RESPONSE OF THE EUROPEAN BANKING FEDERATION (EBF)

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.

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?	The exemptions proposed are in principle justified.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	The EBF supports the extension of MiFID's information requirements to structured deposits. An extension of other MiFID requirements could impose a significant adjustment burden on firms that sell investment products and structured deposits through different business lines.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	The EBF believes that safekeeping services and administration of financial instruments should not be reclassified as core investment services, but should rather be kept as ancillary services. As custodians are usually credit institutions that provide other investment services, they are already authorised

		under existing EU legislation. The proposed reclassification will thus in such cases not lead to a stricter authorisation and supervision regime. It will, however, submit custodians and their clients to new requirements that are materially not applicable to custody activities, thus leading to important uncertainties and additional costs also for the investors. The EBF stresses that safekeeping and the provision of custody services differ significantly from the trading and distribution of financial instruments targeted by MiFID. These services are only very loosely associated with the investment decisions of clients and the proposed reclassification would in any case not enhance investor protection. Finally, the EBF understands that the safekeeping and administration of financial instruments will be addressed in upcoming regulations. Overlapping regulations should thus be avoided.
	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 EBF considers that, in the interest of integrated, global, financial market it is very important that EU clients and counterparties have access to the international market, and to a full range of choice of EU and non-EU originated products and services. The EBF is supportive of the Commission's intention to introduce more harmonization in the way third country firms access the EU markets. The EBF is concerned that access to the EU is made conditional on positive equivalence assessments. Such a request would, de facto, prevent non-EU firms which are willing and able to render MiFID/MiFIR compliant services to access the EU financial market. Key is the interpretation of "equivalence". The EBF cautions against strict equivalence requirements. Any equivalence assessment should be a "top down" approach based on approximation in regulatory outputs, principles and objectives. Furthermore, the EBF believes in

		global, open markets. Third country issuer and investors should be able to participate in the European markets. Likewise, access to foreign markets for European banks should be ensured. According to the current MiFID, the Commission can ask the Council for a mandate for pursuing negotiations with third countries in order to obtain, in those countries, comparable competitive opportunities for EU firms. Market access for EU banks to countries that have committed to a common set of regulatory principles for financial services reform (i.e. the members of the G20) should remain a primary policy objective.
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?	The EBF supports the strengthening of corporate governance of financial firms. Although the EBF supports a hamonisation of corporate governance related issues per se, EU rules must be kept on a principle level. To introduce detailed EU rules on corporate governance would mean far-reaching changes in applicable corporate law principles upon which national regulatory frameworks currently are based. Any forthcoming EU regulation should establish the principles of corporate governance but be flexible enough to adapt to both the different types of financial institutions and the different legal systems within the EU. It is also important that the rules regarding corporate governance in CRD IV and MIFID II are coordinated.
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 EBF understands the Commission's intention in introducing OTFs. The regulatory design for OTFs in the proposal is not fully clear. The main difference between an MTF and an OTF is that the latter may use discretion when matching orders. However, Recital 12 of MiFID states that OTFs should be able to determine and restrict access (to the facility). This aspect would set OTFS apart from MTFs.

		OTFs should be regulated in way that permits OTFs and existing venues to compete fairly for business. Most EBF members consider that: • OTF operators should have the right to determine participants' access based on their specific business model as a general rule. That right should be exercised taking into account market participants' expectations that the OTF does not unduly restrict access to the facility. • OTFs operators' discretion over how the order is executed would allow OTFs to provide tailored outcomes for clients. It is, however, important that market users are not disadvantaged and that the underlying best execution obligations that investment firms operating OTFs have towards their clients are not impaired. • OTF operators should not be prevented from trading against proprietary capital, as a service to clients. Allowing clients to interact with proprietary capital of the platform operator helps liquidity and thus makes it easier for clients to buy and sell financial instruments, and, in the case of derivatives, to hedge their risks. Potential conflicts of interest between the OTF operator and clients in transactions over bonds and derivatives should not be addressed through a ban but, rather, by means of appropriate management and disclosure under MiFID's conflict of interest rules.
	7) How should OTC trading be defined? Will the proposals,	On OTC derivatives, the EBF supports the G20-driven objective

