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	**EACT - European Association of Corporate Treasurers**

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?	
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?	Our perception is that a key aim of MiFID and MiFIR is to push the bulk of financial transactions onto exchanges, MTFs or OTFs so that the various regulatory disciplines on conduct and standards can more easily be enforced. OTC transactions come across as the left over category. However for most companies the ability to deal directly with a financial counterpart dealing as principal on their own account and in tailored transactions is absolutely crucial. The proposals do allow this to continue. However by making eligible platforms the prime focus and by requiring suitably developed derivatives to occur on eligible platforms for both financial and non financial counterparties exceeding the clearing threshold in EMIR, our concern is that OTC will become a backwater with fewer and fewer financial institutions prepared to quote leading to a deterioration in the quality of service, liquidity and competitiveness in pricing for those using OTC. It is therefore important that when ESMA comes to define the list of derivatives that must be traded on eligible platforms it should not specify that definition too widely so as not to damage the capabilities of the OTC markets. For example the good liquidity is a necessary condition to be eligible for eligible platform trading but of itself should not be regarded as a

		sufficient condition.
	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?	Article 24 of the regulation includes a carve out for non financial companies below the EMIR threshold so that such clients are not forced to trade on exchanges, MTFs or OTFs. We welcome this flexibility which very much meets the needs of companies to be able to trade OTC on a bilateral basis using suitably tailored products.
	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?	
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?	Yes, we consider that the new requirements included in Directive Article 24 are sufficient to protect investors from conflicts of interest for independent advice and on portfolio management for two reasons: 1. Investment Firms shall specify whether it is based on a broad or on a more restricted analysis of the market for the first investment service 2. Investment Firms shall not accept or receive fees, commissions or any monetary benefits by any third party in relation to the provision of the service to clients for the both investment services.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	In order to avoid any misunderstanding on the nature of "other non-complex financial instruments" mentioned in paragraph (v) and to prevent any potential disputes between Clients and Investments Firms, we suggest to define "other non-complex financial instruments" more precisely (in a new Annex), notably for foreign exchange and interest rate financial instruments.
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	We consider the additional paragraphs included in the Directive Article 27 improve the obligation of the best execution. Consequently, it is not necessary to modify the wording of this article.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	Yes, given that the current classification regime into 3 categories will be retained and given that the professional clients can refuse to be considered as an eligible counterparty by the Investments Firms, according to the current MiFID regulation.

		In Art 30 of the directive the obligation for firms to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading is expanded so that it applies to dealings with eligible counterparties rather than just retail and professional clients. In effect this means that the regulatory requirements applying to communications made to eligible counterparties will be barely distinguishable from those that currently apply to communications made to professional clients. We believe that this is an unnecessary degree of investor protection for counterparties who are sufficiently experienced to be able to look after themselves. This requirement is unnecessary but is nonetheless acceptable for eligible counterparties.

	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. Under the current MiFID rules appropriateness covers experience and knowledge relevant to the product or service offered and is deemed met by professional clients and is not needed for eligible counterparties. Suitability covers experience and knowledge relevant to the product or service offered and consideration of the client's financial situation. For both professional clients and eligible counterparties, it is assumed that experience and knowledge is met. Firms still need to cover client's financial situation and investment objectives. We believe that this level of protection remains acceptable.

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?	
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	

	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?	

<u>General comments on the review of MiFID Directive</u> (2004/39/EC): will the "Commission Directive 2006/73/EC of 10 August 2006 (implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive") remain still in effect after the review MiFID Directive 2004/39/EC or will the abovementioned implementing Directive be deleted? If, so, by which regulation?
Detailed comments on specific articles of the draft Directive

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