euro gas
The European Union of the Natural Gas Industry

13th January 2012

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 new exemption regime, as outlined in the Commission’s proposal, doesn’t seem to address commodity and commodity derivative firms as regards the possibility of disproportionate and unjustified impacts from the envisaged MIFID extension in scope. Unlike some financial institutions, energy companies, as commodity and commodity derivatives firms, do not typically offer commodity-linked investment products to private investors. Energy companies trade almost exclusively on own account and any MiFID investment services provided can be characterised as being ancillary and forming

		part of a wider energy supply undertaking, with the aims of helping energy consumers to buy efficiently and manage related risks. The new exemption regime provided by the MIFID II Directive, as a result of the deletion of article 2(1)(k,) which currently safeguards companies whose main business is dealing on own account in commodities and commodity derivatives, risks now to expose energy companies to the new requirements of the Directive. This is because of the absence in the proposal of an exemption regime fully reflecting Recital 88, thus addressing energy companies and commodity / commodity derivative firms' concerns. Under article 2(1)(i) of the new proposals, energy companies would be exempted from the MIFID II requirements, when carrying out their trading and risk management strategies, including treasury and proprietary activities, provided that such activities are "ancillary" to their main business. The elements provided at the moment to assess whether an activity is "ancillary" to the main business fall short anyway from providing a sufficient legal certainty as to whether energy companies trading strategies would be exempted under the new proposal. For this reason a broader definition of "ancillary" activity is needed under article 2(3), building upon the criteria already provided by the Commission's proposal (amount of capital employed by the trading activity and the extent to which the activity reduces

		the commercial risks borne by the company's commercial activities). The wording of article 2 par. 1 letter d) should also be improved, to make sure that companies exempted under Article 2(1)(i) who deal on own account in financial instruments as members or participants of a regulated market or MTF are not exposed to MIFID requirements. The cumulative nature of exemptions should be made explicit. In the case of emissions allowances, classified as a financial instrument by the new proposal, energy companies are active on the carbon market for compliance and portfolio optimization purposes, either individually or at group level, as a result of climate policy objectives obligations set under the EU ETS scheme. Therefore, energy companies specificities, and in particular EU ETS obligations, should be better addressed and taken into account by the exemption regime in article 2. Trading in carbon allowances for compliance users is in fact a result of climate obligations set at European level.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	EU ETS compliance users should be exempt by the MIFID requirements when operating on carbon markets, notwithstanding the classification as financial instruments. For energy companies and EU

		ETS compliance users, EUAs and carbon allowances are a compliance instrument for obligations set at European level. The classification of EUAs as financial instrument would trigger disproportionate burdens for compliance users , due to the specific fiscal and accounting regime associated to carbon allowances under the current international accounting standards, the artificial accounting-driven income volatility for energy companies as a result of the carbon price volatility and exposing them to capital and MiFID authorization requirements.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	The approach followed by the EU on several relevant policy domains, including energy markets, requires third country operators to comply with EU legislation. This approach should apply also to financial legislation and trading in financial instruments. However the application of equivalent rules should follow a realistic approach. In fact, it is quite difficult to have identical regimes in all aspects.
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?	A better and clarified definition of the Organised Trading Facility category should be provided. Nevertheless this category should clearly be kept separate from auction platforms managed by infrastructure operators or any other facility which role is limited to providing transparent and competitive access to transport or storage capacities and which is already submitted to energy sector regulations.
	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?	Most contracts on energy markets are forward or spot OTC transactions with physical delivery of the product. If the distinction between physically settled forward products and financial instruments is not made explicit in the revised MIFID, then even pure commercial activities (i.e. gas/power contracts with physical delivery) and hedging / risk management strategies that lack both systemic relevance for the financial markets and the speculative element targeted through MiFID II, would be brought under MIFID II, thus significantly reducing the scope of the ancillary activity exemption for non-financial firms. Therefore, products with physical delivery and which imply physical settlement should not be considered financial instruments. The amended Annex 1, C (6) of the MIFID Directive improperly classifies a contract that is settled physically

		and traded on an organised trading facility (OTF) as a financial instrument. Annex 1, C (6) should clarify the distinction between financial instruments and physical contracts. Financial instruments are subject to MiFID II and associated regulations whereas wholesale energy products for gas and power are already subject to sector-specific regulations (REMIT, Regulation on Energy Market Integrity and Transparency). The "commercial purpose test" in Annex 1, C (7) should also apply to physically settled forwards traded over regulated markets, MTFs and OTFs for commercial activities to be carved out from the definition of financial instruments. Finally, as already clarified by the MIFID implementing Regulation EC n. 1287/2006 (rec. 22), commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries, dealing on own account or dealing or providing other investment services in relation to commodity derivatives covered by Sections C(5), C(6), C(7) and C(10,) should not be required to apply the tests in this Regulation to determine if the contracts they deal in are financial instruments, especially in case of forwards, futures and options. For sake of clarity and legal certainty this wording should be integrated into the legal text of MiFID/MiFIR II.

	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?	Large parts of energy derivatives are traded OTC, which are currently defined in MiFID, as trading outside regulated markets. This kind of trading does not automatically imply less transparency while providing more flexibility in trading activity. Different types of platforms compete against each other, meeting market participants needs and supporting energy markets development. For these reasons, such a measure should therefore be taken into account only when circumstances demonstrate that it would not jeopardize the market. Title V of the MIFIR Regulation also provides that sufficiently liquid classes of derivatives (or a relevant subset thereof) should be traded on

		organised venues i.e. regulated markets, MTFs or OTFs only. This provision may reduce the scope of the exemption provided in EMIR for non-financial counterparties below the clearing threshold. Therefore no mandatory platform trading obligation should be set for non-financial undertakings trading in commodity derivatives.
	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?	Given the importance of their commercial activity and the fact that energy companies take positions to reduce their risks exposure, position management procedures are to be preferred for such companies, supported by appropriate position reporting. Too strict position limits may reduce the liquidity in energy trading markets, while liquidity and therefore more competitiveness is one of the main purposes of current energy legislation. Position limits in respect of commodity derivatives

		should therefore only be set in such a way as to target large speculative positions taken by companies other than those whose main business is related to that specific commodity. This should be applied in particular to the carbon market.
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 extension of the scope of MIFID to commodity and commodity derivative firms would trigger the application of the full CRD regime for those firms, thus leading to disproportionate financial burdens.* *The main financial services legislations that have interactions with MiFID/MiFIR II 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.* *When defining rules for non-financial counterparties MIFID should take into account what has been already agreed in the EMIR Regulation, and specifically take into consideration consistency with the corresponding rules of the Dodd-Frank Act in the US on the treatment of physical forwards as non-financial products, in order to maintain a "regulatory level playing field".* *By losing their MIFID exemptions energy companies would also inadequately be subject to the full central clearing requirements under EMIR (OTC Derivatives Regulation) and to capital adequacy requirements under CRD, once the current CRD exemption expires in the end of 2014.* *The scope of MIFID vis à vis REMIT and MAD for commodity derivatives and physical forwards should also be clarified.* *Full consistency should be granted between the*

		legislative initiatives under discussion and the obligations / safeguards thereof.
	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?	

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article … :	
Article … :	
Article … :	

Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article … :	
Article … :	
Article … :	