

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**.

Contribution by Nestlé SA

Nestlé is an important hedger on the agricultural commodity markets. In 2010 Nestlé bought 18 Bio€ of agricultural raw materials (of which roughly 1/3 in the EU). Where possible, Nestlé hedges price risks through derivatives notably for cocoa, coffee, dairy, sugar, cereals and oils.

Preliminary remarks

The Commission proposals to review the Market in Financial Instruments Directive (MiFID) and the Markets in Financial Instruments Regulation (MiFIR) are timely. Structural agricultural commodity price inflation and unprecedented volatility are becoming a threat for the food industry, farmers and consumers alike. Volatility coupled with food price inflation has macro-economic as well as human impacts.

Derivatives markets are key risk management and price discovery tools for the food chain. Diversification of fund portfolios has led to a “financialisation” of these markets. Speculators have added liquidity to these relatively small agricultural markets; however their reactions to even moderate changes in market fundamentals have amplified volatility.

Nestlé agrees that efforts to improve regulation and supervision of commodity derivatives markets are needed. Global coordination under the leadership of the G20 is a prerequisite to avoid regulatory arbitrage in an outspoken global commodity market. Nestlé welcomes the G20 Cannes

recommendation to exercise formal position management powers.

The EC proposals on commodity derivatives reached a good balance between more transparency and position management versus the need for well-functioning liquid markets. We however regret that the voice of commercial users such as the food industry has not been enshrined into the proposals by mandating users groups for commodity derivatives markets.

Name of the person/ organisation responding to the questionnaire	Nestlé S.A. B. Vandewaetere, European Affairs Manager, Nestlé Z-EUR Birminghamstraat 221 1070 Brussels Phone + 32 2 529 52 27 E-mail : bart.vandewaetere@be.nestle.com EU Transparency Register Number: 15366395387-57
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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?	Nestlé agrees to this point
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	NA (Not Applicable)
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	NA

	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?	NA
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?	NA
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?	NA
	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?	NA
	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?	NA
	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?	NA

	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?	NA
	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?	NA
	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?	NA
	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?	NA
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	<p>Nestlé agrees that efforts to improve regulation and supervision of commodity derivatives markets are needed. Global coordination under the leadership of the G20 is a prerequisite to avoid regulatory arbitrage in an outspoken global commodity market. Nestlé welcomes the G20 Cannes recommendation to exercise formal position management powers.</p> <p>The EC proposals on commodity derivatives reach a good balance between <u>more transparency and position management</u></p>

		<p>versus the need for <u>well-functioning liquid markets</u>.</p> <p>Nestlé welcomes the requirement for regulated markets to apply position limits or alternative equivalent arrangements which are taking due account of the specific market properties (case by case). Nestlé believes that the contract nearest to expiry is the most vulnerable for squeezes (so-called ‘spot’ contract).</p> <p>We particularly welcome the <u>graduated approach</u> empowering the Commission to determine position limits or alternative arrangements taking precedence over any measures imposed by competent authorities. This harmonization approach will be particularly relevant for markets active on similar commodities located in different Member States (eg. cereals).</p> <p>Nestlé is <u>concerned</u> about the fact that commercial undertakings, like the food industry, are not by default exempted from position limits. This could lead to the situation where we can’t fully cover our business needs.</p>
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?	NA
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	NA
	17) What if any changes are needed to the scope of the best	NA

	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?	
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	NA
	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?	NA
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?	NA
	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?	For agricultural commodity derivatives the proposed pre-trade transparency requirements for trading venues are in line with current industry practices.
	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	For agricultural commodity derivatives the proposed pre-trade transparency requirements for trading venues are in line with current industry practices.

