Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu by 13 January 2012.

Name of the person/ organisation responding to the questionnaire	Nordenergi - *the joint collaboration between the Nordic associations for electricity producers, suppliers and distributors* Olof Palmes Gata 31 SE-101 53 Stockholm Sweden

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?	We consider that there are some inconsistencies that we would like to comment: • In art. 2.1. d) the proposal of excluding persons "that are a member of, or a participant, in a regulated market or MTFs" makes the exemption completely useless. In general, almost all market participants are participants of a Regulated market or MTF. In the future, this will be even more frequent,

		especially once EMIR applies. It would be completely counterproductive to push market participants away from MTF/regulated markets to escape from MIFID. If the purpose is to make sure that this exemption does not benefit algorithmic traders, then this should be clearly said here, instead of the reference to regulated markets/MTF (See section on detailed comments). • Art. 2.1. i) should be valid for all trading instruments for risk management purposes. Thus, we consider that the definition of ancillary activity needs to be clarified (art. 2.3). Moreover, "when considered on a group basis" should be extended so that all actors trading instruments for risk management purposes are covered. (See section on detailed comments)
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	• We do not consider that it is appropriate to classify spot emissions allowances as financial instruments. An emission allowance is essentially an input factor to a production process. The operators of installations subject to the ETS system are effectively forced to trade EU allowances to ensure that they comply with emissions reductions and to avoid sanctions in case of non compliance. EU allowances primarily serve cost efficiency in climate protection and they are not investment products. • Additionally, there are provisions in existing financial regulation that would not be suitable for the carbon market and would negatively affect EU-ETS compliance operators. Specifically, capital requirements similar to those imposed on investment firms, which could derive from the current package of legislative initiatives, would impose disproportionate burdens on many EU-ETS compliance

		carbon market participants whose activities do not pose systemic risk.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping 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?	
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?	
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 theoretical distinction between OTFs and other types of trading venues seems clear i.e. discretionary powers in trade execution for OTFs, not allowed to MTFs. However it is unclear what practical implication the introduction of this new type of platform might have, in particular for the energy commodity business. It should be clear that all transactions on OTFs linked to trading in financial instruments that are related to risk management of the main business and considered ancillary activity should be exempted from MiFID. • The impact might be very wide, however the impact assessment provided by the EU Commission together with the proposals fails to provide details on the number of platforms that would need to be classified as OTFs.

	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	• OTC trading should continue to be defined as trading outside regulated markets, as currently defined in MiFID. Therefore off-exchange trading should be considered OTC. • We notice that the introduction of OTFs may reduce the scope for bespoke contracts. • We believe that it shall be possible to trade physical energy contracts in an efficient way without having them defined as financial products. If this change is not done in Annex 1, C we see the risk that physical trading is moved from today's' efficient broker platforms to bilateral trading. We believe that this development is more likely than channelling of trades which are currently OTC onto organised venues. We believe that this would lead to inefficient trading as the benefits of broker trading platforms might be strongly weakened in the future.
	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?	
	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?	
	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?	

	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 do not support the EC proposals to require that all clearing eligible and sufficiently liquid derivatives should be traded exclusively on regulated markets MTFs or organised trading facilities. There shall be no mandatory platform trading obligation for wholesale energy products since appropriate supervision and oversight has been introduced with Regulation No. 2011/1227/EC. (See section on detailed comments, Regulation, art. 24) • This could reduce the flexibility available for counterparties that are not subject to EMIR clearing obligation. Besides this obligation may have an indirect impact on all counterparties increasing trading costs.
	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?	
	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?	
	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	• There is no evidence that demonstrates that process of commodities or other derivatives can be effectively controlled through the mandatory implementation of position limits. The imposition of ex-ante position limits does constitute an ultima-ratio measure and represents a severe

	practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	• Position limits hinder effective risk management as companies would be allowed to manage their commodity price risks only up to a certain level. These limits hamper energy suppliers, for example, in forward selling their electricity production to a sufficient extent (via exchanges), or being able to buy in the emissions certificates required to produce electricity. In this light, the imposition of position limits needs to be subject to additional conditions. • A more flexible approach should be taken allowing regulators to adopt a position management approach which would be the most effective way of ensuring market integrity. • As part of the new arrangements it may be appropriate to more clearly specify the responsibilities of operators of regulated markets, MTFs and organised trading venues to ensure the positions taken by firms trading on their platforms do not undermine market integrity or create systemic risk. (See section on detailed comments) • Moreover, reporting requirements have to be proportionate for non-licensed companies. Platforms do not need real time information to be able to provide weekly position reports. In section 2 of Article 60, "in real-time" should be changed to "on a weekly basis"
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?	

