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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.**

Name of the person/ organisation responding to the questionnaire	EURELECTRIC - Union of the Electricity Industry Boulevard de L'Imperatrice 66 1000 – Bruxelles Belgium

General Remarks

The currently proposed revision of MiFID stands for an intensification of market regulation and expands the financial regulatory regime to non-financial sectors. Mainly the financial crisis in 2008 called the European Commission to prepare financial regulation in order to reduce systemic risk. But there is no comparable financial systemic risk in relation to non-financial counterparties such as energy firms. Energy trading companies:

- Are non financial firms that are generally "one-sided", having natural long or short positions in certain commodities depending on the underlying activity (production or supply of commodities).

- Deal on own account in financial instruments with the primary purpose of managing price risk related to the underlying physical business.
- Do not provide investment services to unsophisticated customers and therefore do not cause concern in relation to customer protection.

Energy firms involved in trading energy derivatives pose a far lower systemic risk than banks and financial firms. This was the conclusion reached by CESR and CEBS in their October 2008 advice which was confirmed in July 2010[1].

Commodity and energy firms were largely unaffected by the financial crisis and performed well throughout and there is no evidence that such firms contributed in any significant way to the crisis. On the contrary, for commodities including power the extension of financial regulation bears the danger that the energy companies would be tied to financial markets and institutions in a new way, leaving them far more exposed to a crisis in the financial world than before. At present, the main risk that power companies face in a sovereign debt crisis is falling demand for their product if the crisis weighs on the economy. Even defaulting in energy trading has no effect on the supply of gas and electricity. In case of a financial default, the physical facilities will continue to ensure security of supply. But implementation of tighter financial regulation could expose energy companies to sovereign credit risk in the same way that banks are. Particularly forcing utilities to clear most of their trades would needlessly drag them into any next financial crisis.

The current approach to expand the scope of the MiFID particularly for the commodity derivative dealers would entail significant consequences for energy companies, including generators, electricity/gas suppliers, electricity trading units as well as network operators as they would have to face high costs to acquire the licence (plus recurring costs to maintain it) due to structural and operational and capital requirements.

In particular, with an extension of the scope of MiFID, the provisions of several further directives and regulations, such as the Capital Requirement Directive (CRD IV), European Market Infrastructure Regulation (EMIR) and Market Abuse Directive/Regulation (MAD/MAR) also become mandatory for those energy companies falling under the MiFID-regime. These regulatory provisions, however, are clearly aimed at and designed for the financial sector. This becomes clear when recognising that, for example, EMIR holds specific exemptions for non-financial market participants not exceeding a certain clearing threshold, explicitly considering the systemic relevance of the operation of such firms. A framework that would not allow energy firms for an appropriate exemption would undermine the development of competitive, integrated and efficient European energy markets. MiFID requirements would be an additional barrier to market entry and would lead to the reduction in the number of market participants. As a result, liquidity would decline. The lack of liquidity in wholesale markets will affect also retail companies and end customers because the possibility to hedge the natural short position will be extremely reduced and as a consequence volatility in end

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[1] CESR-CEBS advice 15 Oct 2008 (CESR/08-752), see under: http://www.cebs.org/getdoc/ee9b85fa-4d64-48dc-9f45-a7350881ddac/2008-15-10-CESR-CEBS-advice-on-Commodities.aspx , confirmed in “CESR Technical Advice to the European Commission in the Context of the MiFID Review and Responses to the European Commission Request for Additional Information” – 29 July 2010

users' prices will increase. Gas and electricity market development would be hindered and this runs counter to the objective of creating a single European energy market.

The unintended consequences for European energy markets would be relevant:

- **Fewer market participants.** Many market participants will leave the market and uncovered risk will be pushed into the real economy.
- **Lower market volumes, lower liquidity and higher risk management costs.** Trading volumes will be lowered given the additional equity and cash collateral required. Spreads will rise and market liquidity will inevitably fall.
- **Reduced efficiency in product markets.** Less market liquidity will undermine the market's ability to provide signals of emerging oversupply and deficits.

