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