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	**International Emissions Trading Association (IETA)** **www.ieta.org** IETA is the leading voice of the international business community on the subject of emissions trading with over 160 member companies from across the carbon cycle. IETA supports efforts to address the pressing environmental challenge of climate change and is dedicated to the establishment of environmentally effective market-based emissions trading systems that generate reductions at least cost to the community. Our answer therefore focuses on questions of scope (Q1), financial classification of emission allowances (Q2), position limits (Q14) and pre/post-trade transparency (Q21 and 25).

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?	While IETA generally welcomes the specifc relevant exemptions, there are doubts as to their interpretation. Given that sector-specific exemptions have been removed, it is important that the legal text corresponds to the implementation of recital 88. It is still unclear what is a 'main business' and what is an 'ancillary activity'? This is not defined and will be left to level 2

		legislation. In some cases, the line can be very thin: Example 1: a EU-based carbon project developer usually also helps in the on-sale of these credits and often brokers such sales in the secondary market. But their main business keeps being project development. Example 2: a power company with a trading branch that trades its main commodities, also carbon allowances, to protect itself against the risk of future price volatility (hedging). While the main business is generating power and delivering it to customers, an open trading position can be significant as taken over several years. Yet, the main business remains the same. This should not be left to national interpretation, as the level playing field is important for the operation of the EU ETS. Moreover, adequate measures should be taken in order to guarantee consistency with other relevant EU provisions (including MAD and OTC derivatives) and obligations / safeguards thereof. The exemptions also do not provide any protection of emission reduction project developers to deliver essential compliance units into the EU ETS without being subject to MiFID regulations.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	While derivative contracts on emission allowances are largely covered by MiFID already, spot transactions are not. Extending MiFID to the spot market is one option to further enhance market oversight. However, this is not the preferred choice of market participants. Emission allowances are conceptually not financial instruments but transferrable rights to emit one ton of CO2, more similar to intellectual property rights or transport capacity rights in the energy market. Extending financial rules to products that are not financial instruments would mean to extend its scope clearly beyond its objective and potentially open up the question of application to other spot products traded in the

		energy market as options or forwards and now covered by a separate regime. It also introduces requirements that are not relevant in a market defined by policy regulation investor protection, best execution rules, organizational requirements). A tailor-made framework that takes into account the peculiarity of this market and where information is created, hold and potentially abused would be preferable. The Commission's MAR proposal already is going down tailor made route (always specifying application to EUAs). The classification as a financial instrument, while not having direct implications in EU financial accounting rules (except for France), could also set a precedent elsewhere. Mark-to-market accounting would introduce unnecessary volatility in company accounts, amplifying the effect of an uncertain policy environment in company books. Also, the legislation does not currently recognise that there are different categories of emission allowances, including Certified Emission Reductions and Emission Reduction Units (collectively "Compliance Units"). By including these Compliance Units within the definition of "financial instruments" the legislation makes any transfer of Compliance Units into the EU ETS an "investment activity". Compliance Units are generated through a very carefully designed and thoroughly verified process, governed and managed the UNFCCC. Compliance Units are usually delivered in the first instance to project developers, in some cases independent companies who are not performing investment activities and are not therefore usually subject to financial markets regulation. Making transfers by project developers in the EU ETS subject to MiFID 2 adds an enormous compliance burden and prohibitive cost on a category of participants that poses no financial risk to the system and is essential for the provision of a vital commodity – Compliance Units – to the EU ETS.

	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?	
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?	
	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?	No evidence that imposition of mandatory implementation of explicit position limits is effective. Thus IETA is not in favour of ex-ante position limits, particularly as companies need to have the flexibility for risk management activities. If still considered to be introduced, it needs to be subject to additional conditions and only be used as a last resort as it can severely affect market functioning. Reporting requirements have to be proportionate for non-licensed companies, e.g. in section 2 of Article 60, "in real-time" should be changed to "on a weekly basis".
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?	Pre-trade transparency in emission markets pre-dominantly depends on information held by public authorities such as aggregate emissions data, allocation data or auction volume.
	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	Price-relevant information is already widely published. That being said, anonymised, delayed data (published reasonably close to 'real time') about the occurrence and volume of all

	that competent authorities receive the right data?	transactions executed in an electronic trading system (e.g. on exchanges/MTF) would provide reliable price information on liquid standardized (and therefore relevant) contracts while preserving liquidity. It would also help all parties gain a better understanding of market evolution and key trends. The publication of pure bilateral transactions post-trade raises challenging questions as to the value of such information. Bilateral bespoke transactions are normally highly bespoke/tailored in their nature. The relevance therefore to the price discovery process of any information contained in such disclosures is likely to be of limited relevance. There are also significant practical difficulties associated with making such information public whilst maintaining confidentiality.
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?	
	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		