As recognised by CESR/CEBS' "in respect of own account dealing, the intention would be to have an exemption which enables entities trading on their own account as part of a primarily non-financial business to remain outside the scope of the Directive." Therefore, we believe that it is important to exempt firms which are not financial institutions or members of financial groups from regulations which are not designed for these institutions or not proportionate to the risks they are exposed.

Recital 88 of the new draft Directive also correctly recognises that exemptions must be maintained within MiFID for participants in commodity derivatives. ("*the exemptions from Directive 2004/39/EC.for various participants active in commodity derivative markets should be modified to ensure that activities by firms, which are not part of a financial group, involving the hedging of production-related and other risks as well as the provision of investment services in commodity or exotic derivatives on an ancillary basis to clients of the main business remain exempt")* In fact, if banking-sector style rules are disproportionately applied to energy firms this will have the effect of reducing liquidity and increase entry barriers for new market participants. But precisely a large number of market participants of different sizes will be able to establish an efficient internal electricity market and to guarantee its integrity. It is therefore important that Article 2 of the new draft Directive ensures that the objective of Recital 88 are achieved.

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?	We consider that there are some inconsistencies that we would like to comment: • In art. 2.1. d) the proposal of excluding persons "that are a member of, or a participant, in a regulated market or MTF"s makes the exemption completely useless. In general, almost

		all market participants are participants of a regulated market or MTF. In the future, this will be even more frequent, especially once EMIR applies. It would be completely counterproductive to push market participants away from MTF/regulated markets to escape from MIFID. If the purpose is to make sure that this exemption does not benefit algorithmic traders, then this should be clearly said here, instead of the reference to regulated markets/MTF (See section on detailed comments). • We miss some exemption that could fit with recital (88) According to this recital, it is necessary to provide a clear exemption for non-financial firms that actively participate in commodity derivatives and related markets for own account, and delimiting the scope to avoid that firms specialising in trading commodities and commodity derivatives are brought within this Directive. This can be clarified through amendments to the ancillary activity exemption clause proposed in MiFID II by stating that all trading activities in instruments used for the commercial activities will be possible to conduct without being licensed (See section on detailed comments, art. 2.3 Directive). • Additionally, we would like to propose a new exemption in relation to this: *(new) persons whose main business consists of dealing on own account in commodity derivatives and/or derivative contracts included in Annex I, Section C10 and who do not provide any investment services or perform any investment activities other than dealing on own account in commodity derivatives or derivative contracts included in Annex I, Section C10 with eligible counterparties, professional clients*

		or wholesale market participants ***<u>as long as the activity does not constitute algorithmic or high-frequency trading</u>*** • Finally we consider that in cases where for certain energy commodities there is a **<u>sector specific EU regulatory regime</u>** (REMIT, Regulation 2011/1227/EC), **<u>there should not be additional obligations pursuant to MiFID</u>**, provided that this regime **<u>includes a market oversight framework and transaction reporting</u>** requirements. A firm chiefly engaged in the production or physical supply of such a commodity and active in relevant spot or physical forward markets should not be exposed to additional requirements and obligations by MiFID. We would propose something along these lines: *(new) "A firm whose main business is producing and/ or supplying a commodity, which is, when considered on a group basis, predominantly of a physical character, and:* *i) Is subject to regulatory oversight and to regulatory reporting obligations by virtue of any binding rules applying throughout the EU specifically to spot and physical forward transactions in that commodity, and* *ii) Is subject also to regulatory reporting obligations in respect of standard derivative transactions in that commodity by virtue of [EMIR]"* As regard the ancillary nature of activities (article 2 par. 3) further definition and clarification are needed in order to safeguard hedging activities on commercial and treasury related risk management procedures for energy companies and non-financial entities, in particular for trading activities which are

