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	**London Stock Exchange Group (LSEG)** **Steven Travers (stravers@londonstockexchange.com 0044 20 7797 4037) or** **Matt Leighton (mleighton@londonstockexchange.com 0044 20 7797 1596)**
	LSEG is pleased to provide responses to this questionnaire. **We have given short, high-level answers to aid reading and analysis, but if more information is required, please contact us.**

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?	1. We support the changes to the exemptions in Article 2(1)(d): a. We also support the requirements (Articles 51(4) and 17(4)) that the provision of direct electronic access should only be offered by authorised firms with effective systems and controls; b. We read the exemptions in Article 2 (1)(d)(ii) - persons who do not provide any investment services or activities other than dealing on own account

		unless they are a member of or a participant in a regulated market or MTF - to mean that such persons can either: • access markets directly, as authorised firms; or • access markets via the direct electronic access services of an authorised firm. c. We believe that such an approach would be appropriate. In both cases, access to markets is via authorised firms, who will be required to have effective systems and controls if they engage in algorithmic trading and/or provide direct electronic access services. However, we suggest that the term 'Participant' does not have a common understanding. 2. For commodities firms, we agree with Article 2(1)(i) which narrows the exemption and applies the meaning of ancillary service more precisely. This will tighten the scope of the exemption and help firms to provide liquidity to the markets. However, there should be a cross reference Article 2(1)(d), to clarify the exemption for market makers in commodity derivatives. We suggest: Article 2 1(i) [Third bullet point] – provide investment services other than dealing on own account in commodity derivatives or derivatives contracts included in Annex I, Section C 10 or emission allowances or derivatives thereof to the clients of their main business, **or to persons to whom the provisos in Article 2(1)(d)(iii) apply**.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	1. Yes, provided that: a. In the case of emission allowances, they meet the criteria of Annex 1, Section C, and are therefore classified as financial instruments; b. The transparency regime for such products is calibrated to reflect the differences in asset classes and the liquidity and structure of, and the nature of the investors in, those markets. Please see our responses to questions 21,

		22 and 23, where we suggest calibration reflecting: • Product class; • Specific trading characteristics in that product; • Market model; • Liquidity profile; • Nature and type of market participants and investors; • Size and type of orders.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	1. Yes, if it includes Central Security Depositories (CSDs). CSDs operate securities accounts but they do not provide investment advice and are neither investment firms nor organised trading venues. They do not fall within the scope of MiFID currently and this should continue to be the case. The operation of CSDs will be covered by the forthcoming CSD Regulation. 2. There is, therefore, a need to exempt CSDs from MIFID – we suggest that this is achieved either by amending Annex 1 or by adding an exemption in Article 2 of MiFID. We would suggest: ANNEX 1 SECTION A (9) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management, **except where those activities are undertaken by Central Securities Depositories as defined in Regulation (EU) No …/… [New CSDR] in fulfilment of core and ancillary CSD functions**. Or Article 2(1)(o)

		[1. This Directive shall not apply to:] **(o) Central Securities Depositories as defined in Regulation (EU) No …/… [New CSDR] undertaking safekeeping and administration functions, as included in Annex 1, Section A, as part of their core and ancillary CSD operations.**
	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?	1. If such access is regulated in a way that allows EU investors and fund managers to continue to obtain the services and products that they currently need, whilst ensuring appropriate EU investor protection, then it may be appropriate to regulate such access. 2. We suggest the following principles: a. The rules should do no more than is necessary to protect EU investors, and then only retail investors- professionals and eligible counterparties should be assumed to be able to protect themselves; b. The rules should not impose an excessive burden on the 3rd country parties as this could mean they do not qualify or that the 3rd country raises protectionist barriers against the EU; c. The rules should recognise that every Member State has a different approach to what is “doing business” in its jurisdiction that the EU cannot quickly harmonise; d. Rules should be principles-based and allow for flexibility and a greater degree of specific differences in other jurisdictions’ rules that nevertheless achieve the same outcomes; e. The MiFID rules on 3rd countries should be appropriate to the MiFID activities and should not be derived from other EU provisions that are not relevant; f. The rules could offer a regime for 3rd country firms that set up an EU branch to obtain a passport to provide services across the EU; g. The rules should allow those 3rd country firms authorised in their home jurisdictions that are not offering services in the EU, not soliciting clients in the EU, but want access to trading platforms, to either trade on their own account, or on behalf of non-EU clients, to be exempt from MiFID authorisation;

