

Review of the Markets in Financial Instruments Directive

Response by ING

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 are deemed appropriate.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	ING refers to and underwrites the reaction of EBF.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	ING wonders whether it is possible to provide clarity on the transition regime for current custodians and safekeepers.
	4) Is it appropriate to regulate third country access to EU	The interpretation of regulatory equivalence of third-country

	markets and, if so, what principles should be followed and what precedents should inform the approach and why?	regimes should reflect the aspirations of the G-20 and reward jurisdictions committed to a common set of regulatory principles for financial services reform (i.e. at least the members of the G20). Given this consideration we recommend that the determination of regulatory equivalence should be determined at EU level, separate from MiFID/MiFIR.
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?	ING refers to and underwrites the reaction of EBF.
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>We agree that the flexibility of OTFs should be balanced by the protection of its users (ING being one of them) – which should include investor protection, conduct of business and best execution requirements. We however believe that unqualified ban of own capital use goes one step too far and will make it difficult to execute larger deals which are usual in non-equity and (currently) OTC derivatives markets. It would also exclude some single dealer platforms from becoming OTFs.</p> <p>Therefore we believe that the unconditional ban of proprietary trading of OTF is a suboptimal solution. There are several <u>alternatives</u> which can be considered:</p> <ul style="list-style-type: none"> - Lifting the ban altogether - Lifting the ban for certain class products (e.g. derivatives) - Give possibility to users of OTFs to consent to execution of transactions against capital of OTF operator in general or

		per transaction.
	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?	ING is supportive of the G-20 aspiration to have standardised and liquid derivatives traded on RMs, MTFs or OTFs. It remains questionable to what extent channelling of trades to OTFs will take place, especially taking into account our response to question 6 regarding the unqualified ban of own capital use.
	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?	ING refers to and supports the reaction of EBF.
	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?	As part of it has to be filled in by ESMA at level 2, appropriateness of arrangements cannot be fully understood.
	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?	ING believes the suggested retention period of at least three years is demanding, particularly in respect of storage costs and in respect of searching recorded conversations. Due to these (proportional) costs associated with longer retention periods, we believe a retention period of up to six months would suffice.
	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?	ING refers to the reaction of EBF.
	12) Will SME gain a better access to capital market through the	ING has no opinion on this question.

	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?	With EMIR in the final rounds of negotiation and the role of CCPs still being debated this valid question cannot be answered completely. First finalize EMIR, take a stance on CCPs and then finalize this Title VI.
	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?	ING refers to and supports the reaction of EBF.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	See answer to question 18.
	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	ING refers to and supports the reaction of EBF.

	best execution is achieved for clients without undue cost?	
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	<p>We welcome the amendment to the Directive that Eligible Counterparties (ECPs) are to be treated honestly, fairly and professionally and to communicate with ECP in a way which is fair, clear and not misleading. We also understand that municipalities would not be classified as eligible counterparties. The classification of ECP as such should warrant treatment very different from other clients, especially regarding information requirements. This especially relates to obligation to:</p> <ul style="list-style-type: none"> - Provide reports on the service to ECP (which need to include (i) <u>periodic communications</u> to ECP, taking into account the type and the complexity of financial instruments involved and the nature of the service provided to ECP and (ii) the costs associated with the transactions and services) (Art. 25(5)); - Provide information ECPs on (i) investment firm and services, (ii) financial instruments and proposed investment strategies (including appropriate guidance on and warnings of the risks associated with the instruments), (iii) execution venues and (iv) costs and associated charges. <p>We believe that given the nature of ECPs these obligations should not be owed when dealing with them. Therefore, we think that the Articles 25(5) and 24(3) should not be applicable to ECPs.</p>
	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	ING has no opinion on this question.

	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?	ING has no suggestion for adjustments.
	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?	Pre-trade transparency should in general include price and volume. However, it should be noted that pre-trade transparency differs per class of investment instruments - these differences as well as already established practices and systems providing for pre-trade transparency for each class of financial instruments should be taken into account to the maximum extent possible.
	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 answer to question 21.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	ING refers to and supports the reaction of EBF.
	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)?	ING has no opinion on these articles.

	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?	We note that transparency requirements should be calibrated to cater for market specifics of each class of financial instruments in order to find a fine balance between market transparency, flexibility and liquidity.
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?	Maximum harmonization across EU making a more profound role for ESMA possible.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	ING has no opinion on this question.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	For OTC derivatives, the interaction with EMIR should be considered carefully.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Development of the US Dodd Frank Act.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	ING has no opinion on this question
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	The role of ESMA is significant: are they sufficiently staffed to deliver? This should be guaranteed.

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