Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP – Comments By the ABBL[1]

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 ABBL understands that following G20 requirements all financial institutions should be in the scope of regulation. It appears that the category of independent financial advisers (IFA) remains regulated at national level. To be consistent, they should fall under the EU wide regime of MiFID. In addition, as currently formulated in article 3 paragraph 1, second bullet point, a financial adviser whose function is precisely to give advice

[1] The Luxembourg Bankers' Association (ABBL) is the professional organisation representing the majority of banks and other financial intermediaries established in Luxembourg. Its purpose lies in defending and fostering the professional interests of its members. As such, it acts as the voice of the whole sector on various matters in both national and international organisations.

The ABBL counts amongst its members' universal banks, covered bonds issuing banks, public banks, other professionals of the financial sector (PSF), financial service providers and ancillary service providers to the financial industry.

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		would be exempted from the scope of the directive. At the same time, entities only receiving and transmitting orders (like Transfer Agencies) may not be exempted from MiFID – this would be reversal of the present situation. As such entities only perform administrative and ancillary functions, not acting in the capacity of intermediaries bound to the end investor by a contractual relationship should therefore not be subject as such to fiduciary and conduct of business duties with regard to the latter, given the purely administrative nature of the relationship
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	In the ABBL's view, structured deposits are first and foremost a banking product already subject to regulations (CRD packages) other than MiFID. They should remain so. The ABBL has no views on emission allowances.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	This "upgrade" to MIFD status will be mostly applicable to non-credit institutions. But the credit institutions will be impacted through the need to review all their procedures. The fact that they would be subject to legal requirements that increase costs, requires some reorganisations for an activity that has experienced relatively few problems in the past and which is or will be regulated elsewhere (at least, under the securities law directive and the capital requirements directive). The activities of depositaries will also be directly regulated in the future by the UCITS and AIFM directives and consequently appropriately exempted in the MiFID. The ABBL is therefore in favour of a status quo where depositary/custody activities services should remain ancillary as far as MiFID is concerned.
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and	This is likely to prove a tricky subject. The ABBL is not opposed to regulation for 3rd countries provided it creates a level playing

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	what precedents should inform the approach and why?	field and that there are realistic reciprocity measures. It should be as easy for non-EU IFs to work in the EU as it is for EU IFs to enter specific non-EU markets. The notions of similar, identical or equivalent legal framework are vague. Generally speaking, the ABBL considers that most advanced economies share at least this characteristic and the remaining ones should also abide by global principles, such as the compliance to Basel Committee principles or IOSCO rules and of course comply with AML rules. The ABBL would point to risks of unequal treatment regarding funds following the adoption of the regulation on funds under the US Vockler rules in the Dodd Frank act. Current understanding is that US mutual funds will be subject to a much better treatment than their non-US counterparts. This rule is likely to impact the fund, the distributors and the manager of the fund (EU and US) if they belong to a financial group.
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?	The ABBL considers that MiFID I rules and the current proposal are appropriate and sees no need for complementary measures.
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?	No. In the ABBL's view what should determine the organisation of platforms is the structure of the underlying market. Equities markets should behave essentially along the same lines, pre and post trade transparency (unless the price is determined by reference to a recognised trading platform or the size of the orders is significantly out of the average). A regime relying on an execution policy that would describe price formation processes, duties and obligations will be more efficient when

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		accompanied by an appropriate regime of post-trade transparency for non-equity markets, as it would better fit with the market structure. For other products like bonds or derivatives, the market structure and organisation is not the same. The ABBL considers that criteria for pre-trade transparency will create more problems than solve potential issues. The ABBL would opt for a regime where the pre-trade requirement is replaced by an execution policy, which would describe the pricing process and allow for flexibility in the different clients accessing the platforms and be dependent on the products traded. To complement the regime an appropriate post-trade transparency regime should be in place for all products with calibrated publication deadline so that they do not turn against the trading parties. In addition, specifically for SIs (Systematic Internalisers), the scope is so broad that any bank that deals on any products with any clients, be it a very basic retail client, will be subject to the full regime. Again taking into account the different products and market structures, the obligation to have "full time" quotes and full pre-trade transparency may be too extreme. The Regime for SIs today is limited to entities that wish to perform this activity as a fraction of their overall activity, in the future they will have no choice but to abide.
	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?	The ABBL has no major concerns regarding the definition of OTC products and trading. The ABBL considers that most trading will either fall under the OTF or SI categories and that OTC will be reduced to purely bespoke products or very specific transactions that would by their nature be purely bilateral. In any