	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?	
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	
	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?	
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?	
	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?	

	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?	
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	
	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)?	
	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?	
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?	
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	

	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	• The main financial services legislations that have interactions with MiFID/MiFIR 2 are the European Market Infrastructure Regulation (EMIR), the Capital Requirements Directive (CRD) and the Market Abuse Regulation (MAR). All these are currently in their legislative process. This situation might end in regulatory uncertainties for market participants/operators and ultimately will result in an excessive increase of cost to be paid by consumers. • Beyond the financial services legislation, interactions are foreseen with sector specific legislation in the energy market. In particular the Regulation 2011/1227/EC recently entered into force introduced a single oversight regime for gas and electricity markets and market participants across the entire EU. Regulation no. 1227 includes rules on registration of market participants, prohibition of insider dealing and market manipulation, transaction reporting, monitoring and enforcement rules by National Regulatory Agencies supported by the Agency for Cooperation of Energy Regulators (ACER). • For this reason we would like point on the need of clear borderlines between all these directives and regulations, with a clear definition of the scope of each one in order to avoid at any time that the same issue could be covered by several pieces of legislation. Therefore, one suggestion would be to add an exemption that could cover this aspect: (new) ***"persons whose main business is producing and/ or supplying a commodity, which is, when considered on a***

		group basis, predominantly of a physical character, and: ***i) Is subject to regulatory oversight and to regulatory reporting obligations by virtue of any binding rules applying throughout the EU specifically to spot and physical forward transactions in that commodity, and*** ***ii) Is subject also to regulatory reporting obligations in respect of standard derivative transactions in that commodity by virtue of [EMIR]"*** (See also section on detailed comments on specific articles of the draft Regulation)
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	• We underline in particular rules concerning the energy sector included in the Dodd-Frank Act approved in the US. We strongly support a better specification of the MiFID II perimeter to exclude from the definition of financial instruments all products with delivery in the future that are physically settled. This is the approach used in the US under the Dodd-Frank Act, and as such any departure from this approach in the EU would create regulatory inconsistency. • In our view the MiFID II proposals failed to clarify the distinction between financial instruments and physical contracts. Indeed financial instruments are subject to MiFID II and associated regulations whilst physical OTC gas and power contracts should remain exempt from MiFID II, but can be subject to sector-specific regulations as Regulation 2011/1227/EC. The amended Annex 1, C (6) classifies a contract that is settled physically and traded on an organised trading facility (OTF) improperly as a financial instrument.

		• Physically settled forward products in particular are of primary use for commercial firms. That would considerably increase the scope of MiFID II to pure commercial activities (i.e. gas/power contracts which aim at the physical delivery) which do not display the characteristics of traditional derivatives. • This may reduce substantially the scope of the ancillary activity exemption as this commercial activity is normally the main non-financial activity of energy firms, but would be regarded wrongly as its main financial trading business (i.e. trading with financial instruments). • In addition this has considerable implications regarding the framework of non financial firms under EMIR and the enforcement of position limits, position reporting and equivalent measures. • We strongly recommend a better specification of the MiFID II perimeter to exclude from the definition of financial instruments all products with delivery in the future that are physically settled. This is the approach used in the US under the Dodd-Frank Act, and as such any departure from this approach in the EU would create regulatory inconsistency. • Therefore, we urge for a revised definition of financial instruments excluding physically settled forward products (see section on detailed comments, Annex I Section C, Directive). • Moreover it should be taken into consideration they the trading of physical gas and power products is now subject to the Regulation No. 2011/1227/EC, which is intended to ensure integrity, transparency and oversight in energy markets; therefore these categories of energy products are

		already covered by appropriate regulation.
	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**	
Article 2.1 d)	MiFID should enable firms which are not market makers and are not executing orders and are not algorithmic or high-frequency traders, to trade on own account on Regulated Markets or MTFs without becoming subject to MiFID. This proprietary activity is not an investment service for third parties, does not involve executing client orders (i.e. not a systemic internaliser), it is not causing investor protection concerns and it is not of systemic relevance. This kind of activity does not cause the potential risks of algorithmic or high-frequency trading and, hence, need not to be addressed by specific risk controls. In addition the wording of the clarification included in the last paragraph should be better calibrated to avoid misunderstandings. *Text proposed by the Commission* *Amendment* (d) persons who do not provide any investment services or activities other than dealing on own account unless they (a) are market makers; (b) ⇨ are a member of or a participant in a regulated market or MTF ⇦ or (c) deal on own account ⇨by executing client orders ⇦ ~~outside a regulated market or an MTF on an organised, frequent and~~	

