

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?	<ul style="list-style-type: none">• We support all members of RMs and MTFs being authorised, and believe that this is a sensible measure to ensure that markets remain fair and orderly.• However, there is potential for regulatory arbitrage as members of OTFs will not need to be authorised: this needs to be readdressed to confirm whether this is the real intention, or a

		revision is required.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	<ul style="list-style-type: none"> We make no specific comments
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	<ul style="list-style-type: none"> The Alternative Investment Fund Managers Directive introduced regulation for custodians of AIF. We understand that UCITS V, which is due to be published soon, will also deal with the regulation of custodians of UCITS. We suggest that there should be greater clarity on the inter-action of these directives, because each relevant firm will be impacted by each piece of legislation.
	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?	<ul style="list-style-type: none"> It is essential that the EU does not unnecessarily restrict free enterprise, or support measures that would endanger growth and job creation. The principles of third country access should therefore be based on open, fair and competitive markets.
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?	<ul style="list-style-type: none"> The provisions for corporate governance are reasonable – members of the managing body should be of sufficiently good repute, and have the knowledge, experience and ability to effectively carry out their responsibilities. We recommend that the governance requirements for banking and securities firms from ESMA and EBA are aligned.
Organisation of markets	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	<ul style="list-style-type: none"> The OTF regime would appear to be adequately differentiated, specifically on the discretion that operators of OTFs will have when admitting members. However, we support the proposal that firms wishing to

and trading	are needed and why?	<p>register an OTF would need to adequately justify why the operation should not be an RM, MTF or SI.</p> <ul style="list-style-type: none"> It is also important that there is a level playing field, and we therefore support OTFs being subject to the same organisation and transparency requirements as RMs and MTFs.
	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?	<ul style="list-style-type: none"> We agree that true OTC should be ad hoc and not done on a frequent or organised basis. However, it is important to consider the characteristics of OTC volumes, in particular, which volumes represent addressable liquidity and are price forming, and those which are either double counted client legs (where large client orders are split into child orders to execute on trading platforms, and all the legs, plus the original order, are reported), or give ups (where Broker A executes an order on behalf of Broker B, who receives an order from a client. In this case, the trade is printed twice, once when Broker A executes the order, and then when Broker A 'gives up' the order to Broker B). We therefore welcome the Commission's proposal for technical standards to be developed that would identify the different types of trades reported under Articles 19 and 20 of MiFIR, and recommend that this would focus on OTC volumes.
	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?	<ul style="list-style-type: none"> The definition of algorithmic trading is ambiguous, and appears to capture all automated trading strategies with the exception of order routing. In Italy, and some other jurisdictions, this would also capture retail clients using stop loss facilities. Mandating that continuous liquidity be provided by all automated traders would run the risk of preventing firms from adequately managing their risk positions. It would be more effective to apply relevant liquidity provision

		<p>obligations to those registered as Market Makers.</p> <ul style="list-style-type: none"> • A clear distinction should therefore be made between the execution strategies of sell side brokers working client orders through lit books, and the proprietary strategies executed by HFT firms. • The proposals on direct electronic access and co-location are sensible. • We observe that the proliferation of control between trading platforms, competent authorities and the control systems that investment firms themselves will need to put into place could lead to an overly complex framework, and run the risk of an ineffectual system of supervision.
	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?	<ul style="list-style-type: none"> • We make no specific comment
	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?	<ul style="list-style-type: none"> • We make no specific comment
	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?	<ul style="list-style-type: none"> • We support the move to bring eligible contracts of OTC derivatives 'on-exchange', and that "eligible" will be determined by a liquidity test. • However, it is important that the drive for standardisation of derivative contracts does not impair the markets ability to effectively hedge risk or impose undue cost on market participants. Risk management products are key for a number of

