

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**.

GAS NATURAL FENOSA's response



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?	<p>From Gas Natural Fenosa's point of view, it is vital that <u>energy firms retain suitable exemptions from MiFID II</u>. The main reasons are:</p> <ul style="list-style-type: none">• the different nature and core business of energy activities in comparison to financial institutions• the absence of systemic risk associated to energy activities• the need to safeguard commodity hedging activities to manage commercial positions and price commodity risks

		<ul style="list-style-type: none"> the need to preserve liquid markets to support hedging activities, maintain hedging costs in reasonable ranges and thus preserve investment in energy sector. <p>Trading activities ancillary to the main business in energy firms (which means trading primarily to manage commercial positions and price commodity risk) should be exempt from MIFID II. <u>In this sense, a legally careful definition and further clarification are needed for the ancillary activity exemption.</u></p> <p><u>Adequate measures should be also taken in order to guarantee consistency with EMIR:</u> a certain non-systemic level of own account trading activities should be permissible without being subject to the MiFID II licensing requirements. This ensures that non-financial firms are treated in the same manner under MiFID II and EMIR and do not become classified as financial institutions.</p> <p>As it is a very extended practice for energy firms to be members of regulated markets or MTF, <u>the wording of the exemption 2(1)(d) should be improved in order to better clarify the intention to include in MiFID only computer/algorithmic traders and not all market participants.</u></p> <p>Another important issue for Gas Natural Fenosa regarding exemptions is that the <u>inclusion in any of the exemptions should not be affected by partial exclusions under other</u></p>
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		<p>_____.</p> <p>On the other hand, regarding the financial instruments to be included under the scope of MIFID, Gas Natural Fenosa considers that <u>physically settled transactions should be only under the regulation of REMIT</u>. They do not pose any system risk to the financial markets and should be regulated by energy regulators. This is the solution that Dodd-Frank Act has adopted in the USA and EU legislation should also follow this proposal.</p> <p>The contrary would lead to:</p> <ul style="list-style-type: none"> • significantly reduce the scope of the ancillary activity exemption for non-financial firms and in case of losing the exemptions from MIFID Financial Instruments would need to be cleared under MIFID and the Capital Requirements Directive would apply • increase transaction costs, deviating money from project investment to margining, which is contrary to the objectives of the Third Energy Package objectives
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	<p>Emission allowances were created under the idea of being another commodity and the possibility of being traded is one of the pillars of the European Emission's Directive.</p>

		<p>For energy firms who operate installations subject to the ETS scheme and who need to trade EU allowances for compliance, <u>emission allowances are not investment products and considering them as a separated financial instrument is not adequate</u>. An emission allowance is essentially an input factor to a production process. The operators of installations subject to the ETS system are obliged to trade EU allowances to comply with emission reductions.</p> <p>Gas Natural Fenosa supports a differentiated regulation for emission allowances trading supervision and transparency, out of MIFID. This regulation should also help to prevent all the problems around EU allowances (VAT fraud, stolen emissions, etc).</p>
	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?	<p>The approach followed by the EU on several relevant policy domains, including energy markets, strictly requires third country operators to fully comply with EU legislation. This approach should apply also to financial legislation and trading in financial instruments.</p> <p>The approach followed by the EU on several relevant policy domains, including energy markets, strictly requires third country operators to fully comply with EU legislation. This approach should apply also to financial legislation and</p>

		trading.
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?	<p>Gas natural Fenosa understands that OTFs differ from regulated markets and MTFs in that the operator has a degree of discretion over how a transaction will be executed and they will mainly cover broker facilities (platform or voice broking).</p> <p>The main concern for Gas Natural Fenosa would really be to know what the implications of the requirement to trade on trading venues (regulated, MTF or OTF) are: is the measure going to penalize the different ways to access the market for market participants? Is there is a risk that these provisions might fragment the market if the majority of participants move their trades to regulated platforms? Is transaction cost going to be increased by imposing new requirements on existing trading venues?</p> <p>If answers are affirmative, the consequences would be contrary to the desired objectives of the measure.</p>
	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?	Gas natural Fenosa understands that OTFs differ from regulated markets and MTFs in that the operator has a degree of discretion over how a transaction will be

		<p>executed and they will mainly cover broker facilities (platform or voice broking).</p> <p>The main concern for Gas Natural Fenosa would really be to know what the implications of the requirement to trade on trading venues (regulated, MTF or OTF) are: is the measure going to penalize the different ways to access the market for market participants? Is there is a risk that these provisions might fragment the market if the majority of participants move their trades to regulated platforms? Is transaction cost going to be increased by imposing new requirements on existing trading venues?</p> <p>If answers are affirmative, the consequences would be contrary to the desired objectives of the measure.</p>
	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?	

