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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.**

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?	Art. 2.1(d) is drafted too widely. It encompasses most if not all market players, as they are de facto for one or the other segment of their trading activity a participant or member of a regulated venue. For example in the Nordic Market, power can only be traded via Nordpool. A small player in that market is not automatically a financial firm. The current wording of the exemption does not reflect that difference. An additional criteria should be introduced, having regards to the volume of commodity trading on all regulated venues. The ancillary activity exemption must be clearer defined to

		reflect the aim of Recital 88. The current wording leaves uncertainty as to the intention of the European legislator, which will undermine the market. The exemption should immediately provide clarity as to its scope which is yet undefined and left to a later drafting by the COM. This will allow a uniform and consistent definition. The ESMA should be associated to the drafting of the level 2 legislation in this regards.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	No. Emission allowances are a licence to emit one ton of CO2. It's a compliance instrument and can not be qualified as a financial instrument without undermining the EU ETS and the compliance trading, buying and selling (where by essence trading does not occur on a voluntary discretionary basis, but for compliance purposes). The impact of such definition on other legislations (i.e EMIR) will lead to complications (for instance concerning long term Emission Reduction Purchase Agreements, in the framework of the CDM).
	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?	No. The definition does not take into account the realities of commodity trading. Even when traded via a broker, physically delivered energy cannot be assimilated to a financial instrument. It is not a derivative and has not the characteristics of one either.
	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 should encompass all trading occurring outside of a regulated market, off-exchange. The introduction of OTFs may lead to the market moving away from broker trading platforms, which per se is a disadvantage. The status of physical forwards remains unclear under MiFID II. It is essential to clearly carve out these contracts, so as not to assimilate them to financial instruments (including because of the impact such classification may have for non financial firms under EMIR). The Dodd Frank Act excludes these explicitly. Such a classification also raises a problem as regards call or put options, which are not to be considered as financial instruments either, because of their dual nature (otherwise: how shall they be cleared? When? To whom shall they be reported?): when the option is exercised, the transaction becomes a physically settled forward.
	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	On position limits: We do not support ex ante position limits. These measures interfere in company internal risk

	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?	management and with beneficial legitimate trading activities. The current provision on position limits doesn't mirror the EU's intention to reduce and prohibit excessive speculation. The widely drafted clause simply opens for discretionary market intervention, without further constraints. On position reporting: Where the trading in financial instruments occurs on own account the positions can be determined easily by the organised venues themselves, as all data is available to them. The reporting obligation should be limited to intermediary trading, where the final beneficiary of the transaction is not apparent to the organised trading venues.
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?	The ESMA could be associated when drafting the definition of ancillary activities, in article 2.3
	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 scope of MiFID and the definitions therein will determine the scope of EMIR. Thus it is capital to adequately and precisely define Financial Instruments (f. Ex. for the "commercial purpose" test in Annex C1.7, one should bear in mind that many physical OTC derivatives may be cleared under EMIR requirements. Nevertheless, the contracts will be physically delivered and are no financial instruments) In the same way, the definitions in MiFID II are relevant for MAD, and indirectly thus for REMIT (which applies when MAD does not apply)
	29) Which, if any, interactions with similar requirements in	The scope of MiFID should not extend over the Dodd Frank

	major jurisdictions outside the EU need to be borne in mind and why?	scope. These legislations have the same basis and should have the same extent, as defined by the G20 commitments.
	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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