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).

Answers from the French Authorities (Ministry of Economy, Finances and Industry)
13 January 2012

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?	France supports the general objective of the Commission to reduce the scope of exemptions for commodity firms (article 2 of MiFID). In particular, the deletion of the k. of article 2.1 appears appropriate ("persons whose main business consists of dealing on own account in commodities and/or commodity derivatives"). All the same, the narrowing of the scope of the i) of article 2.1. appears to be relevant. Corporates involved in cash commodity markets will still be exempted for the investment services they provided as far as it remains an ancillary activity.

		Nevertheless, the articulation between the d) and the k) of article 2.1. is not clear and should be explained within a recital. Moreover, France questions the relevance of maintaining the exemption for "firms which provide investment services and/ or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets" (article 2.1.k). Regarding the exemption of article 3, France considers that requiring persons excluded from the scope of the Directive under paragraph 1 to be covered under an investor-compensation scheme recognized with Directive 97/9/EC or under a system ensuring equivalent protection to the client could have disproportionate consequences and is not relevant for certain kind of intermediaries which do not hold clients assets (e.g. the CIF – *Conseillers en investissements financiers* - in France). Moreover, France is not in favour of introducing the following provision at the article 3: "National regimes should submit those persons to requirements which are analogous to the following requirements under the present directive". It is necessary to maintain the possibility of delegating the competence of supervision should be maintained (e.g. in France concerning CIF associations).
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	France is not in favour of including Emission Allowances in the scope of MiFID.

		Moreover, France is strongly opposed to the classification of EUA as financial instruments which could involve disproportionate consequences for the carbon market. Although EUA are in several aspects quite similar to financial instruments, they present certain significant technical differences (absence of an issuer within the usual meaning of the word; a unique registry system for holding them, etc.) and therefore require an ad hoc approach.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	France supports the will of the Commission to better protect client's assets. Nevertheless, the inclusion of custody and safekeeping as a core service would have unintended consequences on this activity. MiFID provisions relating to investment services are not all adapted to custody and safekeeping. For instance, provisions regarding the best execution obligation are not appropriate. Moreover, there is a concern linked to the access to EU markets by third countries if safekeeping and custody is included as a core service.
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	The current MiFID arrangements for the treatment of third country providers have worked well. There is no evidence that major changes in this proposal are needed. Besides, contrary to the current proposal, the introduction of any such equivalence regime would in any case have to be conditional on strict application of the principle of reciprocity, and should afford the same guarantees as MiFID, particularly as far as the regulatory regime and supervisory arrangements (and not only considering the prudential framework) are concerned.
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading	France has no comment at this stage.

	venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	
Organisation of markets and trading	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	The definition of the new OTF category should be more precise. Moreover, France considers that only regulated markets, MTFs and OTFs for derivatives should be deemed as trading venues. A clear distinction should remain between real trading venues (Regulated markets and MTFs, and other eligible OTFs for derivatives trading as necessary) on the one hand and OTFs on the other hand. OTF should be strictly limited and not become a "catch all category" which would contribute to facilitate regulatory arbitrage. Regarding non derivative markets, in so far as OTFs are able to restrict members or participants and to have discretionary rules as regards execution of orders, they should not be considered as trading venues. It would be confusing to try and align the requirements for all trading platforms and trading systems, while maintaining or setting up different categories that reflect the variety of ways trading can be organised.
	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?	France considers necessary to better circumvent the notion of OTC and to limit it to pure bilateral trading. France therefore suggests defining OTC transactions within the core directive (and not only in a recital) as "bilateral transactions carried out on an ad hoc basis between counterparties and not under any organised facility or system".

		Moreover, France considers necessary to improve the identification of OTC trades (flagging).
	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?	France can only support the requirements to have specific risks controls be put in place. Obviously, it may not be sufficient to require such controls from authorised firms only. For that reason, depending on the case, risks controls should also be performed, either at the level of the firm itself (for authorised firms), or at the level of broker firms offering DMA or "sponsored access" to automated, non-authorised firms. Beyond that, operators of trading venues should also implement their own risk controls. Moreover, ESMA should have the capacity to impose additional parameters of regulation such as minimum tick sizes, minimum latency time in the order book, minimum ratio of cancelled orders, etc. Such parameters should be implemented through binding technical standards.
	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?	France supports these requirements.
	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?	France supports these requirements which appear appropriate for national competent authorities to better prevent market abuses.
	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?	As a general principle, France strongly supports the obligation for all standardised and sufficiently liquid derivatives to be traded on organised venues with adequate pre-trade transparency requirements (Regulated markets, MTF and OTF). This

		requirement is in coherence with the G20 Commitment in Pittsburgh in 2009 for all standardised OTC derivatives contracts to be traded on electronic and multilateral platforms by the end of 2012. Regarding the trading venues, France considers of prior importance to specify that "eligible" derivatives should be traded only on real multilateral and transparent platforms. In that regard, it could be appropriate to specify in a more precise manner to which pre-trade requirements the new OTF category will have to comply with.
	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?	France welcomes the objective to grant SME a better access to capital markets for SME. Nevertheless, France has some objections regarding the proposed regime. First of all, the 100 000 000 € threshold appears to be too low. Secondly, France considers necessary for the Commission to provide explanation on the obligations that will be relieved. Thirdly, consequences of the extension of the concept of admission to trading to MTF should be more in depth analysed.
	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?	France has no comment regarding these provisions at this stage.
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage	France strongly supports the proposal of the Commission to introduce position limits in commodity derivative markets.