	<p>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?</p>	<p>Title V of the MIFIR establishes that sufficiently liquid classes of derivatives should be traded on organised venues (regulated markets, MTFs or OTFs) only.</p> <p>This provision may reduce the scope of the exemption provided in EMIR for non-financial counterparties below the clearing threshold.</p> <p>No mandatory platform trading obligation should be set for non-financial undertakings trading in commodity derivatives.</p> <p>As we already mentioned in answers 6) and 7) the requirement in Title V of the Regulation may also have the following consequence:</p> <ul style="list-style-type: none"> • Potential risk of channelling of OTC trades onto organised venues which would undermine market liquidity and is divergent to the desired objectives of the measure
	<p>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?</p>	
	<p>13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to</p>	<p>Title VI of the MIFIR provides for a non-discriminatory access for both CCP and trading venues and establishes a</p>

	<p>provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?</p>	<p>system that permits competent authority to deny the entrance. From Gas Natural Fenosa's point of view access should be granted in a non-discriminatory basis and the procedure to deny it should be further clarified. In other words, an additional development of provisions 28.4 and 29.4 in its first paragraphs is needed. Moreover, delegated acts approved by the Commission shall be clear about which are going to be 'other factors that could create undue risks' and avoid vague concepts and legal uncertainty.</p>
	<p>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?</p>	<p>Energy firms have always managed their positions with appropriate risk management policies and have not caused any systemic risk to financial Markets. Gas Natural Fenosa thinks that it would be more appropriate to have clear and robust management procedures than establishing ex-ante position limits and thus, we do not support them. We believe that ex-post regulatory supervision of positions is a sufficient measure to ensure the proper functioning of markets. The imposition of ex-ante position limits represents a severe market intervention, hinder effective risk management and should not be applied. If systemic risk is ex-post proven, then position limits could exist. Furthermore, Gas Natural Fenosa considers the obligation to non-financial firms members of regulated trading</p>

		platforms to report on real time set-up extremely costly administrative and economic measures. Hence, alternative solutions must be taken into consideration as the operators of these platforms will report on behalf of these firms and market participant should report at least on a weekly basis only positions in contracts not concluded through platforms (OTC contracts).
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?	

	<p>28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?</p>	<p>There are still under review some financial legislation as the European Market Infrastructure Regulation (EMIR), the Capital Requirements Directive (CRD) and the Market Abuse Regulation (MAR) which have fundamental links with the MIFID/ MIFIR.</p> <p>Gas Natural Fenosa is very concerned about the negative effects or overlaps between these regulations that could occur. The fundamental principles and definitions developed in MIFID should be based on EMIR and, when talking about capital requirements of ancillary activities and clearing thresholds, required levels should be coordinated. If not, there would be a potential risk of EMIR over controls non-financial firms operations out the obligation for clearing on when hedging.</p> <p>Another important law interaction with MIFID where we are really kind to be clarified is related to the CRD. The latest indicates a minimum capital requirement for OTC operations which, if considered, could invalidate the exemptions permitted to non-financial firms under art. 2 of MIFID.</p> <p>Is worth it to make reference to other recently approved measures as REMIT that introduces a single oversight for gas and electricity market, out of the financial regulation.</p>
	<p>29) Which, if any, interactions with similar requirements in</p>	<p>Gas Natural Fenosa believes that the main legislation</p>

	major jurisdictions outside the EU need to be borne in mind and why?	referred internationally is the Dodd-Frank Act approved in the US related to financial markets. <u>According to US legislation mentioned we fully support the exclusion made to instruments with physical delivery in the future from the scope of these regulations.</u> Further, this issue should be better clarified in MIFID.
	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		
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