

## **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](mailto:econ-secretariat@europarl.europa.eu) by 13 January 2012.**

Name of the organisation responding to the questionnaire	<b>State Street Corporation</b>
--	---------------------------------

<b>Theme</b>	<b>Question</b>	<b>Answers</b>
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?	State Street has no comment so far on this point.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	State Street has no comment so far on this point.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	Whilst we do not have any specific adjustments or changes to the inclusion of custody and safekeeping as a core service, State

		<p>Street believes that the implications of this reclassification of custody and safekeeping need to be properly assessed to avoid unintended consequences for what is an essential function within the investment chain and which significantly enhances to investor protection. As part of such an analysis, consideration must also be given to the interaction of such a change with other pieces of legislation such as the review of the Investor Compensation Scheme Directive (“ICSD”), the Securities Law Directive (“SLD”), and the ongoing work on Central Securities Depositories (“CSD”) (see also question 28).</p>
	<p>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?</p>	<p>Whilst State Street in general is supportive of the introduction of a harmonised regime, as a global firm, we frequently need to use the services of firms that are based outside of the EU. Under the current MiFID rules there is no requirement for these third country firms to obtain EU authorisation, however under the proposed new rules this will change as they would be deemed to be providing a core service. We believe that this change is not only onerous, but appears to over-ride the requirements laid down in the Alternative Investment Fund Managers (“AIFM”) Directive and the Undertakings for Collective Investment in Transferable Securities (“UCITS”) IV Directive. We would therefore suggest in cases where the third country firm has no direct engagement with the underlying client, that the firm be exempt from authorisation as the EU firm will achieve compliance with MiFID standards by means of contractual agreements with the third country firm.</p>

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?	State Street does not oppose the suggested corporate governance requirements. We are however not convinced that MiFID 2 is the best place for addressing such issues. In addition, we do not agree with the proposed explicit restriction of the number of directorships. Instead of setting explicit limits, it should be left to national competent authorities to decide on a case-by-case basis, based upon the nature and extend of relevant mandates. State Street therefore suggests deleting points (i) and (ii) in Articles 9 and 48 MiFID 2 and retaining the relevant provisions allowing competent authorities to authorise the combination of more directorships taking into account individual circumstances and the nature, scale and complexity of the investment firm's activities.
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?	<p>Since the initial Commission consultation on the MiFID review, growing concerns have appeared with regards to the suggested new trading venue category of Organised Trading Facilities ("OTFs") and how workable it is going to be, in particular in the context of Broker Crossing Networks ("BCN") and Systematic Internalisers ("SI").</p> <p>Currently, within a BCN when two buy side institutions cross, the broker who owns the BCN faces off against both parties and those trades settle versus that broker. In an OTF framework, as the broker providing the OTF would not be able to facilitate the trades as "riskless principal" they would need to settle versus the other buy side institution, and within a CCP. We believe this is unworkable for most institutions. Under "Best Execution" policy every buy-side institution would have to be pre-cleared as a "market counterparty" which is neither realistic or practical. Furthermore, it is unclear to what extent SIs will be allowed to</p>

		<p>also provide OTFs which, if they could not provide OTFs, would result in a reduction of choice of trading venues and a fragmentation of market liquidity, both with suboptimal outcomes for investors.</p> <p>With regards to derivative trading venues, the concept of Swap Execution Facilities (“SEFs”) as introduced by the US Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) could be used as a basis for regulation of such venues in the EU.</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>In our view, instead of strengthening financial markets, the proposals are likely to result in further fragmentation of markets and trading venues because of the forcible segregation of BCN (agency trades) and SI (principal trades), thereby making the environment more difficult for institutional investors that often place large orders. Executing such orders will become more difficult given the more fragmented market liquidity thereby leading to increased trading costs and inefficiencies to the detriment of investors.</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>State Street would like to focus its comments on the requirements regarding algorithmic trading. In general, the definition of what constitutes algorithmic trading as set out in Article 4.2 30) MiFID 2 is too wide. It therefore risks capturing (trading) activities that should not be considered algorithmic trading which is likely to entail negative unintended consequences.</p> <p>More specifically, the suggested Article 17.3 MiFID 2 requires</p>

