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The Depository Trust and Clearing Corporation (DTCC)

Review of the Markets in Financial Instruments Directive
Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

January 13, 2011

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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?	
	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?	The DTCC believes that it is appropriate to regulate third country access to EU markets as long as such regulation is based on 2 fundamental principles: - **Avoid reciprocity**: The assessment of regulatory equivalence must be independent from any reciprocity provisions within the relevant regulations and should take account of the fact that whilst regulators and regulation may have similar intent, the mechanism by which this

		intent is realised is often governed by local market practices. - **Clarity:** The relevant regulation in each jurisdiction should make it readily apparent to participants, with what provisions they must comply. We would therefore support the concept of 'equivalence' but would recommend care when assessing third country regulation.
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?	Our comment on this specific question applies only to the Data Service Providers/Data Reporting Services providers referred to in the Directive. We believe that the definition of Data Service Provider/Data Reporting Services providers (be they CTP, APA or ARM) is close in nature to that of the definition of a Trade Repository as contained in EMIR Article 2. The specific functions of an ARM and a Trade Repository will be very close in collecting data for use by supervisory authorities. Specifically, MiFIR section 3.4.7. Transaction reporting (Title IV – Articles 21-23) states: *Fourth, for cost and efficiency purposes, double reporting of trades under MiFID and the recently proposed reporting requirements to trade repositories (EMIR) should be avoided. Therefore, trade repositories will be required to transmit reports to the competent authorities.* We therefore believe that given their similar functional responsibilities, the corporate governance requirements for such entities should be similar or even identical to those defined in Article 64 of EMIR. Note: All references to EMIR relate to the text approved by the European Parliament in June 2011.

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 channeling 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	Two of the key principles underpinning the development of efficient and competitive European capital markets are open

	for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	access and freedom of choice in selecting a service provider, be that for trading, clearing or reporting. These principles of choice were first outlined in the original MiFID legislation and look likely to be supported in the final draft of EMIR and reinforced by the Commission's draft on MiFIR. **CCP access/choice:** As outlined above DTCC is supportive of the principles advocated in Articles 29 and 30 of MIFIR in relation to non-discriminatory and transparent access to trading venues and CCPs and notes that further details will be published regarding the conditions under which access could be denied by a CCP or a trading venue, including conditions based on the volume of transactions, the number and type of users or other factors creating undue risks. In general, and subject to the review of the specific standards when available, DTCC believes these types of conditions are appropriate when considering access to trading venues and CCPs. DTCC believes it is important to ensure these open access principles are applied in a non-discriminatory basis regardless of whether the party requesting access is affiliated to the infrastructure provider or not. Whilst we also recognize that this question concerns the access issues contained within Title VI, specifically relating to clearing access to a trading venue, we believe that it is relevant to consider also the need for access to and freedom of choice in the selection of Trade Repositories by the entity holding the ultimate reporting obligation, namely the trading counterparty. We have raised relevant points for consideration in this regard, below. **Repository access/choice:** It is likely that many of the larger institutional users, as well as much of the remaining user community, will determine that the best way to ensure full and complete compliance with their own reporting obligations is to

		have their multiple trading and clearing venues report to a single repository. This in turn would serve as a single control and reconciliation point for the reporting of their entire portfolio, either for any particular asset class or across all asset classes; otherwise they will likely find themselves at some level of non-compliance with the regulations. DTCC believes that a Trade Repository should have no interest in a trade other than to provide record keeping services for the benefit of regulators and the general public and that regulation should contain the following clarifications to protect the implementation and integrity of the post-trade reporting process: • ***Vertical bundling of services should be explicitly disallowed***. While Trading Platforms and CCPs may also offer repository services, no provider of trading or clearing services should be permitted to declare it to also be the sole Trade Repository for the trade it executes or clears. This is particularly important, but not exclusively, when this action would be against the wishes of its customers. Market participants must have the right to contract separately for trading, clearing and repository services as without this safeguard, the reporting obligation could unintentionally add a layer of unnecessary risk to the control processes by forcing unwanted multiple control points. From a regulator perspective, the absence of this safeguard also increases the potential risk that the data contained in a Trade Repository could be incomplete and/or inaccurate. • ***Cross-subsidies between services should also be explicitly disallowed***. The "no bundling" principle described above cannot be fully realized unless the fees charged for these services are determined based upon the true costs of providing each service (i.e., there is no cross-subsidy between services). Nor is this