		h. As stated by ESMA in its technical advice on AIFMD[1], the precedent set by IOSCO should be used, so that the third country firm is considered to be equivalent if its home competent authority is regarded as independent and a MoU is in place, negotiated by ESMA, concerning consultation, co-operation and the exchange of information related to the supervision of cross-border regulated entities; i. The third country authority should be considered independent if it complies fully with the criteria set out in Part II ('The Regulator') of the IOSCO *Methodology for Assessing the Implementation of Objectives and Principles of Securities Regulation*[2], and the Basel Committee Core Principles. 3. We suggest that the issue of third country access across EMIR, MiFID, AIFMD, UCITS, Prospectus Directive and other areas needs a separate Omnibus Directive, developed by the Commission, with the help of the ESAs, over an appropriate period of time. This would allow for a holistic approach across all directives/regulations and ensure that requirements are consistent and joined up.
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?	1. The assessment of time commitment for board members of investment firms may be useful in principle but could prove difficult to calibrate in practice, especially in respect of group companies. 2. There should be a more flexible approach to ensure that 'Blue Chip' firms are not treated the same as SMEs, as in our experience, it can be difficult for SMEs and mid caps to constitute boards whose members will meet the necessary criteria and with suitable experience. 3. We would suggest that this difficulty is recognised when ESMA is developing its draft regulatory standards and therefore we propose the following additional text in Article 9(4):

[1] http://www.esma.europa.eu/system/files/2011_379.pdf - V.II. General criteria for assessing the effective prudential regulation and supervision of third countries
[2] http://www.iosco.org/library/pubdocs/pdf/IOSCOPD266.pdf

		4. ESMA shall develop draft regulatory standards to specify the following: (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the investment firm which competent authorities must take into account when they authorise a member of the management body to combine more directorships than permitted as referred to in paragraph 1(a), **including taking into account the extent to which appropriately qualified and experienced persons are available to be members of management bodies and the adverse impact of limiting the number of non-executive directorships**; 4. The principle of "comply or explain" provides adequate flexibility for smaller listed companies to apply corporate governance in a relevant way. To incorporate this notion in the text, we would suggest the following additional text in Art 9(4): **(f) the notion of "comply or explain" to apply to the management body of any investment firm and the implementation of regulatory standards devised by ESMA.** 5. We agree that it is the role of Member States' competent authorities to satisfy themselves as to the composition of boards in terms of reputation and experience.
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?	1. The Commission's Consultation on MiFID in December 2010 discussed two types of OTF- BCNs and SEFs (for derivative trading etc) - where differently defined OTFs covered each one. The current proposal does not make this distinction and is confused as a result. 2. It is not clear why a firm has to be either an OTF or a systematic internaliser but cannot be both. The normal business model for investment firms allows them to cross client business and to deal on own account, including using proprietary capital to trade with/for clients. The rationale for the separation is not clear, so the rules suggested are not clear, nor is it clear how the requirement would prevent investment firms from registering their OTF as a separate entity.

		3. We agree that the same activity should be regulated in the same way, so we support equivalent requirements on transparency (including pre-trade transparency waivers and post-trade transparency requirements), systems and controls, organisational requirements and ownership structures for RMS, MTFs and OTFs.
	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?	1. The proposals have the combined (but confused) aims of (1) addressing **how** trading in equities takes place outside the defined venues of RM, MTF (and OTF) and (2) **where** trading takes place; these are not the same and should be addressed differently. It is the absence of a coherent market concept underlying MiFID that causes these to be combined and confused. 2. We maintain our view that a large proportion of what is currently viewed as OTC equity trading is the result of the execution of other types of business that are required by MiFID to be reported and published when it is not true "executable" or "addressable" liquidity. This means that the amount of "OTC" equity trading is considerably overstated. 3. The proposals and work referred to in the response to Question 24 will contribute substantially to clarifying the true position, by i) reducing duplicate reporting, ii) increasing transparency, iii) improving understanding of the nature of European equity trading. 4. On the current proposals, only the trading in BCNs would not be treated as OTC but OTF, depending on how firms elect to identify and manage their BCN/SI regimes. 5. A logical approach to the definition of OTC (as opposed to the trading method) would be to define it as all trading falling outside the organised neutral venues (RM and MTF). Further, once defined in this way, provided it is subject to full reporting requirements and appropriate calibrated post trade publication regimes, the way in which trading takes place does not need to be defined. 6. We note that EMIR defines OTC differently by defining it as business executed outside of an RM (EMIR Article 2 (5)).
	8) How appropriately do the specific requirements related to algorithmic	1. The term "algorithmic trading" covers a range of trading activities and is not the same thing as High Frequency Trading (HFT). HFT is not a strategy in itself and

	trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	generally refers to the high speed with which messages can be exchanged with a trading platform (low latency). Neither are necessarily the provision of liquidity to markets or formal or two way prices- algorithmic trading/HFT can be all or some of at least the following: the facilitation of client order flow/order routing, arbitrage activities, market making, liquidity provision and other proprietary trading. 2. Article 17 is confused. Whilst the various controls referred to in 17 (1) and (2) might appear reasonable in respect of a firm that uses algorithms and HFT, Article 17(3) appears to create a market making obligation (during all the trading day and with two way prices) for ALL users of algorithmic trading where only a sub-set of users may engage in these activities. Article 17(3) should be introduced with wording such as: "**Where an investment firm that engages in algorithmic trading does so as a market maker under Article 4.1(6) MiFID, then any algorithmic trading strategy that it operates for this purpose** ~~An algorithmic trading strategy~~ shall be in continuous operation during the trading hours of the trading venue to which it sends orders or through the systems of which it executes transactions. The trading parameters or limits of an algorithmic trading strategy shall ensure that the strategy posts firm quotes at competitive prices with the result of providing liquidity on a regular and ongoing basis to these trading venues at all times, regardless of prevailing market conditions." 3. In respect of direct electronic access, co-location and other aspects of algorithmic trading, the key is to focus on systems and controls; these are the best tools to ensure fair, efficient and orderly markets, particularly in a highly automated environment, as discussed by ESMA in its recent Guidance/Technical Standards (ESMA/2011/456). We also support the provisions in Art 17(4) and 51(5) addressing the risks in direct electronic access and co-location.
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in	They are very appropriate; systems and controls are the best tools for ensuring that markets remain orderly, fair and stable. 1. On capacity management (Art 51(1) and 51(3)), management of capacity is generally best undertaken at the platform level.

	Directive Articles 18, 19, 20 and 51 address the risks involved?	2. On system-applied order to trade ratios (Article 51(7)): we do not support this provision. It risks reducing liquidity or creating pricing inefficiencies between related instruments, and thus increase the cost of orders seeking to execute against displayed liquidity. 3. On circuit breakers (Art51(2), 51(7)): i) Markets generally operate best when they are continuous, and we do not support the use of market-wide circuit breakers. We support and already operate stock-specific circuit breakers; ii) Venues should not be interlinked at the instrument level for circuit breakers; this risks an isolated incident on one venue causing unnecessarily widespread impact across all markets; iii) Automatic rejection of orders on entry based on pre-defined thresholds could inhibit efficient price formation. However, if the price of a potential execution of the order would be outside defined reference price, then the order should be rejected. 4. We are concerned about the scope of delegated acts in Article 51(7). Delegated acts should not set out maximum and minimum tick sizes. We would support a harmonised tick size approach through a common pan-European regime agreed between RMs, MTFs, OTFs and SIs.
	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?	1. It is essential that firms keep records of all <u>trades</u>, including those traded on own account and those executed on behalf of clients: • Greater access to data by regulators will improve the quality of market supervision; • records are essential for administrators and market infrastructures to manage the insolvency/default of an investment firm. 2. Regulators need to have access to more detailed <u>order</u> data. Trading venues (RMs, MTFs and OTFs) should store 5 years worth of order data in a manner accessible to regulators - there is no need for firms to store the same order data.
	11) What is your view of the requirement in Title V of the Regulation for	1. Trading eligible derivatives on organised trading venues can deliver a number of benefits, including better price discovery and transparency, improved liquidity and

	specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	easy access for market participants. We support the creation of incentives to encourage standardisation. However: a. Customers should have a broad choice of execution method, including trading on regulated markets, MTFs, OTFs or OTC trading with dealers; b. Any transparency regime needs to be both flexible and carefully calibrated to ensure investors (retail and wholesale), market participants, liquidity and price formation are not negatively impacted – see also our responses to questions 21, 22 and 23; c. A number of market models are currently available to enable participants to continue to benefit from the bilateral negotiation of bespoke contracts and yet also have the advantage of electronic trade matching and central counterparty clearing. 2. So there is a range of different execution models currently available to market participants. In addition, the deployment of a range of regulatory tools should also naturally move greater flow through organised trading platforms by: a. Encouraging the use of CCPs for clearing eligible products (EMIR); b. Developing carefully calibrated transparency requirements (see our responses to questions 21, 22 and 23); c. Removing barriers to competitive trading and clearing of derivatives (see our answer to question 13).
	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?	1. Yes, the proposals will help, but are only one step in addressing the problem. Additional measures are required to increase investor access to SMEs by reducing regulatory barriers to investment and, as appropriate, providing a framework for appropriate fiscal incentives to be developed. 2. It is important that the proposed thresholds are not reduced as this would isolate excluded SMEs, leaving them with no equity market route for funding. 3. It is important to relate to the Commission's Action Plan to improve access to finance for SMEs (adopted on 7 December 2011). It is Important to support SMEs throughout every stage of their development and help to develop an ecosystem that facilitates access to capital at each stage of a SME's growth lifecycle, not just

