

Review of the Markets in Financial Instruments Directive
Completed by RSJ a.s.
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**.

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?	
	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?	

<p>Organisation of markets and trading</p>	<p>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?</p>	<p>We believe that the Organised Trading Facility is not appropriately defined. We would expect a more detailed definition. It would be appropriate for the EC to provide at least some reasoning for this category.</p>
	<p>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?</p>	<p>Since the definition of OTFs is not sufficient it is hard to make a judgment.</p>
	<p>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?</p>	<p>Section 17(1) RSJ supports efforts to require all investment firms – whether engaged in algorithmic trading or not – to establish effective systems and risk controls. Both human traders and computers have been shown to be prone to make trading errors and investment firms should establish policies and procedures that mitigate the risk of such errors. An approach that is not dependent on the definition of “algorithmic trading strategy,” which is subject to differing interpretations and pressure to limit its scope, would be more comprehensive and avoid the potential for regulatory gaps. Trading limits and thresholds should be appropriate to the asset class or asset classes traded. For example, pre-trade controls for each asset should be selected to target the risk parameters most pertinent to that asset. RSJ supports efforts to minimise the market impact of challenges to a firm’s business continuity through the adequate deployment</p>

		<p>to have in place policies and procedures that can be shared and explained and that access to these policies and procedures is provided to the firm's Competent Authority. However, descriptions of algorithmic trading strategies will only assist Competent Authorities in capturing risks if it is clear what risks the Directive aims to address such that the information delivered is both targeted and appropriate. In this regard, we believe the objectives and the benefits of requiring firms to provide "details of the trading parameters or limits to which the system is subject" are unclear.</p> <p>The focus of regulators should be on the key risks associated with the deployment of an electronic system and on a firm's systems and controls, including:</p> <ul style="list-style-type: none"> • Compliance & risk control frameworks • Appropriate pre-trade limit checking • Software conformance testing • Systems capacity planning at the firm and trading venue levels • Proportionate business continuity planning <p>Section 17(3)</p> <p>The risks that Article 17(3) is designed to address are not clear. It is, therefore, not possible to opine, as the question asks, whether the article "addresses the risks involved". On the other hand, this provision, if adopted, would introduce new risks. In particular, continuous quotation regardless of prevailing market conditions presents significant risks to an investment firm. RSJ believes that firms must be allowed to pause and assess current market conditions, especially if market information is unavailable or unreliable or trading would require firms to take on</p>
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¹ ESMA: Final Report - Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, 22 December 2011 [\[Link\]](#)

		<p>among other things, requiring all standardized derivatives to be cleared through a central counterparty. By discouraging the provision of liquidity on public, transparent markets, Article 17(3) would make it more difficult for CCPs to value and manage the risks associated with cleared instruments.</p> <p>As the algorithmic trading definition is very broad, it can in principal include strategies which do not do any quoting at all – for example they can just be designed for trading large volumes smartly. It obviously does not make any sense at all to pose a continuous trading obligation on these strategies.</p> <p>RSJ believes the following measures are a more appropriate point of focus:</p> <ul style="list-style-type: none"> • Transparent error trade policies • Ensuring that reliable market data is available • Circuit breakers <p>Section 17(4) RSJ believes that appropriate supervision of all market access is an important tool in limiting risk to the financial markets. For this reason, RSJ suggests the wording be adjusted to provide that Article 17(4) requirements apply to all firms providing access to a trading venue. Such an approach would avoid ambiguity over the definition of “direct” electronic access and the potential for such an ambiguity to create regulatory gaps.</p> <p>MiFID 2 Article 19: Specific Requirements for MTFs No comments</p> <p>MiFID 2 Article 20: Specific Requirements for OTFs No comments</p>
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	<p>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?</p>	<p>Introduction</p> <p>Several provisions in article 51 of MiFID draw appropriate conclusions from the 06 May US Flash Crash. The specific points that minimize the risks of a similar event in the European markets are the proposed circuit breakers/trading halts, which allow traders to pause, regroup and resume orderly trading, and the proposed pre-trade risk controls, which make sure orders are rejected when clearly erroneous or exceed pre-determined thresholds. Other proposed provisions, however, could harm market quality and raise costs for investors, such as regulatory limits on the ratio of orders to transactions and minimum tick sizes.</p> <p>MiFID 2 Article 51: Systems resilience, circuit breakers & electronic trading</p> <p>Article 51(1)</p> <p>RSJ supports the requirements that exchange systems be resilient and have sufficient capacity and Business Continuity Planning. In particular, message volume and</p>

		<p>system capacity must be measured and projected across a range of timeframes. Typically, it is burst data rates over short time periods that cause trading platforms to fail, whilst capacity planning is often performed on a multiple of total daily volume basis.</p> <p>High message and / or transaction volumes can be managed if those messages are not submitted over a brief period of time. Furthermore, risk minimization requires trading platforms to measure, monitor, and manage capacity at multiple levels, such that platform-wide message volumes and session / customer volumes are controlled as appropriate. This approach is necessary to ensure specific users do not impact market integrity through their own excessive data-traffic. It remains a concern that some platforms are run closer to their limits in dealing with high data rates.</p> <p>Finally, while Article 51(1) focuses on trading platform execution and matching systems, to fully address the risks associated with inadequate capacity planning it is advisable to encompass post-trade settlement systems within this analysis.</p> <p>Article 51(2)</p> <p>RSJ supports a requirement for trading platforms to reject orders that exceed pre-determined volume and price thresholds or are clearly erroneous. It should be noted that pre-determined thresholds should be asset specific. In addition, we agree that markets should establish volatility controls to pause trading when there is a significant price move. Finally, rules to break or modify trades should be clear and objective so that there is certainty for market participants. This certainty is especially important during periods of market stress, as uncertainty about whether a trade might be cancelled or not could lead some market participants to withdraw from the market.</p> <p>Article 51(3)</p>
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		tick size will often prevent participants from showing their best prices, which will limit competition as the participants cannot compete on price anymore.
	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?	This is an appropriate requirement.
	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 believe that moving the trading of OTC derivatives to public markets is a very good step. It makes markets transparent, efficient and diminishes systemic risk. For most derivatives there are no real obstacles to move those to public markets. The only obstacle is banks resistance.
	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?	Helping the SMEs to have an easier access to public markets should make it easier for them to raise capital.
	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?	
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?	It would be appreciated if the ESMA would have a continuing dialogue with industry. It is worth noting that ESMA already requested a questionnaire in the past regarding the market structure. However we believe it is not good that ESMA is going to implement the Level II to Mifid II outside the EC legislative process.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	No, no changes are necessary.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	Interactions with MAD and ESMA guidelines are very important.
	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?	No there is no. It appears that a lot of legislation is going to be introduced within the Level 2. We strongly believe it is not a good balance.
Detailed comments on specific articles of the draft Directive		
Article number	Comments	
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