	instrument? Will these proposals ensure the correct level of transparency?	
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	<p>The current wording which allows for <u>deferred publication of pre-trade transparency data</u> will be a step back from current industry practices for agricultural commodity derivatives.</p> <p>The authorization for deferred publication should only apply for <u>illiquid</u> markets (Art. 10.1).</p>
	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)?	NA
	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?	<p>For agricultural commodity derivatives the proposed post-trade transparency requirements for trading venues are in line with current industry practices.</p> <p>The current wording which allows for deferred publication of post-trade transparency will be a step back from current industry practices. The authorization for deferred publication should only apply for illiquid markets.</p>
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?	<p>Nestlé welcomes the powers allocated to ESMA to intervene on the market place under certain conditions if competent authorities have failed to address an issue. We underline the importance of the requirement that ESMA's powers should not undermine liquidity or creating uncertainty for market participants which are disproportionate to the benefits of the measure.</p> <p>Permanent dialogue between competent authorities, ESMA,</p>

		trading venues and operators such as the food industry is essential for ensuring an appropriate implementation of the legislation and a good functioning of derivative markets.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	Nestlé welcomes the powers allocated to the Competent authorities including the possibility to ask market participants to reduce their size of the position or exposure. Effective enforcement and sanctions are indeed key to ensure compliance.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	Nestlé reminds policy makers that the MiFID/MiFIR proposals should not be considered in isolation from other Union policies including the Market Abuse proposals, Common Agricultural Policy proposals, resource efficiency initiatives and the energy/biofuels & trade policy. Policy coherence will be needed to address the key challenges linked to agricultural commodities and the better functioning of the food supply chain.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	
	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?	
Detailed comments on specific articles of the draft Directive		

Article number	Comments
Art. 7 & 9	Nestlé welcomes the pre- and post trade transparency requirements for trading venues which are in line with current industry practices.
Article 59.1	<p>Nestlé welcomes the requirement for regulated markets to apply position limits or alternative equivalent arrangements which are taking due account of the specific market properties (case by case). Nestlé believes that the contract nearest to expiry is the most vulnerable for squeezes (so-called ‘spot’ contract).</p> <p>Nestlé is concerned about the fact that commercial undertakings, like the food industry, are not by default exempted from position limits. This could lead to the situation where we can’t fully cover our business needs.</p> <p>Nestlé is concerned about the lack of a mandatory requirement for regulated markets, operators of MTFs and OTFs which admit to trading or trade commodity derivatives to establish user groups. The following minimum requirements should be laid down for such groups in MiFID: transparent decision making procedures, proportional presence of all market participants including those active in the physical market (warehouse, manufacturers), a periodical assessment of contracts and their specifications.</p>
Art. 59.3	Nestlé welcomes the graduated approach empowering the Commission to determine position limits or alternative arrangements taking precedence over any measures imposed by competent authorities. This harmonization approach will be particularly relevant for markets active on similar commodities located in different Member States (eg. cereals).
Art. 60	Nestlé welcomes the mandatory position reporting by categories of traders incl. a publicly available weekly report with aggregated positions and, upon request, a complete breakdown of positions for the competent authority. Nestlé agrees with the proposed classification of market participants which will be used for the weekly reporting purposes (investment firms, investment funds, other financial institutions and commercial undertakings).
Art. 71, 72, 73-80 & 83	Nestlé welcomes the powers allocated to the Competent authorities including the possibility to ask market participants to reduce their size of the position or exposure . Effective enforcement and sanctions are indeed key to ensure compliance.

Detailed comments on specific articles of the draft Regulation	
Article number	Comments
Art. 10.1.	The current wording which allows for deferred publication of pre- and post-trade transparency will be a step back from current industry practices. The authorization for deferred publication should only apply for illiquid markets.
Art. 11.2.	The wording related to the level of disaggregated data on pre- and post-trade transparency is confusing. It should be made clear that disaggregated data by the categories of market participants is not needed.
Article 34 & 35	Nestlé welcomes the powers allocated to ESMA to intervene on the market place under certain conditions if competent authorities have failed to address an issue. We underline the importance of the requirement that ESMA's powers should not undermine liquidity or creating uncertainty for market participants which are disproportionate to the benefits of the measure.