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.**

REPLY OF NASDAQ OMX

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?	• Energy firms must not be unduly burdened. • In order to maintain a liquid market for the benefit of the fundamental market participants, it is important to not disincentivise participation in the transparent market places. • Market making activities are for instance a central part of ensuring a liquid market.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	• Yes, emission allowances and structured deposits should be classified as financial instruments; • Emission allowances trading would come under the same market surveillance requirements as any other financial instrument; • Tailor-made market abuse regime for emission allowances can thus be avoided; • Emission allowances would be accepted as collateral by CCPs.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	• There may be a need to coordinate with incoming CSD legislation in order to avoid overlapping licensing requirements. • A CSD should not also need a MiFID license.

	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?	• MIFID I has not put in place a comprehensive and consistent approach to third countries; each Member State was permitted to grant access to the Single Market based on its evaluation of the 3rd country's regulatory framework as long as it did not give a 3rd country provider more preferential treatment than an EU service provider. • The proposal of the European Commission to have a more systematic and unified third country regime is therefore welcome. • Progress should be conditional upon reciprocity and equivalence principles to allow for a level playing field for EU and third countries actors. • An adequate regime for access of third country actors to EU markets is a key element of well functioning EU markets. • The reciprocity and equivalent tests should be handled at EU level to avoid regulatory arbitrage. • Efficient processes and structures to determine reciprocity and equivalence at EU level are of the essence. More guidance is needed in the level I regulation on how this processes and structures will be organised and what steps will be taken in case of shortcomings. • There should be an encompassing approach when progressing on the access of EU firms to third non-EU markets: - Any progress on any type of services within the scope of MIFID must cover all firms that can be authorized to operate such types of services; - All types of market operators should come within the scope of possible opening up of EU markets for third country firms.
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 focus should be on ensuring implementation of the conflict of interest obligations.
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	• The need for creating a new type of organized venue, i.e. the Organized Trading Facility – OTF, is debated and NASDAQ OMX has doubts on the usefulness of this new category. • It creates an additional level of complexity in an already very

	not, what changes are needed and why?	complex regulatory framework which may constitute a threat to the ability to maintain fair and orderly markets. This new category of venue would make the financial markets more difficult to monitor and survey. This evolution would be to the detriment of less informed investors and affect the confidence in financial markets as a whole. • This new category will restrict the trading opportunities of investors in general, as it allows operators of OTFs to restrict access and execute orders on a discretionary basis (i.e. the operator chooses who he wants to match against who). • It seems dangerous to build a system where some informed investors may gain from being matched with uninformed investors. The best execution obligation and other investor protection rules are unlikely to compensate for the imbalance. • We are concerned that the introduction of the OTF category will result in trading currently carried out on organised venues (regulated markets and MTFs) moving to a more flexible and less controlled venue to the detriment of investors. • What is needed to ensure secure and efficient markets is to clarify the existing categories of public execution venues (RM, MTF, and SI), maintain all of the key trading venue rules for RMs and MTFs without making any of them optional, and add a clear definition of which activities do not have to be subject to the rules of RM, MTF, and SI, which would be the OTC space. If the OTF category is not eliminated the following modifications should be made to its regulatory framework: • OTFs also have to provide non-discretionary execution; • OTFs also must provide open and fair / non-discriminatory access; • Duty to conduct market surveillance within the trading venue (must be the same level of surveillance as for RMs and MTFs, and not be 'adapted' to the size/type of venue) Meanwhile, if the OTF category is kept, we would strongly recommend maintaining other aspects of the OTF regime, including: o Identical transparency requirements as for RMs and MTFs o Separation of proprietary trading and client business (with the former being regulated as an SI and the client business going to an MTF or OTF) • It is key that an efficient mechanism is put in place to ensure implementation of these definitions and concepts and that implementation is consistent throughout Europe. The lack of adequate implementation of MIFID I with respect to trading venues is one of