	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?	that standardised and sufficiently liquid derivatives are traded on regulated markets, MTFs or organised trading facilities. In order to fulfil the G20 objective, the regulation of OTFs should be conducive to accommodate existing OTC derivatives trading. In this regard, OTFs should not be forbidden to trade against their own capital in derivatives trading.
	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?	The EBF supports the introduction of new organisational safeguards and risk-controls on investment firms engaged in "algo" trading. Such controls should reflect, where possible, existing market best practices. The EBF also supports the introduction of well-designed, flexible and dynamic markets safeguards such as those proposed by the European Commission (e.g. circuit breakers). The imposition of "market-making type" obligations on all of "algo" traders may however have a detrimental impact on the level of liquidity in the market as the benefits of the liquidity that these traders currently provide voluntarily, might disappear. Moreover, a general imposition will not prove effective, given the myriad of "algo" strategies used. Finally, EBF supports that firms who provide direct electronic access to clients have in place robust risk controls and filters to detect errors or attempts to misuse their facilities.
	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?	With regard to OTFs (i.e. Article 20) see our response to question 6. With regard to electronic trading (i.e. Article 51) see our response to question 8.

	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?	The EBF points to a potential inconsistency between the recording obligation under Article 16.7 of the draft Directive (3-year term) and the maintenance period imposed for transaction data under Article 22 of the Regulation (5 years). With regard to the recording of telephone conversations or electronic communications involving client orders, a preliminary distinction needs to be made between communications between professional traders – where a common EU regime would be seen as an effective means to help the fight against market abuse – and calls / communications with retail clients – where any regime should be optional for Member States. As for the maintenance of telephone recordings, the Commission's proposal of three years is not necessary: usually, where orders are initially recorded, they are subsequently confirmed in writing. Therefore, a default retention period of e.g. six months would be entirely sufficient. Where supervisors believe that certain recordings should be kept for longer, this can be required case-by-case.
	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?	As stated above (see our response to question 7), the EBF supports the G20-driven objective that standardised and sufficiently liquid derivatives are traded on regulated markets, MTFs or organised trading facilities. The EBF also supports the involvement of ESMA in the determination of "sufficiently liquid" derivatives. The EBF notes, however, that there may be circumstances where it is not always appropriate to trade standardised and sufficiently liquid derivatives exclusively on regulated markets, MTFs, or organised trading facilities. Market participants should retain a choice between executing on a trading facility or OTC, to reflect their particular needs.

	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?	The EBF supports efforts to facilitate access of SMEs to direct funding. However, such efforts must not lead to less investor protection or to an increased risk of market abuse. Besides, the EBF is unconvinced that MiFID would be the best tool to achieve the desired alleviation of the administrative burden on SMEs. Instead, it might be preferable to consider targeted amendments to the Prospectus Directive and the Market Abuse 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?	The EBF clearly supports language in the proposed Regulation calling for the removal of barriers and discriminatory practices that that can be used to prevent competition in the provision of clearing services for all financial instruments. In particular, the EBF strongly supports the introduction of explicit and detailed requirements for open access by trading venues to clearing services. The provisions are sufficient and complement the more limited scope in EMIR, provided interoperability between CCPs first (as envisaged in EMIR to gradually occur) and between CCPs and exchanges is genuinely achieved. As in EMIR, the EBF would support the introduction of review clauses that would seek to ensure that regulation removes vertical silos within exchanges.
	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	The EBF has serious concerns over the effectiveness of position limits as an effective tool to attain any of the objectives identified by the European Commission. Furthermore, the Federation notes that any eventual powers given to supervisors to intervene at a contract level would be detrimental to the well functioning of derivatives markets as they may introduce legal and business uncertainty. It should be noted that an institution's