		equity growth market.
	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?	1. Yes, they are a significant step towards effective competition in the internal market for securities. 2. We agree that index or benchmark providers should be required to grant a non-exclusive licence on commercial terms to any trading venue or CCP that wishes to trade/clear financial instruments based on that index/benchmark. This will deliver the benefit of competition in derivatives markets, providing choice for market participants and investors and reduce the overall cost of trading and clearing derivatives in the EU. 3. The provisions of non-discriminatory access to CCPs and trade feeds within MiFIR will also enhance competition in the trading and clearing of financial instruments. Such access should not be compromised by being restricted to certain instruments or types of contracts, as similar provisions look likely to be in EMIR. 4. The provision for fungibility of identical instruments and for margin offsetting for related instruments will remove an important barrier and will allow the efficient on-exchange trading (and clearing) of derivatives. 5. It is inappropriate for CCPs to compete on risk management functions as this would compromise the safe and effective delivery of services to customers. This is enshrined in EMIR and needs also to be reflected in any provisions in MiFIR concerned with access between CCPs and trading venues. Access to trade feeds should likewise only be assured where demand and safety criteria are met. 6. In order to ensure a 'level playing field' between CCPs so that they are able to compete on equal terms, it is vital that the criteria for access to trade feeds be transparent, proportionate, neutral and not applied in an arbitrary fashion. 7. Article 29 should reflect this. We propose in Article 29(6): Article 29 6. The Commission shall adopt by means of delegated acts in accordance with Article 41, measures specifying:

		(a) the conditions under which access could be denied by a trading venue, including **transparent, proportionate and neutral** conditions based on the volume of transactions, the number of users or other factors creating undue risks. (b) the conditions under which access is granted, **including demand and safety criteria,** confidentiality of information provided regarding financial instruments during the development phase and the non-discriminatory and transparent basis as regards fees related to access. 8. Article 30 should be clearer as to its jurisdictional reach. We assume that this will apply to EU CCPs, trading venues and other related entities only. We propose revised wording for Article 30(2) to clarify some potentially confusing language caused by the double negative and to clarify points on jurisdiction and retrospective application: Article 30 2. No CCP, trading venue or related entity **in the EU** may enter into**, or continue to be party to,** an agreement with any provider of a benchmark ~~the effect of~~ which would **have, or has, the effect** ~~be~~ **of** either: (a) ~~to prevent~~ **preventing** any other CCP or trading venue from obtaining access to such information or rights as referred to in paragraph 1; or (b) ~~to prevent~~ **resulting in** any other CCP or trading venue ~~from~~ obtaining access to such information or rights on terms any less advantageous than those conferred on that CCP or trading venue.
	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	1. In its Technical Advice in 2010, CESR concluded that:[3] "*There is little evidence so far to suggest that markets where position limits are operated for the life of the derivative contract have been any less volatile than those which have not. Nor is there sufficient evidence so far that position limits can*

[3] CESR response to questions 1 to 14 and 19 of the Commission's Request for Additional Information in Relation to the Review of MiFID (CESR/10-1254), October 2010

	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?	*systematically be used to limit the impact significant positions may have on the prices markets generate*". 2. We agree with this. In addition, we support the advice of CESR[4] which states that whilst position limits are useful and may appropriately sit within a set of tools used by exchanges/regulators, they do not appear to be the answer to ensuring orderly markets and being an effective safeguard against manipulation ion their own right. Further, for such limits to work effectively, they will need to be properly calibrated and it will be necessary to know particpants' positions in all contracts that have the same underlying (whether they are traded on a trading venue or OTC). 3. Furthermore, hard position limits would be both (a) difficult to calculate across exchange and OTC markets (as exchange markets tend to use multilateral netting whereas some OTC business is bi-lateral and therefore gross) and (b) difficult to calibrate as customers may be using the derivative to hedge underlying or other correlated business.
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?	1. Though we believe that these questions are best addressed by those firms that are affected by the issues raised, we nonetheless believe that the new provisions in Art 24 will help to improve the relationship between customers and the industry, where that advice is truly independent. 2. However, where advice is not independent, this should be disclosed.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	1. We support the clarification in Art 25 on which instruments are deemed complex and non-complex. 2. We welcome the proposals in Art 25(3a)(i), where ordinary shares of companies traded on the newly defined SME markets and on an MTF, will no longer be defined as complex. This should increase investor interest in SMEs as an asset class. The resulting liquidity will help to reduce the cost of capital for SMEs.