		firms to commit liquidity on an ongoing basis at all times. This would be imprudent, in particular in times of volatility as firms would either refrain from this activity (thereby further reducing the choice of trading venues) or require order book priority in exchange for the liquidity commitment. Such a development is not in the interest of our clients.
	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?	State Street has no comment so far on this point.
	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?	State Street has no comment so far on this point.
	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?	State Street supports the suggested requirement to move all derivatives which are eligible for clearing and sufficiently liquid, to either an RM, MTF or OTF, provided that the criteria for the selection of derivatives eligible for trading are well designed and carefully calibrated. Special importance needs to be attributed to the definition of when a derivative can be considered ' <i>sufficiently liquid</i> '. We therefore welcome the proposal that ESMA should conduct a public consultation before submitting its draft implementing technical standards to the European Commission. However, we would encourage ESMA to work closely with the industry on this definition from the outset to ensure that a workable definition is achieved to ensure that that both the regulatory objective as well as the proper functioning of

		the derivative markets can be ensured.
	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?	State Street has no comment so far on this point.
	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?	Non-discriminatory access to a CCP is of key importance and we welcome and support the proposals in this regard. Similarly, for trading venues, access and ownership criteria must be objective and non-discriminatory to facilitate competition and to allow for the benefits of derivatives trading to materialize, thereby enabling the emergence of new platforms and increased competition among derivatives trading venues.
	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?	State Street has no comment so far on this point.
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?	In our view, it should be clarified that non-monetary benefits such as broker research, financial analysis or pricing information systems may continue to be received as long as they do not impair the ability of investment firms to pursue the best interest of their clients. Such non-monetary benefits add considerable value to investment firms in their investment decision making

		process, and are also subject to the existing MiFID requirement that they enhance the quality of the service. We therefore believe that it should be specified that goods and services which assist investment managers in the provision of services to their clients and do not impair the duty of the investment manager to act in the best interests of clients continue to be permitted under MiFID.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	Whilst we understand the regulatory objective behind the suggested changes to the execution-only regime in Article 25.3 MiFID 2, we do not believe that the current wording is appropriate and we are concerned that it will create uncertainty as to the products that will be able to benefit from the regime. In particular, the term ' <i>embed a derivative</i> ' has in the past already created uncertainty and differences of opinions when used in other pieces of legislation. Moreover, the suggested criteria of an incorporated ' <i>structure which makes it difficult for a client to understand the risks involved</i> ' is too vague and creates too much legal uncertainty as to whether products would be in scope of the regime or not.
	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?	State Street has no comment so far on this point.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	The proposals suggest reclassifying municipalities and local authorities as retail investors. It is foreseen that such entities can ask for professional treatment, subject to certain criteria and tests. Based on our experience with the current regime, State

		<p>Street does not see a need to introduce significant changes to the client categorization rules. We note, in this respect, that the current system provides protection by allowing a professional client to request to be categorized as a retail client if it believes that it lacks the appropriate knowledge. State Street would therefore strongly recommend against the approach included in the MiFID 2/MiFIR proposals since it does not take into account the vast diversity which exists among these investors in terms of size, knowledge, experience as well as investment needs and activities. Indeed, the suggested approach is, in our view, far too rigid and is not justified by current market realities.</p>
	<p>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?</p>	<p>State Street generally supports efforts to improve the coordination of product intervention in the EU. It must however be ensured that any decision to ban a certain product or activity, whether on European or national level, is fully evidence-based, follows extensive consultation and includes a thorough cost/benefit analyses. It is of key importance, in this respect, that the process and the criteria leading to such a ban are clear, objective and transparent and that bans are only imposed if there is a significant risk for the overall stability of European financial markets. Furthermore, firms must be given the right of appeal if they have valid reason to believe that the criteria for a ban as set out in Articles 31 – 33 MiFIR.</p>
Transparency	<p>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</p>	<p>One important feature of MiFID was the introduction of pre- and post-trade transparency in European equity markets. State Street supports, in this respect, further efforts to enhance market transparency and the extension of the pre-trade transparency</p>