	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?	However, in order to prevent regulatory arbitrage, and in coherence with the latest communiqué of the G20 in Cannes on 3 and 4 November, this power should be granted to market regulators (national competent authorities or ESMA) and not to market operators (Regulated markets, MTF or OTF). Moreover, position limits should be mandatory. The mandatory introduction of position limits would have the advantage of developing a European-level approach to derivatives market regulation, commodity derivatives especially, consistent with the US approach. Therefore, position limits would be preferable to any other alternative arrangements such as position management. Position limits should indeed be viewed as a means of regulation so as to limit the emergence of dominant positions, among others, and to protect small actors, who are especially active in the agrifood sectors, for example. Particular attention needs to be paid to the energy market also. Besides, as recommended by Michel Prada in his report on carbon markets' regulation, position limits should also apply to carbon 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?	France doesn't consider that the banning of inducements is necessary the only and the more appropriate way to prevent conflict of interests. The approach proposed by the Commission is indeed based on the implicit postulate that an adviser paid other than by inducements is preferable to one paid by inducements. Yet both approaches entail possible conflicts of interest: in the former case, the method of remuneration of the adviser could, for

		example, lead him to propose an excessive rotation (e.g. churning) of the client's investments; in the second case, the adviser could be led to steer his client towards those financial instruments generating the highest inducements. Therefore, France considers that greater transparency and a more detailed disclosure of inducements could be more appropriate.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The current proposal in Directive Article 25, defining product by product which one is or not complex, is not appropriate and leave room for arbitrage between the different categories of financial instruments. It would be more relevant for the level 1 directive to provide a general definition of complexity and to precise at the level 2 the different categories of products which should be considered complex. ESMA could be granted the power to update the list of products in a way that would ensure a constant adaptation to the new innovative financial instruments.
	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?	France has no comment regarding these requirements at this stage.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	France has no comment regarding these requirements at this stage.
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of	France considers necessary to grant ESMA more power of coordination regarding the ability for National Competent

	investors and market integrity without unduly damaging financial markets?	Authorities to permanently prohibit or restrict the marketing, distribution or sale of certain financial instruments or type of financial activity or practice. There is a strong need for better coordination and harmonization. A non-coordinated prohibition of products or activities would deeply impair the European passport.
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?	France strongly supports the extension of pre-trade transparency requirements to equity-like products.
	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?	France strongly supports the extension of pre-trade transparency requirements to non-equity products.
	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?	Same comments as above (21).
	23) Are the envisaged waivers from pre-trade transparency	France considers that principle of pre-trade transparency should

	requirements for trading venues appropriate and why?	be clearly reaffirmed and waivers strictly reviewed. In particular, if large in scale orders on a given market can have undesirable impacts on prices so that exemption to transparency rule are enforced above thresholds defined by regulators, however other waivers, in particular reference price waiver, have not proved to be justified and should be deleted. Regarding the procedure of granting of waivers, it is necessary to limit the risks of regulatory arbitrage between member states and enhance a more harmonized regime between member states. Therefore, France is not in favour of the proposed provisions that give only to competent authorities the power to grant pre-trade transparency waivers without a binding decision of ESMA. ESMA should be given the power to authorize waivers and not only give its opinion.
	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)?	Regarding post trade transparency, as a first choice, France supports a formal consolidated tape operated by a single, non-profit seeking entity, established and appointed by a legal act (cf. the US consolidated tape). This appears the most appropriate way forward given the public-good nature of such a consolidated tape and the inability for the industry to provide such a solution so far.
	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?	France has no comments regarding these requirements at this stage.

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?	France considers that the role of ESMA should be strengthened and the use of technical binding standards should be more frequent in order to clarify and harmonise the application of MiFID in the EU.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	France strongly supports a better cooperation between Competent authorities and ESMA. Moreover, as far as the supervision of commodity markets is concerned, it is necessary to improve the cooperation between competent authorities and other sector-based authorities notably to prevent cross-markets manipulation.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	France considers that MiFID/MiFIR should be particularly coherent with two major financial services legislation which are EMIR and MAR.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	France considers essential for MiFID/ MiFIR to be in coherence with the US Dodd Frank Act (DFA) regarding in particular two specific aspects: - The supervision of commodity derivatives markets. As it is provided in the DFA, it is essential for competent authorities to be granted the power to set position limits. - The new OTF category should be, for derivatives, in coherence with the Swap Execution Facilities (SEF) requirements.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	France strongly supports the Commission's intention to ensure that sanctions are truly effective and dissuasive in all Member States.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	France has no specific comment at this stage.