		ancillary to the main business. This should be done by further elaborating on the elements already provided by the proposal in article 2 par. 3,
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	• We do not consider that it is appropriate to classify spot emissions allowances as financial instruments. An emission allowance is essentially an input factor to a production process. The operators of installations subject to the ETS system are effectively forced to trade EU allowances to ensure that they comply with emissions reductions and to avoid sanctions in case of non compliance. EU allowances primarily serve cost efficiency in climate protection and they are not investment products. • We therefore suggest that exemptions also address the EU ETS obligations. Trading in carbon allowances for compliance buyers should be explicitly exempted by MIFID requirements as it is in fact a result of climate obligations set at European level. • Additionally, there are provisions in existing financial regulation that would not be suitable for the carbon market and would negatively affect EU-ETS compliance operators. Specifically, capital requirements similar to those imposed on investment firms, which could derive from the current package of legislative initiatives, would impose disproportionate burdens on many EU-ETS compliance carbon market participants whose activities do not pose systemic risk.
	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	We welcome the proposal that third country firms from third countries for which an equivalent decision has been adopted

	what precedents should inform the approach and why?	would be able to request to provide services in the EU. However, the assessment of whether the regulatory regime of a third country is equivalent should not be based on strictly identical financial regimes, because no two regulatory regimes are identical in all respects. Therefore, we propose that equivalence should be defined in terms of intent rather thank in terms of specific rules.
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?	•The theoretical distinction between OTFs and other types of trading venues seems clear i.e. discretionary powers in trade execution for OTFs, not allowed to MTFs. However it is unclear what practical implication the introduction of this new type of platform might have, in particular for the energy commodity business. Therefore it would be useful that MIFID II provides a clearer definition of the Organised Trading Facility Category. It should be clear that all transactions on OTFs linked to trading in financial instruments that are related to risk management of the main business and considered ancillary activity should be exempted from MiFID. In addition, the OTF category should be clearly kept separate from auction platforms managed by infrastructure operators or any other facility which role is limited to provide transparent and competitive access to capacity and which is already submitted to energy sector specific regulation.

		• The impact might be very wide, however the impact assessment provided by the EU Commission does not provide details on the number of platforms that would need to be classified as OTFs.
	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?	• OTC trading should continue to be defined as trading outside regulated markets, as currently defined in MiFID. Therefore off-exchange trading should be considered OTC. • We notice that the introduction of OTFs may reduce the scope for bespoke contracts. • We believe that it shall be possible to trade physical energy contracts in an efficient way without having them defined as financial products. If this change is not done in Annex 1, C we see the risk that physical trading is moved from today's' efficient broker platforms to bilateral trading. We believe that this development is more likely than channelling of trades which are currently OTC onto organised venues. We believe that this would lead to inefficient trading as the benefits of broker trading platforms might be strongly weakened in the future.
	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?	• We do not support the EC' proposals to require that all clearing eligible and sufficiently liquid derivatives should be traded exclusively on regulated markets MTFs or organised trading facilities. There should be no mandatory platform trading obligation for non-financial undertakings trading in commodity derivatives and wholesale energy products since appropriate supervision and oversight has been introduced with Regulation No. 2011/1227/EC. (See section on detailed comments, Regulation, art. 24) • This could reduce the flexibility available for counterparties that are not subject to EMIR clearing obligation. Besides this obligation may have an indirect impact on all counterparties increasing trading costs.
	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 or instead?	• There is no evidence that demonstrates that process of commodities or other derivatives can be effectively controlled through the mandatory implementation of position limits. The imposition of ex-ante position limits does constitute an ultima-ratio measure and represents a severe market intervention. • Position limits hinder effective risk management as companies would be allowed to manage their commodity price risks only up to a certain level. These limits hamper

		energy suppliers, for example, in forward selling their electricity production to a sufficient extent (via exchanges), or being able to buy in the emissions certificates required to produce electricity. In this light, the imposition of position limits needs to be subject to additional conditions. • Therefore we believe it's fundamental that position limits do not restrict energy firms in their risk management activities ("Commercial firms shall not be subject to position limits for those products that are used for risk management activities."). • Rather, a more flexible approach should be taken allowing regulators to adopt a position management approach which would be the most effective way of ensuring market integrity. • As part of the new arrangements it may be appropriate to more clearly specify the responsibilities of operators of regulated markets, MTFs and organised trading venues to ensure the positions taken by firms trading on their platforms do not undermine market integrity or create systemic risk. • Moreover, reporting requirements have to be proportionate for non-licensed companies. Platforms do not need real time information to be able to provide weekly position reports. In section 2 of Article 60, "in real-time" should be changed to "on a weekly basis"
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)?	
	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?	• The main financial services legislations that have interactions with MiFID/MiFIR 2 are the European Market Infrastructure Regulation (EMIR), the Capital Requirements Directive (CRD) and the Market Abuse Regulation (MAR). All these are currently in their legislative process. This situation might end in regulatory uncertainties for market participants/operators and ultimately will result in an excessive increase of cost to be paid by consumers. • Beyond the financial services legislation, interactions are foreseen with sector specific legislation in the energy market. In particular the Regulation 2011/1227/EC recently entered into force introduced a single oversight regime for gas and electricity markets and market participants across the entire

