

---

**European Energy Regulators' response to the Questionnaire on MiFID/MiFIR 2**  
**by Markus Ferber MEP**  
**13-JAN-2012**

---

**1 General comments**

European Energy Regulators welcome the possibility to comment on the ongoing revision of the Markets in Financial Instruments Directive (MiFID). We would like to focus on issues related to commodity derivatives as electricity and gas trading may be affected by such a revision.

European Energy Regulators are particularly interested in the revision of MiFID given our new responsibilities at national level to implement and apply the REMIT provisions for monitoring energy trading. We have also provided input to the European Commission's public consultation on the "Review of the Markets in Financial Instruments Directive (MiFID)"<sup>1</sup> launched in 2011.

European energy regulators have already previously been engaged in the discussions on how to secure market integrity in energy trading. In December 2007, ERGEG together with CESR was mandated by the Commission to provide an advice on market abuse issues related to the energy sector. Energy and financial regulators noticed in their advice that the Market Abuse Directive only partly covers energy markets as it is designed for the financial markets. It applies almost exclusively to financial instruments admitted to trading on a regulated market. Physical products (e.g. spot market products) are not covered and derivatives markets products are covered only if they are admitted to trading on a regulated market. Thus, energy and financial regulators recommended in their advice a sector specific regime for electricity and gas trading.

The importance of a sector-specific regime for the energy sector has to be seen in the context of a rapidly growing energy market. Energy trading including emission allowances, coal and oil markets, will gain further importance in the near future, since wholesale market volumes are increasing. Trading provides good opportunities for hedging which is crucial for numerous market participants in order to ensure price predictability. This is especially true for the rapidly increasing amount of small and medium sized companies, as e.g. municipal energy suppliers, entering into energy trading in order to gain competitive advantages. In the course of the EU attempt to increase the production of electricity from renewable sources, on the promotion of the use of energy from renewable sources, the amount of renewable energy traded on the

---

<sup>1</sup> European Energy Regulators' response to the European Commission's public consultation on "Review of the Markets in Financial Instruments Directive (MiFID) of 26 January 2011" [http://www.energy-regulators.eu/portal/page/portal/EER\\_HOME/EER\\_PUBLICATIONS/CEER\\_PAPERS/Cross-Sectoral/2011/C11-FIS-23-04\\_MiFID\\_02-Feb-2011.pdf](http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Cross-Sectoral/2011/C11-FIS-23-04_MiFID_02-Feb-2011.pdf)

energy market will also increase significantly. This will lead to higher trade volumes, more traders and most likely a higher volatility of energy prices. In addition to its supply function the electricity and gas market – as most commodity markets – have become more and more “financialised”. Thus, the integrity of the markets will become more important than ever.

## 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](mailto: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?	<p>The Commission proposes to narrow the MiFID exemption stipulated in Article 2(1)(d) and (i) MiFID and to delete the MiFID exemptions stipulated in Article 2(1)(k) MiFID. Commodity firms would then only be exempted for hedging activities stipulated in Article 2(1)(l) MiFID. This would significantly limit the scope of the MiFID exemptions for commodity firms and therefore oblige more commodity firms, including energy firms, to become licensed as an investment firm by financial regulators.</p> <p>European Energy Regulators like to bring to the rapporteur's attention that this would create higher costs, especially for small companies, which might have to access the energy markets through regulated investment firms and thereby - in contrast to</p>

		<p>its intension - could have a negative effect on the liquidity, competition and systemic risk in the energy wholesale markets.</p> <p>European Energy Regulators therefore emphasize that the regulatory framework should avoid unnecessary bureaucratic burdens and cost for accessing the markets. This is especially the case for energy derivatives, or energy related products (like transmission rights), which are used by companies from the energy sector as hedging, sourcing or outlet. This is why it would be important to precise this notion in order to increase legal certainty and clarity for commodity firms and particularly energy firms wishing to participate in energy derivative wholesale markets. Moreover, from a practical point of view, it might prove difficult to clearly distinguish between hedging physical production or consumption and other trading activities for instance.</p> <p>In summary, we would advocate to keep the exemption Article 2(1)(k) contained in the current MiFID.</p> <p>Furthermore, taking into account that transmission rights for electricity and gas would be covered by REMIT if excluded from the scope of the financial legislation, there won't be any loopholes in the oversight of these products. At the same time negative side-effects which stem from their coverage by the financial regulation would be avoided. Based on the above mentioned reasoning European Energy Regulators strongly recommend to clarify that transmission rights for electricity and gas are covered by the sector-specific supervision regime of REMIT by adapting the definition of</p>
--	--	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

