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	**Financial Supervision Commission** **PO Box 58** **Finch Hill House** **Bucks Road** **Douglas** **Isle of Man** **IM99 1DT** Mrs Roxanne Oldham – Director – Policy & Legal

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?	The inclusion of structured deposits is supported.
	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?	To regulate third country access to EU markets is understandable and appropriate, but as set out in the proposals it is not proportionate. Due to the importance of the free flow of capital and world trade, the requirements for third countries should not be so onerous as to make dealing with EU clients undesirable. This could result in a narrowing of choice for EU citizens as well as less investment in the EU from outside the EU. Any requirements for third countries should be harmonised across financial services type Directives and other legislative provisions to avoid a multitude of different standards for third countries dependent on the specific nature and subject matter of any measure. The requirements for third countries should be consistent and fair and focus on meeting international standards (such as those

		of IOSCO, Basel, FATF, IAIS, etc.) and as verified by the international assessors, such as the IMF. This would avoid duplication of effort and the potential for subjective and political decisions. It would also help to avoid an overly burdensome regime for ESMA to manage. It is also considered that if a particular third country is acceptable under these standards, and an appropriate co-operation agreement is in place, then if a third country firm is regulated/licensed in that jurisdiction there should be no requirement for that third country firm to also register with ESMA in the EU. This is especially important given that the services that can be provided under the proposals without a branch or subsidiary in the EU do not include services for retail clients. As services can only be provided to professional clients and eligible counterparties, then disclosure to that client of the fact that the firm is not regulated in the EU but is regulated by the competent authority of a suitable jurisdiction ought to suffice. Additionally, it would be more appropriate if any regulatory visits on the third country firm were to be conducted by the third country competent authority. Reliance ought to be rightfully placed on that authority given it has met international standards.
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 requirements in Article 9 at 1(a)(i) and (ii) seem overly restrictive and more applicable to banking institutions or very large investment firms. For small to medium investment businesses this does not appear proportionate. It is noted that competent authorities may authorise other combinations, but that

		provision is then so wide as to be the opposite of the stated effect of the Article. It is likely that each competent authority would set very different levels in their jurisdictions which would not then provide in reality for any harmonisation or level playing field.
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?	_
	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?	_
	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?	It is considered appropriate that communications with all clients should be clear, fair and not misleading (regardless of their classification). No requirement will ever secure certainty that investors will be protected, but this requirement would certainly help towards achieving that aim.

	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?	It is considered that professional clients should be able to opt into being classed as eligible counterparties (with appropriate warnings) especially in the light of the requirement that communications to this class of client must also be clear, fair and not misleading.
	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?	_
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Requirements and obligations of the World Trade Organisation.
	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 - None

Detailed comments on specific articles of the draft Regulation

Article number	**Comments**
Article 36/5:	Paragraph 5 of Article 36 is not considered appropriate for eligible counterparties or professional clients. Such clients should have the ability to choose the applicable law as long as that choice is not unreasonable.
Article 37:	This does not refer to professional clients and it is considered that it ought to do so. Indeed the FAQ issued alongside the proposals is worded as if this Article includes professional clients, and this could be an oversight of drafting?