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		case appropriate reporting rules should be in place post-trade.
	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?	At this stage, the ABBL considers that the approach developed by the EU Commission is appropriate. In the category of algorithmic trading a specific focus should be placed on HFT for at least 2 reasons. Some academic researches point to the fact that more actors in a market improve transparency and liquidity, but that crossed a certain point it adds volatility without improving the price formation process. Then a second element is that under MiFID I rules and probably under the current proposal in MiFID II this strategy is performed by non-MiFID regulated entities. That is why the ABBL would opt for the introduction of a clear threshold in the proportion of cancellation of orders to total orders placed in level 1 regulation. It is abnormal that 99% or more of orders placed are systematically cancelled, even if trading takes place at extreme speed. To balance this point of view, the ABBL understands that part of the innovation in algo trading has been allowed because of improved technology and fighting progress may not be in the best interest of the EU economy, but certain HFT behaviours are strongly impacting market integrity and shall as a consequence be appropriately regulated.
	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?	They are appropriate.
	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?	The delay of 5 years to store data may be relatively long, the ABBL would opt for 3 years and unlimited time in the event there is a case against a or several transaction. Conceptually the

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		ABBL would make a distinction whereas to whom the information is addressed. As long as it is between professionals in the chain of the execution of the order, it shall suffice to have the minimum information to carry the trade. There may be more precise information for the authorities. In any case, the ABBL is not supportive of the requirement to identify the client neither of the trader or algorithm. Client identification is subject to local rules on data protection and there may be risk of leakage of information within the EU as well as outside (Swift case), the association will therefore propose to rely at IF level on an identifier that does not refer to the name, or other legal documents (this system is already working in some EU jurisdictions), what may be required is the type of counterparty (i.e. Retail/Professional or eligible). The ABBL does not think that the identification of the trader adds any value, the IF is the one responsible for the trade. It shall at its level know who has done the trade and act accordingly. This also poses an operational issue as the person that is seen as placing the trade may not be the one responsible for it. The ABBL thinks here about middle office staff or any other relevant person than the "trader himself"
	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?	The ABBL regrets that the decision to trade all on platforms has been taken, MiFID closes the door left open in EMIR by forcing trading on markets. It remains however that bespoke derivatives transactions may better suits the need of their client if done outside standardised procedures. The current rules leave little space for these products.
	12) Will SME gain a better access to capital market through the	The approach is laudable, but it is only embryonic. In fact the

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	introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	regulation should bridge the gap between two opposing requirements: on the one hand, increasing SME access to markets and at the same time incentivising investors to be active in these market segments. The problem is that SMEs need more flexible constraints when investors seek more information and transparency on companies they do not have the means to know as well as large public entities.
	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?	The remaining requirements may come from other regulations than the MiFID, like the CSD regulation, SLD or others. Specifically with EMIR, the approach is probably sufficient.
	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?	The ABBL is not in favour of creating different categories of investors and limiting markets. The idea to create good and bad investors or stakeholders will only end up in less efficient markets, because there would be less stakeholders ready to trade in different directions (buy/sell).
As a 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?	The ABBL thinks that the EU Commission found the appropriate approach at EU level. The terminology proposed may not be the most ideal from a marketing point of view, but it is going in the right direction. The association would have proposed that each Member State is left to define on its own terms how to translate the “independent” concept. Regarding portfolio management, the prescription is probably too broad. For example, delegation of the management of part of the portfolio may as a consequence be

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		forbidden, which is not optimal for investors. The ABBL does not see, as CESR expressed in the recommendation 07-228b that retrocessions are always inappropriate, at least as long as sound conflict of interest policies and Chinese walls are in place. As a regulation, the ABBL would propose to impose a 3 steps approach whereby the product selection should first be determined based on qualitative and quantitative data, then a separate entity will/may negotiate any form of cooperation agreement and, finally, the remuneration of the person advising or managing the client's asset should not be linked to one specific product but to the "overall performance" as defined by IF criteria. In summary, MiFID's suitability obligation applies in all cases, therefore the association fails to understand the conclusion that the quality of advice provided to a client should be depending on whether or not the advisor receives fees / commissions / benefits by any third party. The quality of the advice is related to analysis to the advice, so the suitability test in combination with appropriate disclosure around the characteristics of the advice should be the appropriate means to ensure high quality of advice
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The ABBL would first and foremost remind that complexity does not equate to risks. What should count is the risk supported by the investor, in the knowledge that all financial investments present some risks. The scope for execution only products should accordingly remain as it is under MiFID I. There may be grounds for limited review, notably for some bonds or shares, the derivative component of which may be increasing the risk profile of the product. But as is the case today, a bond with a call

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		option is a complex product, which may not be appropriate. Much of the debate is on UCITS, and presents the risk to create a divide between "good and bad" UCITS, what the association considers extremely damaging both in the EU and outside. The UCITS is a valued brand and shall not be tainted because of a regulation like MiFID. The ABBL understands that there may be some cases where the brand UCITS could be fine tuned, but what should be avoided is a ban on some products. As a reminder, the retail category is the widest in scope as it includes natural private persons from very wealthy to very average and even corporates… Banning is thus not a good option. In the interest of the brand, UCITS may be revisited so that the ones that are increasing investor risks may be considered as complex. In the best of worlds, ESMA may be the most appropriate entity to address the issue, but then appropriate staff and capacities should be available to deal with the many issues they will undoubtedly face.
	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?	The ABBL sees little value in defining the list of execution venues. This is a relatively burdensome procedure of little benefit for clients, if an investment firm is not able to execute an order it is likely that the client will quit. What is probably more important for the client is the execution of an order than where it is executed (at least for retail).
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	With the review of the default position of local government, the ABBL thinks that progress has indeed been made. The association would nevertheless point to a weakness in the eligible category where implicitly there will be an assessment of each institution in that category. The ABBL considers that this