	or instead?	position in a given derivative many not be a good representation of their net market exposure.. In its response to the Commission's request for additional information in relation to the review of MiFID, CESR said that "*there (is not) sufficient evidence so far that position limits can systematically be used to limit the impact significant positions may have on the prices and market generally*". Instead of setting hard, non-calibrated position limits, supervisors may instead request firms to dynamically manage their positions (i.e. to adjust them in relation to the changes in the volumes of contracts traded at a specific price level, while balancing risk and reward).
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?	The EBF believes that investors should be able to have access to the best possible advice. That is the key consideration. The quality of the advice provided to a client is not dependent on whether or not the adviser accepts or receives fees, commissions or any monetary benefits paid or provided by any third party. Whilst the EBF certainly welcomes the introduction of more disclosure around the characteristics of the advice provided, we consider that the proposal should stipulate in a non-equivocal manner that different kinds of advice may persist within one and the same financial intermediary. With regard to portfolio management, the EBF considers that a portfolio manager should be able to receive fees for portfolio services (management or advice) offered to a product provider (most typical an investment fund) and still offer portfolio management or investment advice to clients that includes products issued by the product provider in question. The EBF

		recalls in this context the good work done by the Committee of European Securities Regulators (CESR) in clarifying the types of entity behaviour that European securities regulators encourage (good practices) and discourage (poor practices) in the context of inducements
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The EBF is concerned that the catalogue of products that can be sold on an execution-only basis is too narrow. Complex products would be excluded. The EBF recalls, however, that often products are made complex so as to reduce the risks for investors. Structured UCITS are a case in point. Other restrictions would relate to a products' listing status, irrespective of its factual liquidity conditions. The EBF considers that an assessment of various elements – risk, complexity and liquidity – is necessary to properly determine the selling regime for each product. ESMA may be the best placed to determine the more detailed criteria for the assessment of which products shall not be for execution only.
	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?	Although the EBF is unconvinced by the need of this rule, it suggest that the proposed obligation to summarise, for each class of financial instruments, and make public on an annual basis, the top five execution venues from whence their client orders were executed in the preceding year exists only where the investment firm selected more than five execution venues for a certain financial instrument class. And this, notwithstanding the right of the investment firm, as is currently the case, to select particular execution venues for a certain asset class.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	For the EBF, the MiFID client categorisation regime is broadly adequate. It has proven nonetheless partly unsuccessful, in respect of local public authorities and municipalities. In this

		regard, it might not be appropriate to treat many of them as eligible counterparties. The EBF welcomes that the Commission is proposing to grant these entities the choice to "opt up" and be treated as professional clients. This will likely be very relevant for, in particular, larger municipalities and local authorities. It is, however, a matter of concern that Member States are able to establish different assessment regimes for these entities as this may lead to may lead to diverse classifications across the EU and enhanced compliance costs. The EBF favours that ESMA has a role in ensuring that classifications are consistent.
	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?	The EBF considers that supervisory authorities should be sufficiently equipped to prevent a threat to financial stability or market integrity and, therefore, should be able to act in the context of MiFID. Nonetheless, the EBF believes that prohibitions or restrictions should be seen as a last resort measure. The EBF considers that the use of current incentives/disincentives to encourage/discourage market behaviour may be a more effective way to address any specific market concerns.
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?	The EBF understands the Commission's proposed extension of transparency obligations to depositary receipts, exchange traded funds and certificates issued by companies. However a lot will depend on Level 2. As currently drafted, quoting obligations for equities (and non-equities) at the level of detail articulated, appear onerous. The EBF also agrees with extending the trade transparency regime to actionable indications of interest.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all	The EBF considers that the scope of non-equity instruments to which pre and post trade transparency requirements would be

	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?	extended is too broad. The Level 1 text could be signposted to limit the scope to a definition of product liquidity which is more narrowly based than a bond's or structured finance product's admission to a regulated markets or the fact it has a prospectus or a derivative's admission to a trading venue or the even broader requirement for post trade transparency to be reported to a trade repository. One possible way could be to limit pre trade transparency for derivatives, at least to those instruments that are required to being transacted on trading venues, because these requirements are contingent on liquidity. The EBF suggests defining pre and post trade transparency requirements in a way that could be adjusted and calibrated, yet in a harmonised manner, according to (i) the specific type of instrument, (ii) the main features of their relevant markets, (iii) the size of the transactions and the type of operators and investors. The EBF considers that the Commission's proposal for SI rules for others markets than equities are somewhat difficult to interpret. Article 17.6 under MiFIR requires an SI dealing in non-equities instruments to comply with best execution obligations (Art 27, MiFiD) and quotes must 'reflect prevailing market conditions in relation to prices at which transactions are concluded for the same or similar instruments on RMs, MTRs or OTFs'. It is not clear how firms will be able to meet the best execution obligation under the Request for Quote (RFQ) model where instruments are illiquid given there is no reference price. There is, furthermore, a serious risk that the pre-trade