[4] See footnote 3

		3. We note that Structured UCITS are in the list of complex financial instruments. This is not in line with the UCITS Directive which classes **<u>all</u>** UCITS products as non-complex. 4. It is important not to confuse 'complex' with 'risky'. Many so called "complex" products are designed to reduce risk and indeed have that effect.
	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?	1. We support most of the proposals in the Directive in relation to best execution and welcome the Commission's proposal to retain the "execution only" services, as these services provide investors with choice. 2. We believe that the requirement in Art 27(2) for publication of execution quality data must be adopted on a harmonised basis in the EU, so that investors are comparing consistent data. 3. In addition, consideration should be given to the differences between quote and order driven markets. 4. This will enable investors to make valuable use of the data to make best bid and offer comparison.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	1. In principle we agree that the current regime provides adequate protection and reflects the reality of the market, particularly in fixed income markets.
	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?	1. In our view any measures to ban products of any type should be taken with great caution and only in response to market failure. If not, there could be an adverse effect on economic growth and development to meet the needs of issuers and investors. 2. We believe that most issues requiring intervention will be specific to the particular nature of a Member State's national market and that the incidences of pan-EU issues will be low. 3. We suggest that regulators should adopt an evidence-based approach to regulation and would suggest that the criteria for exercising such a power should be consistent for all products, namely, that they represent an unacceptable level of risk for

		investors. 4. Furthermore, regulators should seek to apply equal treatment for similar financial instruments.
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?	1. We support the move to extend pre trade transparency to equity-like instruments. 2. However, while the equity regime is an appropriate starting point for determining transparency for these instruments, we do not believe that it can be automatically applied. The transparency regime for these instruments waivers should include consideration of: • Product class; • Specific trading characteristics in that product; • Market model; • Liquidity profile; • Nature and type of market participants and investors; • Size and type of orders.
	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?	1. We support increased transparency, both pre- and post-trade, for non equity instruments and agree with the Commission that such a regime should be sufficiently tailored to reflect differences in asset classes, provided that the design of such a regime takes account of the CESR Technical Advice to the Commission in July 2010[5]. However: a. Any regime must recognise the differences between the wholesale and retail markets – in particular with bonds. For instance, LSEG operates several retail bond markets; ORB in the UK and MOT in Italy. Both of these markets are fully pre- and post-trade transparent. However, in the wholesale markets, professional investors do not have access to pre-trade transparency in the way we understand it for equity markets, due to the structure of debt markets, and the need to allow those who commit capital to operate under appropriate conditions.

[5] CESR Technical Advice to the Commission in the context of the MiFId Review: Non-equity Markets Transparency (CESR/10-799), July 2010

		b. Participants make markets in, and therefore commit capital to, these instrument types, despite many of them being highly illiquid. If equity-like pre-trade transparency requirements were applied to these markets, it is likely that participants would be less inclined to commit capital to them, leading to a deterioration of liquidity and price formation. Transparency should not be viewed as a guaranteed means to achieve liquidity and/or increase retail participation. c. A transparency regime for non equities must therefore be appropriately calibrated to reflect: • Product class • Specific trading characteristics in that product; • Market model • Liquidity profile; • Nature and type of market participants and investors; • Size and type of orders d. For each product, the transparency regime should be consistent and applied across all types of trading venue (RM, MTF, OTF) and across different trading methods (order driven/quote driven). 2. In our view, it is not a question of prioritising instruments. It is more important that the sort of calibration in c) above is specifically identified in the Level 1 text as criteria to be adopted by ESMA in devising appropriate transparency regimes for different instrument types.
	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	• Yes, subject to the points we raise in our response to question 21, which are also relevant here. We believe this can deliver the right calibration and transparency regime given the issues with the trade-off between transparency and liquidity referred to in 1a and 1b in question 21.

	ensure the correct level of transparency?	
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	1. Subject to our comments in question 20, the current waivers (price reference, large in scale, negotiated trade and order management facility) are appropriate and should be preserved. These should be specifically identified in the Level 1 text as being the minimum waivers for ESMA to consider. However, there is a need to review and potentially modify the waivers and the approach to granting and implementing them. In particular: a. There needs to be greater consistency, transparency and certainty in the interpretation and application of the waivers; b. The process must retain sufficient flexibility to enable policy makers and regulators to adapt quickly to market developments. Too prescriptive a regime will reduce the competitiveness of European RMs and MTFs, potentially adversely impacting lit and dark books across the EU; c. There must be consistency of approach between different venues. It is important that the same activity is regulated in the same way to ensure a level playing field and avoid regulatory arbitrage. In this context we support the Commission's intention to extend pre-trade transparency to OTFs. 2. The design and application of waivers for non-equity products needs to reflect the differences in asset classes (see our response to questions 21 and 22). We support the approach proposed by the Commission to take account of the market model, trading characteristics, liquidity and size and type of orders. We would also add the type of investor to the list of criteria.
	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	1. The best way to improve the quality and consistency of post-trade data, and to enable the creation of an affordable consolidated view of the market, is to make the current commercially-driven consolidation processes work more effectively. 2. We fully support the Commission's proposals to enhance the quality, granularity and consistency of post trade data. This should build on the work of undertaken by the CESR Technical Working Group and the Market Model Typology (MMT)