		<p>financial instruments in MiFID. This would avoid that energy traders who profit from an exemption would unintentionally (!) come under the purview of MiFID if they trade financial transmission rights.</p>
	<p>2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?</p>	<p>EU emission allowances (EUA) are neither covered by the Draft REMIT nor by the current version of MiFID. Only EUA derivatives are covered by the current version of MiFID.</p> <p>Classifying EUA as financial instruments would of course immediately solve the supervisory gap as they then would be covered both by the MiFID and by the MAD regime in the same way as any other financial instrument. However, European Energy Regulators believe that this option would have to be adapted to respect the specificities of the carbon market.</p> <p>The Prada report expressed that a unique feature of the CO<sub>2</sub>-market is that the supply is set in advance by public authorities. This market is then an instrument of economic optimization: the possibility to trade allowances ensures that emission reductions are achieved where they are cheapest, i.e. in installations with the lowest marginal abatement cost. It thus enables to reach the emission reduction target at the lowest social cost. The dual nature of the market results in two types of regulation issues: the environmental regulation, which corresponds to the rules governing the supply of allowances (the cap) and the regulation of allowance trading.</p> <p>This is why European Energy Regulators share the view</p>

		<p>expressed in the Prada report and support the creation of a regulatory framework adapted to the specificities of the CO2 market. Applying existing financial regulation to the parts of the market currently not regulated would be the simplest option. The extension could consist in the inclusion of all transactions on allowances and credits within the remit of financial directives, e.g. MiFID and MAD. Nevertheless, financial regulation, designed originally for classical markets of financial instruments, is not always adapted or relevant for the CO2 market. A good example of this is the fact that the notion of issuer of a financial instrument, which is core to MAD, is not relevant on the CO2 market.</p> <p>From the European Energy Regulators' point of view, the CO2 market is closely linked with the gas and electricity markets. They share in common several fundamentals such as the level of electricity demand, coal and gas prices, economic activity and etc. CO2 and wholesale energy prices are interdependent and thus the CO2 prices have an impact on the energy prices. In addition, a significant share of participants to carbon markets participates in the wholesale energy markets, in particular, electricity utilities.</p> <p>As a consequence, the foreseen regulatory regime for the CO2 market should involve the European Energy Regulators, who can bring their expertise of the fundamentals of the energy and carbon sectors and their knowledge of wholesale energy market and its participants.</p>
	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?	
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 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?	
	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?	
	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?	
	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?	
	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?	
	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?	
	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?	
	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	European Energy Regulators like to underline that position limits on commodity derivatives markets, especially on wholesale energy products (with the meaning of Regulation (EU) N° 1227/2011) markets, must take into account underlying physical assets, e.g. open positions may be backed up by physical assets like power plants, and those must be considered as bona fide hedging:



	or instead?	<p>Position limits on commodity derivatives are treated both in Article 59 (limits imposed by trading venues) and in Article 72 (g). European Energy Regulators stress that it is necessary to ensure that these two articles are compatible with each other. Moreover, concerning wholesale energy products (with the meaning of Regulation (EU) N° 1227/2011), European Energy Regulators shall be involved in the process relating to position limits.</p> <p>In the US the CFTC published its final rules regarding position limits for futures and swaps 18 November 2011:</p> <ul style="list-style-type: none"> <li>• 28 physical commodity futures contracts are involved, of which 4 energy contracts (3 oil-related contracts and the NYMEX Henry Hub Natural Gas, excluding electricity);</li> <li>• The aim is to prevent excessive speculation and manipulation;</li> <li>• There are bona fide hedging and pre-existing positions exemptions;</li> <li>• Limits are set by the CFTC but developed in consultation with DCMs (designated contract markets, i.e. exchanges ruled by the CFTC); and</li> <li>• 2 limits in 2 phases: spot-month limit and non spot-month limit.</li> </ul>
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?	
	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?	
	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	Pre-transparency was a topic strongly discussed in CESR/ERGEG advice to the European Commission in the context of the 3 <sup>rd</sup> Package (CESR/08-998, C08-FIS-07-03). Pre-trade transparency in the sense used in the energy sector focuses mainly on transparency of price sensitive information (so called fundamental data) and less on trade

	<p>transparency requirements and why?</p>	<p>transparency as pre-trade transparency was perceived as sufficient.</p> <p>European Energy Regulators are therefore of the opinion that transparency of price sensitive information is also a crucial and effective measure to avoid market abuse in energy markets. This is in particular true for the electricity markets where storability is almost not possible and therefore production and consumption have to match constantly. Such a framework has been currently defined in REMIT (EU 1227/2011) for gas and electricity. The publication of all relevant fundamental data before trading takes place (such as load, outages, foreseen amount of electricity from renewable sources, cross-border congestions, etc.) gives traders a good view of the current supply and demand situation. It is also an important measure for the reduction of systemic risks, since with a better knowledge of the current market situation traders may refrain from building up dangerous positions and exaggerated risk taking. Moreover, reasonable transparency on what the market is about is the best way to avoid “speculative hypes” and contributes to fair prices charged to end customers which represent true economic values.</p> <p>With regard to the proposed provisions for the MiFIR regulation it should be more clearly defined what pre-trade transparency is and take into account that fundamentals of the electricity and gas commodity derivatives market are very different from an equity market. At the same time it</p>
--	-------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