		EU. Regulation no. 1227 includes rules on registration of market participants, prohibition of insider dealing and market manipulation, transaction reporting, monitoring and enforcement rules by National Regulatory Agencies supported by the Agency for Cooperation of Energy Regulators (ACER). • For this reason we would like to insist on the need of clear borderlines between all these directives and regulations, with a clear definition of the scope of each one in order to avoid at any time that the same issue could be covered by several pieces of legislation. In our answer to question 1 we propose some type of exemption that could cover this aspect.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	• We underline in particular rules concerning the energy sector included in the Dodd-Frank Act approved in the US. We strongly support a better specification of the MiFID II perimeter to exclude from the definition of financial instruments all products with delivery in the future that are physically settled. This is the approach used in the US under the Dodd-Frank Act, and as such any departure from this approach in the EU would create regulatory inconsistency. • In our view the MiFID II proposals failed to clarify the distinction between financial instruments and physical contracts. Indeed financial instruments are subject to MiFID II and associated regulations whilst physical OTC gas and power contracts should remain exempt from MiFID II, but can be subject to sector-specific regulations as Regulation 2011/1227/EC. The amended Annex 1, C (6) classifies a contract that is settled physically and traded on an organised trading facility (OTF) improperly as a financial instrument. • Physically settled forward products in particular are of

		primary use for commercial firms. That would considerably increase the scope of MiFID II to pure commercial activities (i.e. gas/power contracts which aim at the physical delivery) which do not display the characteristics of traditional derivatives. If physically settled forward products are considered financial instruments, pure commercial activities (i.e. gas/power contracts with physical delivery) and hedging / risk management strategies that lack systemic relevance for the financial markets as well as the speculative element targeted through MiFID II, would be brought under MIFID II. • This may reduce substantially the scope of the ancillary activity exemption as this commercial activity is normally the main non-financial activity of energy firms, but would be regarded wrongly as its main financial trading business (i.e. trading with financial instruments). • In addition this has considerable implications regarding the framework of non financial firms under EMIR and the enforcement of position limits, position reporting and equivalent measures. • We strongly recommend a better specification of the MiFID II perimeter to exclude from the definition of financial instruments all products with delivery in the future that are physically settled and that in the case of the energy commodities are subject to the mentioned sector-specific regulation REMIT.. This is the approach used in the US under the Dodd-Frank Act, and as such any departure from this approach in the EU would create regulatory inconsistency. • Therefore, we urge for a revised definition of financial instruments in Annex 1, C (6) excluding physically settled

		forward products (see section on detailed comments, Annex I Section C, Directive) and possibly clarifying the distinction between financial instruments and physical contracts. • Moreover it should be taken into consideration they the trading of physical gas and power products is now subject to the Regulation No. 2011/1227/EC, which is intended to ensure integrity, transparency and oversight in energy markets; therefore these categories of energy products are already covered by appropriate regulation.
	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**
Article2.1 d)	MiFID should enable firms which are not market makers and are not executing orders and are not algorithmic or high-frequency traders, to trade on own account on Regulated Markets or MTFs without becoming subject to MiFID. This proprietary activity is not an investment service for third parties, does not involve executing client orders (i.e. not a systemic internaliser), it is not causing investor protection concerns and it is not of systemic relevance. This kind of activity does not cause the potential risks of algorithmic or high-frequency trading and, hence, need not to be addressed by specific risk controls. In addition the wording of the clarification included in the last paragraph should be better calibrated to avoid misunderstandings. *Text proposed by the Commission* *Amendment* (d) persons who do not provide any investment services or activities other than dealing on own account unless they