	(APAs)?	developed through the collaborative efforts of exchanges, MTFs, market data vendors and trade reporting venues. 3. The MMT work to date was recently evaluated in a dedicated industry working group meeting, chaired by ESMA on the 29th November 2011. The MMT work with key vendors and execution venues is nearly complete so its focus should now shift to examining practical 'use cases' and other issues from the users (buy-side, sell-side, institutional, retail). The Fix Protocol Limited (FPL) trade association will act to facilitate this engagement with the MMT Steering and Technical Committees. 4. We would hope that ESMA would support the MMT proposal. There will then be a definitive, detailed and comprehensive set of rules that prescribe all trade types, flags, formats, standards and parameters that will effectively and comprehensively define the data to be reported and consolidated. 5. This will also allow market participants and investors to better analyse and understand trading activity. This will go a long way towards resolving confusion surrounding the nature of OTC equity trading. 6. To enforce such an approach, we support the introduction of the proposed APA regime, based on authorisation from the relevant competent authorities. We believe that requiring investment firms to publish their trade reports through APAs under an enforceable harmonised regime will facilitate the consolidation of data and overcome the issues around OTC/off order book content transparency and the integration of this data with post-trade order book content from trading venues. 7. In the context of transaction reports, and for the same reasons of data quality and consistency, we also support the introduction of ARMs. 8. We support the establishment of the CTP regime and the possibilities for multiple CTPs to exist. We believe that appropriately regulated consolidators can provide as authoritative a tape as a single provider and in a more efficient and market focused way than a single provider.
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and	1. See our response to question 24 – these are critical steps that must be taken to improve the quality and consistency of post trade data. Harmonisation of data will effectively and comprehensively define the data to be reported and consolidated and

	investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	will go a long way towards resolving confusion surrounding the nature of OTC equity trading. 2. We support the establishment of the CTP regime and the possibilities for multiple CTPs to exist. We believe that appropriately regulated consolidators can provide as authoritative a tape and in a more efficient and market focused way than a single provider. 3. We also support the proposals to require separate pre and post-trade data services to be offered (LSEG already offers separate post trade market data services for real time post trade data for LSE and Borsa Italiana markets). This will increase choice and flexibility to, and reduce costs for, end users. In the context of equity and equity-like products we also support the proposal to make data available free of charge 15 minutes after the time of publication – the market will have a choice of a "no-cost" tape of record (see point 5 below for a comment on non-equity products). 4. The text on what constitutes a "reasonable commercial basis" should clarify that the purpose of delegated acts is to specify appropriate criteria for charging that would inform commercial and regulatory decisions regarding price levels and structure rather than set prices. This should include, for example, criteria around customer types, use of discounts and other fee structures, data packaging and technology solutions. 5. The introduction of a consolidated post-trade tape for non-equities needs to take into account the diversity and complexity of these products – it should not simply be a wholesale extension of the data regime designed for equities. We welcome the proposal to phase in the implementation of a non-equities product after 2 years in order to take advantage of the experience gained from the introduction of the post-trade consolidated tape for equities.
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?	1. Supervisory arrangements must set out clearly the respective responsibilities and obligations of competent authorities and investment firms. 2. ESMA's role in this is to provide practical regulatory and market input, rather than merely replicate the role/approach of the Commission and make effective use of its representative and stakeholder groups.

		3. It is important for credibility that ESMA works within its legal remit and recruits personnel with the appropriate level of skills and experience.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	1. It is important that competent authorities understand what is required of them; the legislation must give clear direction. 2. The role, remit and obligations of competent authorities given by Directive, Regulation or ESAs must be clear, fair and evidence-based.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	1. An example of a missed opportunity to align the regulation is in the area of the selling and product information requirements for Securities, funds and structured products; structured deposits and unit-linked insurance-based investments. This should be dealt with first in the PRIPs regulation and aligned with MiFID/MiFIR. 2. The key interactions with other financial services legislation that need to be considered are: • Third country provisions (see response to question 4); • Definition of SME (Prospectus/State Aid rules); • Definition of OTC (EMIR); • Depository and ancillary issues (CSD/AIFMD/Solvency II); • Definition of 'complex' products (UCITS); • Selling standards (UCITS/PRIPs); • Corporate Governance (New regulation/MiFID). 3. We would suggest that in addition to adopting an evidence-based approach to regulation, there should be a more holistic approach to policy making in financial services. 4. We would suggest that legislators look at: a. Closing gaps in regulation that could lead to regulatory arbitrage; b. Removing overlaps of existing provisions and existing powers for competent authorities; and more importantly; c. Those areas where the provisions conflict with legislation that is has already

