

## **Review of the Markets in Financial Instruments Directive**

### **Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP**

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to [econ-secretariat@europarl.europa.eu](mailto:econ-secretariat@europarl.europa.eu) by **13 January 2012**.

<b>Theme</b>	<b>Question</b>	<b>Answers</b>
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?	In case custody and safekeeping would remain in Annex I section A of the revised directive as a core investment service, a specific carve-out for Central Securities Depositories (CSDs) would have to be foreseen, which means that CSDs should be added to the list of exempted entities under Article 2 of MiFID II (see our answer to question 3).
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	No comments.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	The inclusion of “safekeeping and administration of financial instruments” in the list of investment services (Annex I section A of the directive) will be problematic if it results in the unintended inclusion of central securities depositories (CSDs) in the scope of the revised MiFID. Although securities account

		<p>provision is one of the most important functions of a CSD (as part of its safekeeping function), today most CSDs do not fall within the scope of MiFID because they are neither investment firms nor organised trading venues. ECSDA believes that this should remain the case in the future given the nature of CSD activities, which do not fit with the objectives of the MiFID and which are to be fully regulated under upcoming EU legislation on CSDs.</p> <p>More generally we believe that the proposal to include “safekeeping and administration of financial instruments” in the list of investment services (Annex I section A of the new MiFID instead of section B on “ancillary services”) appears unjustified for at least two reasons:</p> <p><b><i>(1) Safekeeping activities carried out by entities holding securities accounts for their clients, whether custodian banks or CSDs, are already regulated:</i></b></p> <ul style="list-style-type: none"> <li>- Custodian banks are already subject to authorisation either as investment firms and/or as credit institutions under existing EU legislation;</li> <li>- CSDs are soon to be regulated under the EU regulation on CSDs, which will cover both their core and ancillary services.</li> </ul> <p>Overlapping regulations should thus be avoided, not only because duplication could lead to inconsistencies in implementation, but also because the proposed reclassification of the safekeeping and administration of financial instruments services as investment services would not lead to a stricter authorisation and supervision regime.</p>
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		<p><b>(2) The MiFID requirements are not applicable per se to CSD safekeeping services.</b> Indeed, safekeeping as offered by CSDs differs significantly from the trading and distribution of financial instruments targeted by the MiFID and is only very loosely associated with the investment decisions of clients. For instance, it is unclear how and if suitability or assessment of appropriateness could be applied to the processing of corporate actions on securities such as client instructions to participate in a General Meeting. Moreover, it should be clarified which of the general principles would apply to CSDs because of the provision of such services.</p> <p>The objectives of the MiFID, including most importantly the protection of investors as securities account holders, are not directly applicable to CSDs. CSDs are neither investment firms nor organised trading venues, they do not provide investment advice and they are not involved in any kind of pricing, distribution, market making, marketing or trading of financial instruments<sup>1</sup>. In addition, their participants are typically wholesale, sophisticated counterparties such as custodian banks (even in those countries where retail investors' accounts are maintained at CSD level). There is thus no reason for CSDs to fall under the scope of the revised MiFID.</p> <p>In case custody and safekeeping would remain in Annex I section A of the revised directive as a core investment service, a specific carve-out for CSDs would have to be foreseen (see our</p>
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<sup>1</sup> Investment orders are not addressed to CSDs but to banks or other financial intermediaries which act as custodians for their clients. Intermediaries then pass on their clients' orders to CSDs for execution. A CSD thus processes instructions which have already been "issued" and does not know the reason behind the instruction given by an investor to its financial intermediary.

		answer to question 1).
	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?	No comments.
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?	No comments.
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?	No comments.
	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?	No comments.
	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?	No comments.
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51	No comments.

	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?	No comments.
	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?	No comments.
	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?	No comments.
	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?	No comments.
	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?	No comments.

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?	No comments.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	No comments.
	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?	No comments.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	No comments.
	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 comments.
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?	No comments.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all	No comments.

	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?	No comments.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	No comments.
	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.
	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?	No comments.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing	No comments.

	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?	No comments.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	ECSDA believes that consistency must be ensured between the MiFID/MiFIR II, EMIR, CRD and the upcoming regulation on CSDs. The three pieces of legislation together will form the backbone of the EU financial market infrastructure and the existence of overlapping provisions means that the three texts should be aligned to ensure reciprocity across the different layers of the value chain (trading, clearing, and settlement).
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	No comments.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	No comments.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	No comments.
<b>Detailed comments on specific articles of the draft Directive</b>		
<b>Article number</b>	<b>Comments</b>	

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