	; ⇨This exemption does not ***apply to*** persons ***exempt under Article 2(1)(i)*** who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof; ⇦(d) persons who do not provide any investment services or activities other than dealing on own account unless they (a) are market makers; (b) ⇨ are a member of or a participant in a regulated market or MTF ⇦ or (c) deal on own account ⇨by executing client orders ⇦ ~~outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them~~; ⇨This exemption does not ***prevent*** persons who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof, ***to be exempted under any other applicable exemption as long as the activity does not constitute algorithmic or high-frequency trading***; ⇦
Article 2.1 i)	This exemption should be valid for all trading instruments for risk management purposes. Thus, the definition of ancillary activity needs to be further clarified (see our suggestion in Article 2.3 below). Moreover, "when considered on a group basis" should be extended so that all actors trading instruments for risk management purposes are covered. *Text proposed by the Commission* *Amendment* (i) persons ⇨ who: ⇦ ⇨ - deal ⇦ ~~dealing~~ on own account in financial instruments, ⇨ excluding persons who deal on own account by executing client orders, ⇦ or

	⇨ - provide ⇦ ~~providing~~ investment services ⇨ , other than dealing on own account, exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, or ⇦ ⇨ - provide investment services, other than dealing on own account, ⇦ in commodity derivatives or derivative contracts included in Annex I, Section C 10 ⇨ or emission allowances or derivatives thereof ⇦ to the clients of their main business, provided ⇨ that in all cases ⇦ this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive ~~2000/12/EC~~ ⌦ 2006/48/EC ⌫ ;(i) persons ⇨ who: ⇦ ⇨ - deal ⇦ ~~dealing~~ on own account in financial instruments, ⇨ excluding persons who deal on own account by executing client orders, ⇦ or ⇨ - provide ⇦ ~~providing~~ investment services ⇨ , other than dealing on own account, exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, or ⇦ ⇨ - provide investment services, other than dealing on own account, ⇦ in commodity derivatives or derivative contracts included in Annex I, Section C 10 ⇨ or emission allowances or derivatives thereof ⇦ to the clients of their main business, provided ⇨ that in all cases ⇦ this is an ancillary activity to their main business, when considered on a group basis ***or for the owners in case of joint trading entities***, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive ~~2000/12/EC~~ ⌦ 2006/48/EC ⌫ ;
Article 2.3	The elements to be considered in order to define an activity ancillary to the main business should be clarified, in particular given the fact that the 'ancillary test' should apply (see amendment #2) only to the provision of investment services to the clients of the main business and this activity should be carefully oversight to ensure investor protection. *Text proposed by the Commission* *Amendment*

	3. ⇨The Commission shall adopt delegated acts in accordance with Article 94 concerning measures ~~In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission may ,~~ in respect of exemptions (c) and (i), to ~~and (k) define the criteria for determining~~ clarifying when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner. ⇩new The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements: ***- the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity,*** - the capital employed for carrying out the activity. 3. ⇨The Commission shall adopt delegated acts in accordance with Article 94 concerning measures ~~In order to take account of developments on financial markets, and to ensure the uniform application of this Directive, the Commission may ,~~ in respect of exemptions (c) and (i), to ~~and (k) define the criteria for determining~~ clarifying when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner. ⇩new The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements: ***- trading in all financial instruments that are related to risk management of the main business, when considered on a group basis or for the owners in case of joint trading entities, shall be considered as ancillary activity;*** - the capital employed for carrying out the activity ***compared with the capital employed for the main business*** . ***- the revenues generated from the physical markets compared to revenues generated from the financial markets. As revenues from the financial market is considered fees, taxes etc., but not the contractual value.***
Article 4 (28), (29):	**Definition of Parent Undertaking and Subsidiary** The current definitions of parent undertaking and subsidiary do not pay attention to characteristic company structures in the energy sector, which have been created during the liberalisation of the respective markets. Trading activities have repeatedly been demerged and especially municipal utilities and other small and/or medium companies have established joint trading entities to