	(a) are market makers; (b) ⇨ are a member of or a participant in a regulated market or MTF ⇦ or (c) deal on own account ⇨by executing client orders ⇦ ~~outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them~~; ⇨This exemption does not ***apply to*** persons ***exempt under Article 2(1)(i)*** who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof; ⇦(d) persons who do not provide any investment services or activities other than dealing on own account unless they (a) are market makers; (b) ⇨ are a member of or a participant in a regulated market or MTF ⇦ or (c) deal on own account ⇨by executing client orders ⇦ ~~outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them~~; ⇨This exemption does not ***prevent*** persons who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof, ***to be exempted under any other applicable exemption as long as the activity does not constitute algorithmic or high-frequency trading***; ⇦
Article 2.1 i)	This exemption should be valid for all trading instruments for risk management purposes. Thus, the definition of ancillary activity needs to be further clarified (see our suggestion in Article 2.3 below). Moreover, "when considered on a group basis" should be extended so that all actors trading instruments for risk management purposes are covered. *Text proposed by the Commission* *Amendment* (i) persons ⇨ who: ⇦

	⇨ - deal ⇦ ~~dealing~~ on own account in financial instruments, ⇨ excluding persons who deal on own account by executing client orders, ⇦ or ⇨ - provide ⇦ ~~providing~~ investment services ⇨ , other than dealing on own account, exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, or ⇦ ⇨ - provide investment services, other than dealing on own account, ⇦ in commodity derivatives or derivative contracts included in Annex I, Section C 10 ⇨ or emission allowances or derivatives thereof ⇦ to the clients of their main business, provided ⇨ that in all cases ⇦ this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive ~~2000/12/EC~~ ⌦ 2006/48/EC ⌫ ;(i) persons ⇨ who: ⇦ ⇨ - deal ⇦ ~~dealing~~ on own account in financial instruments, ⇨ excluding persons who deal on own account by executing client orders, ⇦ or ⇨ - provide ⇦ ~~providing~~ investment services ⇨ , other than dealing on own account, exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, or ⇦ ⇨ - provide investment services, other than dealing on own account, ⇦ in commodity derivatives or derivative contracts included in Annex I, Section C 10 ⇨ or emission allowances or derivatives thereof ⇦ to the clients of their main business, provided ⇨ that in all cases ⇦ this is an ancillary activity to their main business, when considered on a group basis ***or for the owners in case of joint trading entities***, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive ~~2000/12/EC~~ ⌦ 2006/48/EC ⌫ ;
Article 2.3 :	The elements to be considered in order to define an activity ancillary to the main business should be clarified, in particular given the fact that the 'ancillary test' should apply (see amendment #2) only to the provision of investment services to the clients of the main business and this activity should be carefully oversight to ensure investor protection.

	Text proposed by the Commission *Amendment* 3. ⇨The Commission shall adopt delegated acts in accordance with Article 94 concerning measures ~~In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission may ,~~ in respect of exemptions (c) and (i), to ~~and (k) define the criteria for determining~~ clarifying when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner. ⇩new The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements: ***- the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity,*** - the capital employed for carrying out the activity. 3. ⇨The Commission shall adopt delegated acts in accordance with Article 94 concerning measures ~~In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission may ,~~ in respect of exemptions (c) and (i), to ~~and (k) define the criteria for determining~~ clarifying when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner. ⇩new The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements: ***- trading in all financial instruments that are related to risk management of the main business, when considered on a group basis or for the owners in case of joint trading entities, shall be considered as ancillary activity;*** - the capital employed for carrying out the activity ***compared with the capital employed for the main business*** ; ***- the revenues generated from the physical markets compared to revenues generated from the financial markets.***
Article 4 (28), (29)::	**Definition of Parent Undertaking and Subsidiary** The current definitions of parent undertaking and subsidiary do not pay attention to characteristic company structures in the energy sector, which have been created during the liberalisation of the respective markets. Trading activities have repeatedly been demerged and especially municipal utilities and other small and/or medium companies have established joint trading entities to survive on the market. They usually have chosen the form of a jointly affiliated group. This company structure needs to be addressed in the current proposal to guarantee well-balanced and fair regulation.