		<p>non-financial, but economically important industries. If the cost of such risk management products increase there is a chance that non-financials will face higher profit volatility. This would not be good for the stability of equity valuations, and would have damaging impact on pensions and savings.</p>
	<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>	<ul style="list-style-type: none"> • The profile of SMEs in the European economy is vital, and it is important that they have better access to capital and funding. • The proposal to set up SME MTFs should help do this, as will the Commission's decision to rate shares admitted to an MTF as non-complex.
	<p>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?</p> <p>If not, what else is needed and why? Do the proposals fit appropriately with EMIR?</p>	<ul style="list-style-type: none"> • We welcome the Commission's decision to grant non-discriminatory access to market infrastructure, benchmarks and to CCPs, and believe that this is consistent with the principle of open and fair markets. • However, it should be clarified that non-discriminatory access includes provisions for treating identical financial instruments as fungible for the purpose of netting.
	<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>	<ul style="list-style-type: none"> • We support the use of position reporting in order to ensure the integrity and proper functioning of markets. However, there need to be common and sensible guidelines to ensure consistency across the member states. • We also support the use of position limits, but they should be imposed in a consistent manner, and in a way that does not unduly harm the effective functioning of markets.

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?	<ul style="list-style-type: none"> There is a potential for unintended consequences and a dislocation in markets during the transitory period in the change in independent advice and inducements that needs to be properly managed. If not, significant confusion may arise, that would not be beneficial for end investors.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	<ul style="list-style-type: none"> Whilst we accept the need to ensure high levels of investor protection; any investor who has demonstrated sufficient knowledge and sophistication should be able to execute trades in these products on an execution only basis.
	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?	<ul style="list-style-type: none"> We believe that the changes proposed will be effective in ensuring investor protection. However, common guidelines will be required to ensure that reporting requirements are consistent. A detailed cost benefit analysis should be required on the detail of the regulatory reporting requirements for trading platforms and investment firms to ensure such obligations are proportionate and do indeed protect consumers.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	<ul style="list-style-type: none"> We make no specific comment
	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	<ul style="list-style-type: none"> Powers should be available to assess the impact of products on markets and investors at a suitable period after their launch. It is difficult to write a set of rules that would cover

	financial markets?	very possible scenario that may arise.
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?	<ul style="list-style-type: none"> We support the extension of pre-trade transparency requirements to equity-like instruments, provided that adequate calibrations are made to account for their liquidity, and other characteristics.
	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?	<ul style="list-style-type: none"> Whilst we support moves to introduce pre-trade transparency requirements on non-equity products and that the regime should be sufficiently tailored to account for differences between asset classes, along the lines of CESR's technical advice to the Commission in July and October 2010.
	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?	<ul style="list-style-type: none"> Please see our answer to question 21
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	<ul style="list-style-type: none"> We make no specific comment

	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)?	<ul style="list-style-type: none"> • We fully support better consistency and quality of data being provided, in order to tackle market abuse, but also to provide greater clarity on trading activities. • However, it will be important to ensure that adequate controls are in place to prevent a proliferation of reporting requirements, and reduce the possibility for double counting. In particular, there must be adequate linkages between EMIR and MiFIR on what is reported to whom – and that these requirements adequately tie in with REMIT where applicable.
	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?	<ul style="list-style-type: none"> • Transaction reporting: The new requirements to include the identification of the end client would appear to be operationally very difficult at present, and will require common client identification numbers to be introduced in order to make this proposal feasible. It is important that a proportionate answer is found. This would be particularly pertinent for RTOs (Router and Transmitter of Orders)
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?	<ul style="list-style-type: none"> • It is clear that the ESAs are still in the development stage. However, it is essential that if they are to effectively draft binding technical standards within acceptable timescales, they either receive more resource, or their workload will need to be more carefully managed.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	<ul style="list-style-type: none"> • We make no specific comment

	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	<ul style="list-style-type: none"> There are many important interactions between all the initiatives (e.g. MiFID/MiFIR , EMIR, REMIT, CRD IV, short selling, PRIIPs, Solvency II and MAD) that need to be carefully considered in order to avoid unintended consequences.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	<ul style="list-style-type: none"> The most prominent jurisdiction will be the US; where rule writing for Dodd Frank is underway. It is important that, where possible, linkages are driven between Dodd Frank and MiFID.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	<ul style="list-style-type: none"> We make no specific comment
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	<ul style="list-style-type: none"> We make no specific comment
Detailed comments on specific articles of the draft Directive		
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