	needed and why?	requirements to equity-like instruments since it is generally beneficial for the efficiency of equity and equity-like markets.
	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?	<p>Mandatory market transparency in non-equities markets can have unintended consequences and therefore requires careful balancing between the need for price formation and the need for adequate liquidity. As such, we believe that abrupt, prescriptive change should be avoided in favour of evolutionary change driven by the market and encouraged by proper regulation towards new trading venues with enhanced transparency features.</p> <p>When considering regulating pre- and post-trade transparency in fixed income markets, it needs to be recognized that not only are mostly professional investors active in these markets, but also that the universe of instruments is far greater (estimated at over 300,000 instruments) than in equities. The underlying structure and dynamics of the debt market are very different to equity and the '<i>equitisation</i>' of fixed income markets as envisaged in MiFID 2/MiFIR needs to be evaluated for a potential impact on the liquidity of these markets.</p>
	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?	Given the very general nature of the Regulation's provisions and the lack of detail, it is difficult to comment on the appropriateness of the provisions. Whilst we welcome that the proposal recognizes that the transparency regime needs to be calibrated to the respective instrument that is traded, certain principles of the relevant regime should have been set out in the Level 1 text to provide some more clarity on the envisaged regime.

	<p>23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?</p>	<p>Investment managers have a duty of best execution towards their clients and market impact minimization is a key part of that duty. Knowledge of large orders will move the price very quickly, therefore mechanisms such as waivers/delayed publication, or the possible exemption from pre-trade transparency rules are necessary. Careful calibration of post-trading transparency publication rules is also very important.</p>
	<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)?</p>	<p>The availability and comparability of data has become more costly and difficult since the introduction of the MiFID regime. State Street therefore welcomes and supports measures to improve the quality and consistency of data, to reduce the cost of post-trade data for investors and, in particular, the introduction of a consolidated tape. We believe that these suggested improvements to the MiFID regime will be important in ensuring that the goals and benefits of transparency, competition and investor protection are achieved. We therefore support the Commission's proposals in Article 11 MiFIR regarding the obligation to offer trade data on a separate and reasonable commercial basis. We also support commercial solutions for CTPs in principle, but fear that commercial drivers towards comprehensive CTPs will be insufficient. We therefore consider that the European Commission should be equipped to mandate a single consolidated tape if necessary.</p>
	<p>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</p>	<p>State Street has no comment so far on this point.</p>

	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?	State Street has no comment so far on this point.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	State Street has no comment so far on this point.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	State Street encourages the consideration of in particular the review of the ICSD, the SLD, and the ongoing work on CSDs with regards to the scope and the reclassification of custody and safekeeping as well as the European Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (“EMIR”) regarding access to CCPs.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	As a global financial services provider that is headquartered in Boston, Massachusetts, we would urge the European institutions to take into account the provisions of the Dodd-Frank-Act, e.g. in areas such as derivatives trading, to avoid costly, inefficient and artificial fragmentation of global financial markets.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	State Street has no comment so far on this point.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MiFID/MiFIR 2?	Considering the MiFID 2 / MiFIR proposals, too many details of the MiFID 2/MiFID regime are being pushed to Level 2. Whilst it is understandable that the Level 1 text cannot cover all details

		which are better dealt with in Level 2, we believe it is important to set out more specific guidelines for the Level 2 measures. Given this lack of clarity, it is not only difficult for the industry to comment on some of the proposals, e.g. the envisaged pre- and post-trade transparency regimes for non-equity markets, but it also increase the uncertainty around the future regulatory framework for securities markets in the EU. Furthermore, State Street would like to stress that the significant number of envisaged MiFID 2/MiFIR Level 2 implementing measures will represent a significant challenge to ESMA given its still very limited resources and the number of implementing measures that other pieces of EU legislation such as the AIFM Directive, the short selling Regulation, EMIR and the Credit Rating Agencies Regulation require.
Detailed comments on specific articles of the draft Directive		
Article number	Comments	
Article ... :		
Article ... :		
Article ... :		
Detailed comments on specific articles of the draft Regulation		
Article number	Comments	
Article ... :		