

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**.

Answers below provided by Siemens AG

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 it crucial to make sure that corporates can access derivatives markets for hedging purposes without the risk to be fully drawn into MiFID/MiFIR. Therefore, the extended definition of “ancillary” activities in Art. 2 (3) MiFID is positive, although we are not sure capital employed is a very relevant criterion for the relative size of these activities. However, Art. 2 (1) (ii) MiFID includes “ <i>participant[s] in a regulated market or MTF</i> ”, which is unsuitable, as many corporates are already using platforms for certain standardized derivatives, and the expression “participant” might capture any customer of such exchanges or platforms. This article should be limited to registered participants (i.e. professional traders or brokers) in regulated markets.

	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?	While regulating third country access seems plausible, it is important the relevant rules are not prohibitive, as this would only reduce the number of available alternatives from an end-user point of view. Therefore equivalence of foreign regulations to MiFID/MiFIR should be defined in terms of intent rather than in terms of specific rules (maybe accredited by ESMA like in EMIR).
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?	There seem to be misconceptions about the roles of players in current derivative markets. While “regulated markets” would include trading platforms with secondary market turnover in highly standardized products, the other three, MTF, OTF and SI, would usually not (see also answers on Q7). Examples are widely used venues like 360T and FXAll. Common to derivative transactions off regulated markets is that what is traded will be of individual character to a degree (e.g. tenor, basis price, size),

		<p>and therefore in most cases not qualify for secondary trading. In other words, these transactions are still OTC, only their execution is done in a more systematic (and transparent) way. Order book concepts are not suitable here, as end-user transaction requests will almost never be identical (also important for the transparency rules envisioned, see Q20pp). Existing market players typically act as intermediaries for third party transactions. In some cases they may trade on own account with the customer, and close out their position over a certain period of time thereafter. This is facilitating liquidity and pricing of large or otherwise nonstandard orders (typical for corporate end users). We believe that also OTFs should be allowed to act on own account, as some platforms are single-dealer venues, e.g. Swiss Key.</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>It is highly important for corporate end users that the OTC market continues to exist to allow tailored hedging. As illustrated in our answer given on Q6, this includes partially standardized structures done on platforms that could qualify as MTF or OTF, and purely bilateral transactions done with banks which might be categorized as SI. The more standardized transactions, e.g. currency transactions where only individual basis prices or maturities are required, but which are small in size for the underlying instrument, are more likely to be done on a platform. The advantage for the user is that several banks on the platform may offer quotes without the need to contact them individually, fostering transparency. The important difference to an exchange is the user can define what exactly he requires, instead of having to choose from a limited number of instruments actively traded. The more specific the required structure is, the more probable is a bilateral execution with a bank. We do not see that the new MiFID will change that to a significant degree, as it has</p>

		evolved over time as the most effective way for corporate end-users. OTC should primarily be defined by nature of the transaction: if it is not fully standardized, and therefore not traded on exchanges/regulated markets, it should continue to be considered OTC. We would also welcome a clarification of the SI definition to make sure that bilateral execution is neither defined OTC or not purely by counterparty 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?	
	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 are not convinced a trading obligation on specific venues would increase post-trade transparency (as OTC derivatives will already be reported to trade repositories according to EMIR), and believe pre-trade transparency rules attached could actually be harmful (see answers to Q22). The exemption to the trading obligation for non-financial counterparties linked to Art. 7(2) EMIR is clearly helpful, but only for those below the clearing threshold. Companies crossing that line would be obliged to trade on platforms even for their hedging transactions. The

		<p>result could be serious problems to access the necessary tailor-made derivatives and increased hedging cost due to transparency rules (see answers to Q22). Further effects could be mismatches in hedging and lower hedging volumes, ultimately leading to higher risks remaining on corporate balance sheets. We therefore recommend adding a further criterion which takes into account whether the purpose of the derivative transaction is hedging or not, which could refer to the definitions of “hedging” according to EMIR. This would, irrespective of thresholds, also solve the problems with transparency rules we describe under Q22. As corporate hedging transactions are no retail products, investor protection should not be an issue here. Supervisory requirements are covered via EMIR as mentioned above.</p>
	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	<p>We are in principle sceptical about the benefit of trading bans as a tool to stabilize markets. In any case, we think it should not be the operators of trading venues being responsible for setting any other limits than those that apply already today for their venues. Additional emergency measures should be the sole responsibility of the regulators. An important point for us is that</p>