		the major shortfalls of MIFID.
	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?	• It is necessary to set a market organization allowing that as many investors as possible see and access the trading interests expressed by other investors. This means that the OTC space should be as limited as possible. • We agree to maintain an Over-The-Counter segment where some selected trading interests only interact between one another, but it needs to be better controlled to make sure that OTC transactions are carried out only when justified and that uninformed investors do not lose out. It is important to have a definition of what can be OTC and what should be executed on the other trading venues. • Modify the OTC definition to ensure that brokering not taking place in a system but above the standard market size is included in the OTC category. • It is important that the definition of OTC is included in the body of the regulation and not in a recital in order to ensure that it is taken into account and implemented consistently by Member States. • We doubt that transactions presently in the OTC space will move to the OTF, especially since the proposal has a very flexible approach to OTC and does not define it well. On the contrary, we foresee that transactions on RM and MTFs will move to the more flexible environment to be created by the OTF category.
	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?	• We agree that all HFT firms should be adequately authorized and supervised and broadly support the proposed provisions. • It is important to ensure sufficient systems and controls for firms offering Direct Electronic Access, especially as all HFT firms will not be members of the trading venues but will access markets indirectly, and thus will not be under the supervision of authorities and will not have a direct relationship with the trading venue. • However, we believe that the continuous quoting obligation imposed on algorithmic trading (Article 17(3)) is neither workable nor realistic for various reasons, one being that not all algorithmic trading applies market making strategies. Market making mechanisms imposed by the trading venues would be a better way of meeting the Commission's goal, which is to ensure that high frequency traders remain committed to a market as much as possible.
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity	• We agree that all trading venues should have the ability to deal with peak orders and message flows and to have effective business continuity arrangements as this is essential to ensure the proper

	arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	functioning of markets. • Regarding temporary trading halt it is important that when trading is suspended on the main market trading is also suspended on all other trading venues (unless this is due to a technical difficulty of systems).
	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?	• It is very important that investment firms keep records of all trades on own account as well as for execution of client orders, in particular for best execution purposes and also check any possible conflict of interest issues.
	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?	• We find this requirement appropriate.
	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?	• The MiFID II proposal for an opt-in SME Growth Market label for MTFs is similar to what NASDAQ OMX has already created with the First North MTFs in all the countries where we operate. • Although we do not object to the SME Growth Market concept, we are not convinced it will bring the needed improved access to finance for SMEs. • The most relevant initiatives to improve access to finance for SMEs are measures to kick-start investors' interest, such as tax incentives and allocation of funds targeted at SMEs during all stages of their growth. • NASDAQ OMX appreciates that the proposal does not create an 'SME layer' on the regulated 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?	• These provisions are aimed at improving the situation in certain markets or products where competition is lacking. This includes in particular derivative contracts. • No new entrant in the exchange traded derivatives market have succeeded in attracting volumes and compete against incumbent derivative exchanges in Europe (i.e. Eurex and Liffe) not even the CME. The barriers to entry to markets for exchange-traded European interest rate derivatives and European single-stock derivatives are currently high (e.g. lack of margin offset). We also note that the proposed merger between NYSE Euronext and Deutsche Borse would raise barriers even further. Whereas there are efficiency aspects to support concentration in terms of netting positions, use of collateral and a liquid market, the concern is that this creates lock-in