		<p>should be considered that trade-transparency could also lead to the risk of collusive behavior. When considering transparency measures, relevant authorities and the European Commission should beforehand well assess the impact on the market structure and on competition.</p>
	<p>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?</p>	<p>Following the line of arguments in question 21 European Energy Regulators emphasise to take into consideration the specificities of commodity derivatives like electricity and gas and not to apply the same transparency requirements applicable to the highly mature equity markets. Transparency requirements should like the waivering regime also take into account the market model, liquidity and other factors.</p> <p>It should be considered to further specify the requirements in delegated acts.</p> <p>In order to appropriately calibrate the requirements to the sector relevant market regulators and DGs - for electricity and gas ACER, DG ENER and national regulators should be consulted. Coherence with REMIT provisions shall be ensured.</p>
	<p>23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?</p>	<p>European Energy Regulators are of the opinion that if clearly defined and non-discriminatory waivers could be an instrument for certain markets. However, it should not lead to asymmetric information or undermine free and fair competition between market participants or trading venues. European Energy Regulators like to encourage the involvement of sector specific agencies and authorities in the decision process.</p>

	<p>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)?</p>	
	<p>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?</p>	<p>European Energy Regulators are aware of the fact that the level of post-trade transparency information available from platforms is not necessarily uniform throughout the EU. At the same time it should also for post-trading transparency be taken into account that the relatively young electricity and gas wholesale markets are not comparable to the highly mature and liquid equity markets.</p> <p>In order to contribute to a more efficient wholesale price formation process and efficient and secure energy markets, European Energy Regulators consider that the existence of a reasonable level of post-trade transparency information should be reached on a pan-EU basis. With regard to post-trade transparency, the rationale should be to have available useful and reliable data, giving fair information on the liquidity and concentration of trading on European electricity and gas wholesale markets while keeping in mind the following constraints:</p> <ul style="list-style-type: none"> <li>• Limiting the burden put on market participants for providing this information;</li> <li>• Avoiding direct and indirect disclosure of commercially sensitive data;</li> <li>• Avoiding costs exceeding the benefits of publishing the information by not introducing additional obligations when a sufficient level of transparency</li> </ul>

		<p>already exists; and</p> <ul style="list-style-type: none"> <li>• The impact on competition</li> </ul> <p>CEER recommends a daily publication of information on standardised contracts. This should include derivatives irrespective of whether they are financial instruments according to MiFID or not and spot contracts. Besides relevant volume and price information the publication should include the number of trades and indices describing the structure of the market (without relieving information about the market shares of the different market participants). The publications should be harmonised between the different platforms existing in Member States: the format and content of publication should be the same. Wholesale markets organised as auction sessions determining a market clearing price for each delivery hour of the following day would need to make public aggregated information on hourly volumes and prices shortly after price determination. Trade-by-trade information may be relevant for platforms trading on a continuous (or rolling) basis. The information should be available to all interested parties on a non-discriminatory and reasonable commercial basis.</p> <p>If this data is already available and compliant with standards to be defined, no further measures would need to be taken by the platforms.</p> <p>Before deciding e.g. on a potential delay time, access conditions with regard to wholesale energy products, such a framework would need to be carefully tailored for the needs of the particular energy and energy derivatives markets. REMIT (EU 1227/2011) empowers ACER to review transparency</p>
--	--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

		requirements and provide recommendations to the Commission. European Energy Regulators recommend that ESMA is empowered to analyse in consultation with ACER, NRAs and the market whether there would e.g. be a need to provide longer delays for certain types of trades, in particular large trades made for own account (cf. delays provided by the MiFID post-trade transparency regime). Not only the size of the transaction, but also market structure, relative burden of costs of complying to the publication obligations should be taken into consideration.
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?	Key interactions with other EU financial services legislation concern in particular the EMIR as regards OTC derivatives data, the Transparency Directive regarding publication of inside information and the Capital Requirements Directive concerning the capital requirements for MiFID licensed investment firms, but there are also key interactions beyond the EU financial services legislation and especially the Regulation on Wholesale Energy Market Integrity and Transparency concerning market abuse and data collection in the wholesale energy market.
	29) Which, if any, interactions with similar requirements in	European Energy Regulators underline that European legislators

	major jurisdictions outside the EU need to be borne in mind and why?	should bear in mind the developments in the US, particularly concerning the Dodd-Frank-Act and its implementation by CFTC and SEC.
	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?	
<b>Detailed comments on specific articles of the draft Directive</b>		
<b>Article number</b>	<b>Comments</b>	
Article ... :		
Article ... :		
Article ... :		
<b>Detailed comments on specific articles of the draft Regulation</b>		
<b>Article number</b>	<b>Comments</b>	
Article ... :		
Article ... :		
Article ... :		