	producers and consumers which could be considered as well or instead?	<p>any limitations should not apply to non-financial hedging, as these transactions are already per definition not contributing to systemic risk. Another cross-reference to EMIR would be helpful here.</p> <p>Art. 60 MiFID requires participants of regulated markets, MTF and OTF to report to their operators “<i>details of their positions in real time</i>” so they can forward that to “<i>competent authorities on request</i>”. We do oppose this requirement for several reasons. Firstly, we do not understand the logic behind it, as venue operators will already hold the relevant information about trades done on their systems. Secondly, there is a high probability of double reporting, as this information will also go into trade repositories under EMIR rules, at least from venues other than exchanges (compare answers to Q7). Thirdly, a continuous “live reporting” requirement seems overblown for occasional inquiries by authorities (“<i>on request</i>”), as its implementation will require additional structures in corporate back offices.</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?	
	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?	<p>We believe the pre-trade transparency rules envisioned are not appropriate for any other trading venue but exchanges. They seem to reflect an incomplete understanding as to how existing trading venues operate (see answers to Q6 and Q7).</p> <p>Transactions done via MTF, OTF and SI will mostly be OTC derivatives by nature, and for those an order book concept does not make sense: these transactions are designed to stay with the original buyer, and will not be traded in secondary or retail</p>

		<p>markets. Providing “<i>prices and the depth of trading interest</i>” on a “<i>continuous basis</i>” on such individual transactions will, in highly liquid market segments, at best be meaningless for the public. In illiquid market segments, due to an exotic underlying, unusual tenure, order size, etc., the rule could be harmful for a corporate user placing an order. In case the order is very exotic this may allow to identify the sector, or even the individual firm acting. In any case the result would be a price increase for the bespoke transaction, including follow-up orders if the total amount sought is split. The best way to avoid these unwanted effects is to exclude hedging transactions defined according to EMIR from the requirement (see Q11). At the very least, counterparties not subject to the trading obligation of Art. 24 should be exempted, as otherwise the result will be that non-financials below the clearing threshold will avoid to trade on platforms - a result that cannot be in the interest of regulators.</p> <p>The same publication issues arise for trades with an SI, which, due to the widened definition scope, will include many bank counterparts of corporate users. However, the SI proposals include an additional problem: the requirement to quote the same price to all clients. SIs are rightfully differentiating their prices due to different levels of counterparty credit risk: cleared trades will be cheaper than uncleared ones, and those with highly rated counterparties cheaper than those for lower rated ones. In a “one price” policy, the result will be a higher price for almost everyone, as it has to suit also the more risky counterparts from a bank perspective. This is not only unfair to more solid institutions, but also a disincentive to use central clearing. To note, also for an SI the usual counterparty in a derivative transaction will not be a retail investor, but a professional client. Hence, an SI should be allowed price differentiation, as long as this relates to counterparty credit risk.</p>
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	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?	As corporates are frequently involved in non-standard transactions, the important issues in post-trade transparency are reporting delays and volume masking calibrated in line with transaction size and liquidity. Without it, two problems will arise: firstly, if a larger hedging deal is split into smaller orders (a standard procedure for less liquid market segments or exotic underlyings), the prices for the following tranches will rise - exactly what the splitting was supposed to avoid. Secondly, banks would be unwilling to take large client positions onto their book, as the dealer risks the market moving against him before he has unwound his risk. This, like on the customer side, is often done via smaller order units over a certain period of time. The result would not only be that the execution prices would increase to buffer this unwind risk, but also that some illiquid transactions a corporate would look for as a hedge might not be available anymore. Therefore, the framework of delays should allow market participants sufficient time to manage their positions prior to a disclosure being made.
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?	<p>From a corporate point of view, the legislation MiFID has to be aligned with most is EMIR. If the exemptions EMIR includes for non-financial users are not reflected in MiFID, these relief elements will be obliterated. The respective issues in MiFID are the platform trading obligation (see answers to Q11), position limits and real-time reporting for commodity derivatives (see answers to Q14), and pre-trade transparency requirements (see answers to Q22). Furthermore, Art. 31 and 32 MiFIR allow ESMA and national authorities to restrict or prohibit certain financial instruments and activities under only vaguely defined circumstances. A corporate end-user seeking a hedging transaction should not be hindered to do so, as this type of business would not be speculative or otherwise damaging to markets. The same logic applies to position limits imposable by ESMA (Art. 35 MiFIR) or local authorities (Art. 72 MiFID).</p> <p>In all these cases, there should either be exemptions for non-financials not subject to the clearing obligation (Art. 5 (1) EMIR), or for hedging transactions still to be defined in EMIR. The former proposal might be easier to administrate as only the clearing threshold has to be monitored, the latter would make sure hedging transactions are not endangered under any circumstance.</p>
	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		
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Detailed comments on specific articles of the draft Regulation		
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