	survive on the market. They usually have chosen the form of a jointly affiliated group. This company structure needs to be addressed in the current proposal to guarantee well-balanced and fair regulation. The following must be noted in advance: It is the purpose of the cited article 32 of Directive 83/349/EEC to extend the provisions on consolidated companies to the group of joint ventures. In fact, the proposed amendment is meant as a clarification: in both situations, the subsidiary is effectively managed and controlled by the respective parent undertakings. In the case of common control by more than one parent company, there is no reason to assume a particular protection requirement in favour of these parent undertakings. They already have the control and the access to information they require to protect their respective (investor) interests. Consequently, there is no reason to treat jointly managed companies differently. In particular, this holds true as regards the application of the group exemption in Article 2.1 (b). For reasons of proportionality and equality, the relationship between jointly managed entities and their respective parent undertakings should be considered sufficient to be covered by Article 2.1 (b). **Amendments to MiFID II:** **Proposal for revision of Article 4 (28)** 24) 'Parent undertaking' means a parent undertaking as defined in Articles 1 and 2 ***as well as a jointly managed undertaking as defined in Article 32*** of Seventh Council Directive 83/349/EEC of June 1983 on consolidated accounts; **Proposal for revision of Article 4 (29)** 25) 'Subsidiary' means a subsidiary undertaking as defined in Articles 1 and 2 ***as well as a jointly managed undertaking as defined in Article 32*** of Directive 83/349/EEC, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;
Article 59	As we proposed in question 14 it may be appropriate to more clearly specify the responsibilities of operators of regulated markets, MTFs and organised trading venues to ensure the positions taken by firms trading on their platforms do not undermine market integrity or create systemic risk. Thus we propose that article 59 is <u>added with the following text</u>:

	Amendment (new) ***1a. When applying position limits on their market participants, regulated markets, MTFs and OTFs shall take into account the extent to which the limits*** ***(a) will significantly address the threat to the orderly functioning and integrity of financial markets or of the regulated markets, MTFs and OTFs including in relation to delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union;*** ***(b) will not have a detrimental effect on the efficiency of financial markets, including liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure;*** ***(c) will hinder market participants to manage exposures related to their groups commercial activities or comply with regulatory obligations.*** ***1b. Operators of regulated exchanges, MTFs and OTFs can apply to the competent authority for a derogation from setting limits specified in this article. The operator of regulated exchanges, MTFs and OTFs must provide justification of why limits are not being applied including how market integrity will not be undermined. The competent authority will decide on whether such derogation is justified under the criteria in paragraph 1 and 2. All notifications of derogations and decisions of the competent authority shall be reported to ESMA and the European Commission.*** We believe it's fundamental that position limits do not restrict energy firms in their risk management activities. An alternative approach would be to include an amendment to specify that ***"Commercial firms shall not be subject to position limits for those products that are used for risk management activities."***
Annex I, Section C	A revised definition of financial instruments excluding physically settled forward products is needed to avoid that physical trading is moved from today's efficient broker platforms to bilateral trading. We believe that this development would be more likely than channelling of trades which are currently OTC onto organised venues. *Text proposed by the Commission* *Amendment* (6) Options, futures, swaps, and any other derivative contract relating to commodities that ***can*** be physically settled provided that

	they are traded on a regulated market ⇨,OTF, ⇦ ~~and/~~or an MTF; (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that ***can*** be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls; (6) Options, futures, swaps, and any other derivative contract relating to commodities that ***are not intended to*** be physically settled provided that they are traded on a regulated market, an OTF and/or an MTF; (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that ***are not intended to*** be physically settled, not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 24 New paragraph 2a:	The trading obligation procedure defined in MiFIR may reduce the scope recognised in EMIR. Additionally it doesn't take into consideration the rules introduced for wholesale energy markets with the Regulation 2011/1227/EC on market integrity. *Text proposed by the Commission* *Amendment* ***2.a The obligation laid down in paragraph 1 shall not apply to wholesale energy products which are subject to appropriate monitoring by the competent prudential-supervision authorities as defined in Regulation 2011/1227/EC.***