		effects and it becomes very difficult for an exchange or CCP to compete for the volumes in this contract – unless there is genuine inter-operability and open access, as well as access to licences for benchmarks. The improvements in efficiency, that are built-in when competition and choice among several marketplaces is available, need to be preserved. • The open access provisions in MIFID II therefore need to allow for new entrants and smaller markets to survive and compete with incumbents. For this to happen, it is necessary to impose access rights to new entrants and smaller markets only when they have reached a sufficient size to compete with incumbents. Without exempting new entrants and smaller markets from access rights, any chances for a repetition of the success story written by MTFs in cash equities markets following the implementation of MIFID I, would disappear. Competition with incumbents from new franchises would be stifled before it actually had a chance to develop.
	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 best way to develop well functioning commodities markets is to develop transparency and oversight. Principles from securities markets are relevant, but must be tailored to the specific commodity market. NASDAQ OMX supports the development of the Regulation on Energy Market Integrity and Transparency (REMIT, 'a market abuse framework for wholesale energy markets'). • An important part of the oversight that exchanges already have in place is position management regimes, fulfilling the objectives included in the MiFID proposal. We welcome a regime which recognises the benefits of such post-trade position management. Further limitations on participants of transparent venues risks reducing liquidity on these venues, thus driving derivatives trading OTC as well as away from CCP clearing. • Position limits will not stop price volatility. Many wish to distinguish between hedging and speculation but this is not possible. In addition, volatility does not only come from speculation. Distinguishing between good and bad liquidity does not work, it is liquidity that matters. • Problems in the food supply chain or abusive speculation can never be addressed with measures focused only on derivatives. Problems only occur if there is also unwanted behavior on the spot markets. • The most efficient measure is to ensure proper surveillance of both spot and derivatives markets in combination.
Investor	15) Are the new requirements in Directive Article 24 on	• Towards the objectives of increasing transparency, safety and

protection	independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	liquidity of OTC derivatives markets, we support articles 24 and 26 of the MiFIR proposal.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	• Best execution has proved difficult to implement and control as it is a very flexible concept. It is important to ensure that the trading venue organisation does not leave opportunities to favour informed investors over uninformed investors. This is why the OTF structure that allows discretion in the matching of orders of all clients (informed and uninformed investors) of an OTF raise concerns and is likely to deteriorate best execution. • The publication of data on execution quality can foster competition between venues allowing firms to make an informed choice and delivering best execution. We therefore support this requirement. • It should concern all venues but only for liquid shares as this is the bulk of trading in Europe • We would also like to underline that if specific metrics are agreed for presenting data, such metrics should be submitted to a thorough consultation process allowing execution venues to voice any difficulty that they may anticipate.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	• Again, we believe that the best protection, especially for retail investor is a sound organisation of how orders are traded and executed that reduces the potential for conflict of interests. Conflict of interests between the firms and its clients, on the one hand, and between the various categories of clients of a firm, on the other hand. This is why we are concerned that the introduction of the OTF category, where the operator can match orders at its discretion, can raise issues in terms of protection of less informed clients i.e. retail investors.
	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?	• There should be as much transparency and clarity as possible on the powers for authorities to intervene, i.e. when such powers may be utilised, on what basis. This would prevent as much as possible undue damaging to financial markets and would support well functioning markets.

		• Mechanisms to ensure cross-market surveillance have to be developed.
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?	• NASDAQ OMX believes that the transparency regime should be clear in the legislation itself and cannot entirely be pushed to delegated acts. Key principles for transparency waivers need to be agreed in the legislative text. Waiving pre-trade transparency for large orders makes sense, waiving pre-trade transparency for negotiated trades or when using a reference price only makes sense for large orders. This has to be reviewed and agreed at level one. • Depositary receipts, certificates: transparency requirements should apply to all equity like instruments. Investors in these instruments will benefit from the extension of the transparency regime as they will be able to assess more easily the quality of execution obtained. They will also benefit from enhanced competition allowed by transparency.
	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?	• It is important to understand the different characteristics of different non-equity instruments (such as bonds), and take this into consideration when creating new transparency regimes for these instruments. • Local characteristics of bond markets motivate local variations of the transparency rules. This is because a smaller bond market displays special features, including very few market participants. Because of the special importance of the bond market, not least the importance of the government bond market for the managing of public debt in a Member State, the legislative text should indicate that a smaller bond market can continue to function efficiently with a transparency regime that differs from larger bond market.
	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 reply to 21
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	• Pre-trade transparency waivers should continue to exist but need to be more consistently applied throughout Europe and across trading venues. The principles for such Pre-trade transparency waivers should