		requirement sufficient in itself. While market participants should be able to enjoy the economies of shared platforms (e.g. CCP recordkeeping doubling as Trade Repository recordkeeping where practical), the allocations of platform operating costs between services cannot be arbitrary. If a clearing provider were to simply charge for repository operations at the margin, for example, that would be a clear subsidy. Therefore, allocations of the costs of ongoing shared services and generic development need to have a rational basis. • ***The regulation should clarify rules protecting choice and open access generally***. To avoid any provider taking advantage of gaps in specific rules, the regulations should clarify their rules regarding the following points, which will enhance enforcement: (a) prevent predatory or coercive pricing by providers engaged in any two or more of trading, clearing or repository services, and (b) prevent any other unfair or coercive direct or indirect linking or blocking of links between trading, clearing or repository services. • ***Similar rules should apply to prevent unfair horizontal bundling of services across asset classes***. Finally, identical rules ought to apply within each of the trading, clearing and reporting services under the regulatory infrastructure to prevent unfair horizontal bundling of services across asset classes. Any provider offering trading clearing or repository services for one asset class should not be permitted any of the above bundling or tying when providing services for other asset classes. We would be very happy to assist the Parliament in determining appropriate regulatory provisions to facilitate this requirement.
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage	A significant amount of new information will be available to regulators through the EMIR Trade Repository framework,

	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?	allowing further analysis with respect to position limits. This TR framework will fit well with the requirement outlined under both MiFID 2/MiFIR and MAD. DTCC's current experience of inquiries from market regulators is that they want to understand positions in conjunction with transaction activity and hence consistency in the data sets is important. We believe transaction reporting and repository objectives are closely aligned and can be met with a single response. This level of regulatory data should enable regulators to see the buildup of concentrations and positions in the market and therefore enable them to respond appropriately.
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 transparency requirements and why?	
	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?	
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	
	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 would reiterate the need to ensure harmonisation of these provisions with similar provisions relating to repositories as outlined in EMIR in order to avoid the imposition of unnecessary additional cost and risk on the marketplace as we believe that repositories will wish to be at least authorised as ARMs.
	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?	

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?	We are in agreement with the explanatory memorandum for MiFIR which states that MiFIR is "*also an essential vehicle for delivering on the G 20 commitment ……. complementing the legislative proposal on OTC derivatives, central counterparties and trade repositories*" For this reason, all references within the proposed Directive or Regulation should, where relevant, be aligned with the finally agreed text of EMIR
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	In developing provisions for Data Service Providers and Data Reporting Services providers referred to in the Directive, MiFID 2/MiFIR should seek to harmonise its requirements with those in other jurisdictions, thereby reducing opportunities for regulatory arbitrage. DTCC believes that consistent regulations between jurisdictions will streamline efforts to monitor and regulate OTC markets and, therefore, encourages European policymakers to consider the requirements already adopted in other jurisdictions such as the United States and Asia. With respect to trade reporting and price dissemination, the market should be open, allowing agents to operate to feed regulated services to allow efficient, highly automated and high quality processes to develop. The trading participants who have to pay for these services and have the reporting obligation should be free to choose an appropriate vendor for the given regulated

		services.
	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?	

Detailed comments on specific articles of the draft Directive

Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	

Detailed comments on specific articles of the draft Regulation

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Article ... :	
Article ... :	
Article ... :	