	The following must be noted in advance: It is the purpose of the cited article 32 of Directive 83/349/EEC to extend the provisions on consolidated companies to the group of joint ventures. In fact, the proposed amendment is meant as a clarification: in both situations, the subsidiary is effectively managed and controlled by the respective parent undertakings. In the case of common control by more than one parent company, there is no reason to assume a particular protection requirement in favour of these parent undertakings. They already have the control and the access to information they require to protect their respective (investor) interests. Consequently, there is no reason to treat jointly managed companies differently. In particular, this holds true as regards the application of the group exemption in Article 2.1 (b). For reasons of proportionality and equality, the relationship between jointly managed entities and their respective parent undertakings should be considered sufficient to be covered by Article 2.1 (b). **Amendments to MiFID II:** **Proposal for revision of Article 4 (28)** 24) 'Parent undertaking' means a parent undertaking as defined in Articles 1 and 2 ***as well as a jointly managed undertaking as defined in Article 32*** of Seventh Council Directive 83/349/EEC of June 1983 on consolidated accounts; **Proposal for revision of Article 4 (29)** 25) 'Subsidiary' means a subsidiary undertaking as defined in Articles 1 and 2 ***as well as a jointly managed undertaking as defined in Article 32*** of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;
Annex I Section C (6), (7) ::	**Definition of Financial Instruments:** According to the currently proposed version of MiFID, physical contracts are largely brought under financial market supervision. Currently, only spot contracts and strictly bilateral forwards remain outside the scope of MiFID. Basically it is important to state that the definitions in MiFID do not necessarily coincide with their customary interpretation. For instance, the term "forward" apparently covers all OTC derivatives, whereas all derivatives on regulated markets (including MTF and recently OTF) are defined as "futures". However, the terms do not include a specification whether they are financially or

	physically settled. As a consequence, the seemingly minor adjustment in Annex I, Section C, paragraph 6 (i.e. the addition of "OTF") causes serious consequences for the energy sector. All derivative transactions on regulated markets, MTFs and OTFs would qualify as financial instruments covered by MiFID. Concluding any of these transactions in its ordinary business, would bring an energy supplier under the application of MiFID. In particular, this broad understanding of financial instruments would render several exemptions in Article 2 (e.g. the exemption for ancillary activities) completely useless. In comparison, the respective draft law in the U.S. (i.e. Dodd-Frank-Act) uses another definition of financial instruments which excludes physically-settled derivatives expressively. To avoid the disadvantage of regulatory arbitrage, an adaptation of the definitions of financial instruments is highly required. This situation is particularly inapprehensible for the energy sector since Regulation No 1227/2011 on wholesale energy market integrity and transparency has been published in the Official Journal of the EC on 8 December 2011 which is focused on physically settled derivatives. Therefore, we urge for a revised definition of financial instruments excluding physically settled derivative contracts at least for the energy sector (i.e. wholesale trading of power and natural gas). **Amendments to MIFID II:** *Text proposed by the Commission* *Amendment* (6) Options, futures, swaps, and any other derivative contract relating to commodities that ***can*** be physically settled provided that they are traded on a regulated market ⇨,OTF, ⇦ ~~and/~~or an MTF; (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that ***can*** be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls; (6) Options, futures, swaps, and any other derivative contract relating to commodities that ***are not intended to*** be physically settled provided that they are traded on a regulated market, an OTF and/or an MTF;

	(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that ***are not intended to*** be physically settled, not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 24 New paragraph 2a:	The trading obligation procedure defined in MiFIR may reduce the scope recognised in EMIR. Additionally it doesn't take into consideration the rules introduced for wholesale energy markets with the Regulation 2011/1227/EC on market integrity. *Text proposed by the Commission* *Amendment* ***2.a The obligation laid down in paragraph 1 shall not apply to wholesale energy products which are subject to appropriate monitoring by the competent prudential-supervision authorities as defined in Regulation 2011/1227/EC.***