		be agreed at level 1. • Waiving pre-trade transparency for large orders makes sense, waiving pre-trade transparency for negotiated trades or when using a reference only makes sense for large orders. This has to be discussed and key principles to be agreed in the legislative text. • Thresholds currently set for the large in scale waiver are still relevant because the average order size remained generally stable. Since the reference price waiver was meant to allow crossing large orders seeking to avoid market impact, it is important to set a minimum threshold below which orders cannot be executed under the reference price waiver exemption.
	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)?	• We agree with the Commission´s proposal on data service provider provisions. Better controlling entities disseminating, reporting and consolidating along with better input data will improve the quality and reliability of data which is key to progress current arrangements.
	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?	Equity: • Post-trade transparency alone is not sufficient, price formation and best execution require pre-trade transparency. Improving the quality of post-trade transparency of the OTC market (at present representing 30-40% of the overall market) is crucial to acquire the knowledge necessary to effectively protect investors and maintain fair and orderly market. • In this light, we agree with the proposal of the Commission if they can facilitate effective implementation i.e. - specifying that post trade information are to be published as close to instantaneously as is technically possible; - Making sure reporting in real time does not extend beyond 1 minute; - Requiring systems not to be designed to publish details in a "batch" but instead to publish the details as soon as they are entered into the system; - For the deferred publication regime of large transactions, shorten the delays permitted so that almost all transactions are published no later than the end of the trading day. Only the very largest trades that occur late in the trading day could be able to be published on the next day but even then before the opening of the following trading day;

		Non-Equity: • It is important that a post-trade transparency regime is appropriately calibrated, in order to support the functioning of the market, including liquidity availability. • We agree the regime should be transaction size based. It is important to the post trade transparency regime, that the information is available as close to "real-time" as possible, which makes a transaction based set-up the only solution. Hence, we support a transaction based regime. • We believe that all executed trades should be published; however, in order to avoid any negative consequences for liquidity, it is important to calibrate the regime appropriately. This should include a possibility to delay publication of large trades. The thresholds for delayed publication should ultimately be based on the underlying liquidity in a security. Costs: • Separate post-trade data products from pre-trade data products as well as the overall availability of 15-minutes delayed data free of charge, will support data consolidation with regard to cost efficiency. NASDAQ OMX already provides products that allow purchasing pre-trade and post-trade data separately. We also provide data for free after 15 minutes and it would be useful to ensure that third parties reselling or disseminating the data do the same. • According to a recent research study, the adoption by various exchanges of a separate post-trade product has already reduced the cost of data due to exchanges by 62.5% (from 200 EUR to 75 EUR). However, given the small share occupied by exchanges in the overall cost of data (8% to 15%, with a downward trend), bringing overall costs down will require a collaborative effort on the part of everyone.
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?	• The ESAs have been given tasks and powers aimed at ensuring harmonised implementation of the single rule book. It is important to provide the ESAs with sufficient resources to be able to actually carry out this work.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	• One of the major shortfalls of MIFID I has been the inability of anyone to monitor fragmented markets in an adequate way. MiFID fragmentation has not been matched with cross-border surveillance. A trading venue can monitor its own venue but does not have an overview of the market at large, i.e. trading happening on other RMs,

		MTFs, (OTFs), SI and OTC in the same securities. Regulators have often only part of the information needed (even with the recent efforts to improve exchange of information) and they often do not have the necessary systems. • Primary and secondary markets should be required to cooperate more. MiFID II needs to enable this. There is agreement between exchanges and MTFs about this. One possibility would be if the 'primary market' (for equity, the market of listing) was given the prime responsibility for real-time surveillance of a share. This market also has a better view of the issuer and its information disclosure. This is technologically feasible nowadays. Better market data is also necessary to enable oversight and MIFID II seems to take care of this aspect.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	• Interaction with the MAD on market surveillance and EMIR on post-trading is critical.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	• Interaction with the US regime is very important. For instance the Dodd Frank Bill.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	• No, too many provisions are pushed at level 2 without sufficient principles/guidelines in level 1. Level 1 should set a frame for level 2 measures on important issues such as transparency and third country regime. • The principles/guidelines governing transparency waivers should be at level 1 and not left for level 2 otherwise the level 1 does not really give an adequate frame to the transparency regime. • The level 1 should also set principles/guidelines for third country regime.
Detailed comments on specific articles of the draft Directive		
Article	**Comments**	

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