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	**Robert F. Brandenburg III, Vice President – Risk Management / Peabody Energy Corporation**

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?	Peabody is the world's largest private-sector coal company. We fuel 10 per cent of U.S. power generation and 2 per cent of worldwide electricity. We operate a global trading and brokerage platform which transacts in coal, freight and fuel- related derivatives through two UK subsidiaries to manage risk associated with the buying, selling and delivery of coal. The UK subsidiaries have no

		non-group clients for the derivative trading activity. We welcome the steps that are being taken to ensure that there are adequate exemptions from MiFID for commercial end-users of derivatives such as ourselves. We do however have some observations on the specific language currently suggested in Article 2. We expect that revised Article 2(1)(d) will offer us an exemption but believe that one point can helpfully be clarified. We centralise commercial price risks from across our group in the two UK subsidiaries described by way of intra-group transactions. Those risks are then managed, as appropriate, by those UK subsidiaries operating on a principal basis. This structure minimises systemic risk by concentrating aggregate group exposures in one part of our overall group and netting exposure relating to risks around our group. We do not think that any part of our intra-group activity should be regarded as "execution of orders" on behalf of group companies but if this were not the case, on the current drafting, even an isolated example could potentially disapply the Article 2(1)(d) exemption for us. This could be addressed by adding onto Article 2(1)(d)(iii) wording which would permit, outside a MiFID licence, execution of orders by way of intra group activity, similar to that now suggested in Article 2(1)(i). Thus Article 2(1)(d) could read "deal on own account by executing client orders, other than dealing on own account exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings".

		We expect also that revised Article 2(1)(i) will provide us with a full exemption from MiFID licensing but we are of course in this context very interested in the debate concerning the meaning of "ancillary". Specifically, we are concerned that the dividing line between activities which are, essentially, part of risk management to hedge exposures generated by physical commodities, and "speculative" activities is very difficult to draw in relation to real-world trading activity engaged in by a firm such as ours. Physical commodities, particularly those that are mined, grown or drilled, are hedged using contracts with standardised qualities and locations. The differences between the hedged product and the standardized contract create "basis" risk. Imperfect hedging results due to various reasons including lack of market liquidity and differences in qualities, delivery timing and location. Thus, physical commodity portfolios are often hedged using an amalgam of different contracts that need to be adjusted on a daily basis. You should be aware that these techniques are significantly different from those used by financial traders in the same markets and that this activity is routine hedging of physical and price risks, and should properly be regarded as "ancillary" activity.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	
	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?	
	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?	
	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?	
	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 practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	Peabody is supportive of proposals which seek to prevent manipulative behaviour in derivative markets, particularly around those that have an element of physical delivery such as commodities. Therefore we welcome the Commission's proposals to provide regulators with suitable tools to combat manipulation. However, we believe that hard position limits set by regulators

		across all markets, as opposed to position management measures administered by exchanges, may have unintended consequences. We do not believe that position limits would be effective in preventing price volatility. Blanket position limits are detrimental to producers of commodities as they can make it more expensive, or even impossible, for producers to hedge risks. When limits are set such that hedging is unavailable, associated increased costs will have a knock on effect in the real economy, specifically increasing the price of goods to the end consumer. We believe that active position management by exchanges – which will be able to respond to specific market conditions – offers a more tailored and dynamic alternative. We therefore consider it necessary to retain the wording in the Commission proposal which envisages alternatives to hard position limits and to accept that these may offer a more suitable solution to the issues which the Commission seeks to address.
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?	In general Peabody is supportive of pre- and post-trade reporting requirements. We are concerned with the timing of required reporting related to both. Commodity derivative markets have different characteristics from traditional equity markets previously regulated by the original MIFID. Many commodity markets are illiquid and have small numbers of participants. Too much detailed information at inappropriate times can cause market instabilities that mask what normal supply and demand expectations would imply. We are very supportive of the authorisation of deferred publication in light that it allows for competent authorities to assess timing and volumetric comparability within the market in development of disclosure arrangements. In sum, we encourage requirements that will take into account the differences of each market and its relative impact on the greater financial stability of the E.U.

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?	
	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**	

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