		transparency obligation embedded in the SI requirements will harm the liquidity in the bond markets with the result that banks will not be able to quote prises on bonds at the large scale they do currently to their customers.
	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?	See response to question 21
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	The rationale for the waivers continues to be valid. However, some banks have reported difficulties with the current definitions of thresholds and standard market sizes as regards their respective application on the different trading venues. In order for the waiver regime to be applied consistently and coherently across the EU markets, , the EBF supports that competent authorities have to inform ESMA about the local use of waivers and that the latter writes guidelines to ensure compatibility of a local authority proposal of a waiver with the level 2 requirements.
	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	No comments on ARMs and APAs. On the CTP, the EBF does not foresee any viable, purely market driven model within a near future. The EBF has expressed its preference for a publicly-sponsored consolidation mechanism in the longer run and with a new tender every third year to ensure some competition in terms of price and tape quality for the future.
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and	Best execution requirements create a need for investment firms to purchase a minimum of securities market data from trading

	investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	venues, vendors, etc. More certainty over the ownership of market data (intellectual property rights) would be an important contributor to a competitive market data environment. In particular, it must be defined who owns which data, from which moment onwards. The timestamp, which can be considered as the investment firms receipt for his order, and the information of executed trades sent to a specific investment firm, should be owned by this investment firm in order to enable the firm to consolidate the information with other investment firms, to derive the information etc. without being charged.
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?	The EBF strongly invites the co-legislators to: • give ESMA sufficient time to prepare their rulemaking (delegated / implementing acts and the technical standards). Sufficient time should permit ESMA to produce thorough impact assessments and engage in adequate public consultation. Unrealistic timetables will lead to regulations that are not sufficiently elaborated. This may cause serious detrimental effects to the financial markets. The consultation timeframe in the context of the Prospectus Directive (i.e. over 3 weeks, including the Christmas break) has been very disappointing. • ensure that any mandate given to ESMA is justified and that the level 1 texts provides sufficient details as regards the contents of the delegated acts or technical standards to be produced.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements	N/A

	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?	European Regulation on Market Infrastructures (EMIR) on: • Removal of barriers and discriminatory practices in the provision of clearing services • Material scope of the trading mandate (*vs.* the clearing mandate). • Reporting of transactions via Trade Repositories. ESMA's Binding Technical Standards for EMIR transaction reporting should ensure consistency with those arising from MiFID. Market Abuse Directive on scope of instruments subject to insider dealing / market manipulation; on references to SME markets; and on consistency on sanctions. Future Central Securities Depositories on authorisation and supervision of CSDs and their functions (safekeeping / custody) Insurance Mediation Directive Review – PRIPS initiative (upcoming) on distribution regime for insurance investment products UCITS Review on structured UCITS AIFMD on level playing field requirements on delegations to third country service providers. Directive on legal certainty of securities holding and transactions

		(upcoming) on requirements on investment firms providing safekeeping and administration of securities services.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Coordination with IOSCO/G20 rules should be ensured. With regard to IOSCO, the following recent reports are important: • Regulatory Issues raised by the Impact of Technological Changes on Market Integrity and Efficiency, October 2011 • Principles for the regulation and supervision of commodity derivatives markets, September 2011 • Principles for Dark Liquidity, May 2011 • Principles for financial market infrastructures, March 2011 • Principles on Point of Sale Disclosure, February 2011 • Trading of OTC Derivatives, February 2011
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	N/A
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	The EBF believes that more signposting at Level 1 is necessary to ensure that important matters of principle are clear. The market and transparency regime is a case in point.

Detailed comments on specific articles of the draft Directive	
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