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		may create legal uncertainties regarding the treatment of some eligible clients. Some may probably be categorised outright in the lower categories of professionals if the intent is to increase their protection level. As a reminder, an eligible client can always require to be reclassified. This reclassification should then probably be general in nature instead of being under a dual regime of ad hoc and general (for all trades).
	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?	Yes, provision on banning products should first be notified to ESMA for consideration before being authorised at MS level. The fear is that criteria to suspend or ban at MS level may be too weak and there is a real risk of market protection and fragmentation.
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?	The ABBL has seen that some segments of the markets are more active than others. Typically the members of the largest reference market indexes are actively traded, but when one goes outside this relatively narrow group the trading is extremely thin or even non-existent on a daily basis. In fact in the references indices of some countries outside the 2 to 5 largest company trading is relatively seldom. Thus to protect market integrity and investors, rules on pre- and post-trade transparency should be tailored so that they do not create additional problems for these lesser-traded companies.
	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	Definitely, most of these products are not traded actively and most of them are traded in sizes that are commensurate. The idea would be to design a system that would preserve the specificities of these markets and allow for requests of quotes and "non-firm" quotations. In addition, requests to display continuous pricing and force trading on displayed quantities may be

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	transparency requirements and why?	counterproductive. The ABBL is of the opinion that each platform should announce and disclose how it will organise its trading as well as the rights and duties of its participant. Where possible, post-trade information should be as close to real time as possible if it does not undermine the market structure. Ideally, post-trade information should be aggregated via an ARM or consolidated post-trade tape.
	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 response to 21
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	No, as shown by ESMA (CESR) in previous research, the average size of trading order for shares has decreased since the introduction of MiFID. As a consequence, what is considered a large order may be revised downward. This should probably be adapted yearly by ESMA based on market surveys
	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)?	Generally speaking, the ABBL considers that these types of arrangements will help improve access to and availability of market information. Among the issues identified is the cost of these intermediaries, property right of information/data and the resilience of each intermediary. A question, for example, is how many CTPs does the market need? One would probably be enough and it should be structured around the concept of a public infrastructure to ensure its sustainability and neutral market technology.
	25) What changes if any are needed to the post-trade	Probably a consideration that data on transactions belongs to the

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	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?	intermediaries dealing on the markets, so that raw data is available at cost. Afterwards, the cost of information should be limited to the technical cost of IT to aggregate and spread data. The ABBL thus reiterates its objective of relying on a public infrastructure
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?	Their role is already well developed and a lot of tasks will end up in their scope. Probably too much of it and without a sufficiently clear mandate. Expectations are high; they should not be unrealistic given the size of the institutions and files to address. Thus the ABBL would plead for a circumscribed and clear mandate and for the authority to have decisive powers when supervising markets, market activities and products. Notably, bans or suspensions of trading should in all cases be agreed/supported by ESMA, not by MS first.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	The ABBL does no see specific improvements from the MIFID. Budget and staff should probably be assessed on a regular basis to remain in line with the tasks that are remitted to the agencies
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	On the one hand the ABBL is not convinced that forcing derivatives onto exchanges after forcing them onto clearing houses via the EMIR is always a sound idea. On the other hand the PRIPS legislation should be linked to the MiFID as it would design a tool to inform clients on financial products. It is likely that what remains to be agreed or supported is the alignment of regulation in MiFID and Life/pension insurance (IMD) so that retail clients are subject to the same type of rule wherever they seek investment products. Finally, the ABBL is not sure if the status of IFAs that are regulated by MS should remain in an area where according to the G20 all financial actors should be

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		regulated. The association has understood this as a requirement to be regulated at EU level.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	The ABBL considers that access to the EU market and benefit from a passport is a good idea. Facilitating access to the EU will strengthen competition and will thus be good for the economy. But interactions with countries of origin should be organised in manner that services and service providers are subject to equivalent rules so as to create a level playing field and at least not put EU headquartered institutions on an unequal footing on their home market.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	Yes, the association points to the fact that these proposal are of administrative nature, if an EU regime is sought probably there shall be a need to think about the full regime of sanctions including criminal and private law, a premise that the ABBL considers shall remain with the MS.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	Overall the balance may be appropriate, but to be pragmatic not all difficult discussion can be remitted to ESMA, sometimes the mandate for level 2 measures may lead to unexpected outcomes because there are many technical details left to level 2 and because ESMA when the time will come to analyse the different measures may still be under the required capacity both in staff and means.

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

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Information about the ABBL: ***ABBL ID number in the COM Register of interest representatives:*** 3505006282-58	
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