		been adopted and is currently in force.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	1. The issue of access of third country firms to EU markets is one that should be actively considered by policy makers. 2. As stated in our response to Q4, we have concerns around the possible effects that the “**equivalence**” test and “**reciprocity**”, as set out in the Commission’s proposals, could have on the broader EU economy. 3. These requirements seem to be at odds with the EU’s GATS/WTO commitments, and could open the EU up to accusations of protectionism.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	1. Yes, but regulators should ensure that rules are effectively supervised and enforced if any sanctions regime is to be effective. 2. We support the proposals to ensure that sanctions across Member States are strong and robust. We believe that authorised firms should not be allowed to treat administrative fines and penalty payments as a cost of doing business. 3. We believe that criminal sanctions could be imposed for the most serious of offences.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	1. Perhaps Level 1 text should signpost more of the direction and intention of the Level 2 (see our response to questions 21, 23 and 27). 2. The balance between Level 1 and Level 2 measures should reflect the political and policy objectives of policy-makers and the need for expert technical input. The development of clear, evidence-based, legislation that is consistent and appropriately calibrated requires this balance. 3. In the context of MiFID, the degree of discretion delegated to Level 2 measures could have a major overall impact on the regulation / directive. Examples include the Level 2 measures relating to pre-trade and post-trade transparency, and the definition of the class of derivatives subject to the trading obligations set out in Article 24. It is therefore appropriate that to preserve the balance between policy and technical input additional guidance is provided in Level I text to direct the drafting of Level 2 implementing measures (for example, see our responses to questions 20 – 23).

<table>
<tr><td colspan="2"></td></tr>
<tr><td colspan="2">Detailed comments on specific articles of the draft Directive</td></tr>
<tr><td>Article number</td><td>Comments</td></tr>
<tr><td>Article 2(1)</td><td>Issue: Scope. See response to question 1. Proposed amendment:

Article 2

1(i) [Third bullet point] – provide investment services other than dealing on own account in commodity derivatives or derivatives contracts included in Annex I, Section C 10 or emission allowances or derivatives thereof to the clients of their main business, or to persons to whom the provisos in Article 2(1)(d)(iii) apply.</td></tr>
<tr><td>Article 2(1) (and Annex 1)</td><td>Issue: Scope. See response to question 3. Proposed amendment:

ANNEX 1
SECTION A

(9) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management, except where those activities are undertaken by Central Securities Depositories as defined in Regulation (EU) No …/… [New CSDR] in fulfilment of core and ancillary CSD functions.

Or

Article 2 (1)(o)
[1. This Directive shall not apply to:]
(o) Central Securities Depositories as defined in Regulation (EU) No …/… [new CSDR] undertaking safekeeping and administration functions, as included in Annex 1, Section A, as part of their core and ancillary CSD operations.</td></tr>
</table>

Article 9(4)	Issue: Corporate Governance. See response to question 5. Proposed additional text to Article 9(4): Article 9 4. ESMA shall develop draft regulatory standards to specify the following: (a) the notion of sufficient time commitment of a member of the management body to perform his functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the investment firm which competent authorities must take into account when they authorise a member of the management body to combine more directorships than permitted as referred to in paragraph 1(a), **including taking into account the extent to which appropriately qualified and experienced persons are available to be members of management bodies and the adverse impact of limiting the number of non-executive directorships**; **(f) the notion of "comply or explain" to apply to the management body of any investment firm and the implementation of regulatory standards devised by ESMA**.
Article 17(3):	Issue: Algorithmic trading. See response to question 8. Proposed amendment: Article 17(3) "**Where an investment firm that engages in algorithmic trading does so as a market maker under Article 4.1(6) MiFID, then any algorithmic trading strategy that it operates for this purpose** ~~An algorithmic trading strategy~~ shall be in continuous operation during the trading hours of the trading venue to which it sends orders or through the systems of which it executes transactions. The trading parameters or limits of an algorithmic trading strategy shall ensure that the strategy posts firm quotes at competitive prices with the result of providing liquidity on a regular and ongoing basis to these trading venues at all times,

	regardless of prevailing market conditions"
Article 32(1)	Issue: Member States are to require investment firms or market operator operating a MTF that suspend or remove securities from trading must inform other RMs, MTFs and OTFs, who must then also suspend/remove that security (if traded on those venues) where this is due to non-disclosure of information. However, it will generally be the case that the corporate issuer of the traded security on the MTF will not have a direct relationship with that MTF (as the issuers will have the relationship with the relevant regulated market or listing/competent authority. Therefore, it will not be the MTF that makes the original decision to suspend/remove a security due to a failure to disclose information. Resolution. Proposed amendment to Article 32(1): Article 32 1. Member States shall require that an investment firm or a market operator operating an MTF that suspends or removes from trading a financial instrument makes public this decision, communicates it to regulated markets, other MTFs and OTFs trading the same financial instrument and communicates relevant information to the competent authority. The competent authority shall inform the competent authorities of the other Member States. Member States shall require that **where the appropriate competent authority or market has suspended or removed a security due to the non-disclosure of information, that authority or market shall inform other trading venues trading that security, who shall be required to suspend or remove that financial instrument from trading** ~~other regulated markets, MTFs and OTFs trading the same financial instrument shall also suspend or remove that financial instrument from trading where the suspension or removal is due to the non-disclosure of information about the issuer or financial instrument~~ except where this could cause significant damage to the investors' interests or the orderly functioning of the market. Member States shall require the other regulated markets, MTFs and OTFs to communicate their decision to their competent authority and all regulated markets, MTFs and OTFs trading the same financial instrument, including an explanation if the decision was not to suspend or remove the financial instrument from trading. See also Article 53(1) below.
Article 53(1)	See also Article 32(1) above.

Issue: Member States are to require RMs that suspend or remove securities from trading must inform other RMs, MTFs and OTFs, who must then also suspend/remove that security (if traded on those venues) where this is due to non-disclosure of information. However, it will be the case in some Member States that it will not be the RM that makes the original decision to suspend/remove a security due to a failure to disclose information, but another authority (e.g. listing or competent authority).

Resolution. Proposed amendment to Article 53(1):

Article 53

1. Without prejudice to the right of the competent authority under Article 72(1)(d)50(2)(j) and (e)(k) to demand suspension or removal of an instrument from trading, the operator of the regulated market may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such a step would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

~~Notwithstanding the possibility for the operators of regulated markets to inform directly the operators of other regulated markets,~~ Member States shall require that an operator of a regulated market that suspends or removes from trading a financial instrument makes public this decision, communicates it to other regulated markets, MTFs and OTFs trading the same financial instrument and communicates relevant information to the competent authority. The competent authority shall inform the competent authorities of the other Member States of this. Member States shall require that **where the appropriate competent authority or market has suspended or removed a security due to the non-disclosure of information, that authority or market shall inform other trading venues trading that security, who shall be required to suspend or remove that financial instrument from trading** ~~other regulated markets, MTFs and OTFs trading the same financial instrument also suspend or remove that financial instrument from trading where the suspension or removal is due to the non-disclosure of information about the issuer or financial instrument~~ except for cases where this could cause significant damage to the investors' interests or the orderly functioning of the market. Member States shall require the other regulated markets, MTFs and OTFs to communicate their decision to their competent authority and all regulated markets, MTFs and OTFs trading the same financial instrument, including an explanation where it was decided not to suspend or remove the financial instrument from trading.

Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 29(6)	Issue: Access to infrastructure and benchmarks. See response to question 13. Proposed amendment: Article 29: 6. The Commission shall adopt by means of delegated acts in accordance with Article 41, measures specifying: (a) the conditions under which access could be denied by a trading venue, including **<u>transparent, proportionate and neutral</u>** conditions based on the volume of transactions, the number of users or other factors creating undue risks. (b) the conditions under which access is granted, **<u>including demand and safety criteria</u>,** confidentiality of information provided regarding financial instruments during the development phase and the non-discriminatory and transparent basis as regards fees related to access.
Article 30(2)	Issue: Access to infrastructure and benchmarks. See response to question 13. Proposed amendment: Article 30 2. No CCP, trading venue or related entity **in the EU** may enter into**, or continue to be party to,** an agreement with any provider of a benchmark ~~the effect of~~ which would **have, or has, the effect** ~~be~~ **of** either: (a) ~~to prevent~~ **preventing** any other CCP or trading venue from obtaining access to such information or rights as referred to in paragraph 1; or (b) ~~to prevent~~ **resulting in** any other CCP or trading venue ~~from~~ obtaining access to such information or rights on terms any less advantageous than those conferred on that CCP or trading venue.

Article ... :	
Article ... :	