Review of the Markets in Financial Instruments Directive
TOTAL's submission

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Your contact point: François-Régis Mouton
francois-regis.mouton@total.com
Tel.: + 32 2 288 94 17

Review of the Markets in Financial Instruments Directive
Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP
Submission from TOTAL S.A.

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?	TOTAL is supportive to exempt all hedging activities to support industrial activities as well as exempting ALL intra group activities. Removing the MiFID I exemption for energy companies would increase the cost of hedging energy price exposure including for central clearing (as prescribed by the European Market Infrastructure Regulation EMIR) and for capital requirements under the future revision of the Capital Requirements Directive (CRD). A reduction in hedging activity in energy markets would reduce liquidity, and more

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		importantly reduce transactions linked to physical markets. The Commission's proposed exemption for non-financial counterparties under MiFID II endeavors to be accommodative. However, a clear text would help avoid restrictive or inconsistent interpretations that prevent energy companies fully optimizing their market risk. In particular, managing energy market price risk is a central feature of today's energy industry (and less ancillary in nature).
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	It is appropriate to include them in the MiFID II scope, , **but not to define them as financial instruments, since industry is a mandatory buyer of the allowances.**
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	Intermediaries between participants and clearing houses or "clearers" need to be included in the MiFID II scope.
	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?	It is appropriate. Access for companies in third country companies with equivalent legislation to that of the EU is vital given the global nature of this activity. Determining the regulatory equivalence of the regime of a third country should principle based rather than based on specific regulations in order not to overly restrict this process.
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?	

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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?	OTF definition is not precise enough, so we do not understand what is the implications/consequences for our metiers. We do not even understand what Commission's objective is actually. We are sympathetic to the views expressed by the EFET in its submission on this question. EFET's answer stipulates: "The theoretical distinction between OTFs and other types of trading venues seems clear. However the practical implications of this definition are unclear. EFET is concerned about the implications of the requirement to trade on organised platforms, including OTFs (see our answer to question 11). The impact assessment provided by the EU Commission fails to quantify these implications, and the potential impacts might be widely underestimated."
	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?	Clearly, pure OTC physical trading products which are NOT and CANNOT be traded through an exchange or a MTF, should NOT be covered by MiFID II. Not all OTC products can be traded on Regulated, MTF or OTF facilities
	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	

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	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?	Title V is potentially dangerous: 1/ Intra group transaction need to be totally exempted and 2/ as all markets are NOT organised. MiFID II and EMIR can put a clearing obligation onny on markets which are already "collateralised". We are sympathetic to the views expressed by the EFET in its submission on this question. EFET's answer stipulates: "A large share of energy derivatives in the EU are currently traded OTC on broker platforms. These markets are still in their infancy, and they remain for the most part illiquid, bespoke, and non-continuous. These markets still require broker support to function efficiently: specialised brokers 'work the market' by monitoring interests from different parties and encouraging buyers and sellers to amend their orders to match market needs. Such services are an essential route to market for both established players and smaller new entrants who may not have the resources to scrutinise market developments continuously. Importantly, these trading arrangements provide flexibility without impairing transparency: interests and transactions

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		are posted to all market participants, not just a 'club' of major players, and serve to establish trusted market indexes. Moreover, the preservation of the OTC market is compatible with the growth of central clearing, which is another central objective of MiFID and EMIR: it is possible to execute a trade OTC and then hand over this trade to a clearing house for clearing and settlement (energy companies already use this type of hybrid arrangement at present). The important feature of the existing arrangements is that different types of platforms compete against each other to accommodate new developments, meet the needs of market participants, and support the development of evolving energy markets. As such, EFET is concerned that the proposed measure in Title 5 may reduce the range of services and routes to market available to market participants. There is also a risk that this requirement may increase transaction costs by imposing new requirements on existing trading venues. To be clear, we see a risk that these provisions might fragment the market if the majority of participants move their trades to regulated platforms. Such a development would reduce liquidity and make price discovery more difficult, which goes against the stated objectives of the measure. Against this backdrop, EFET recommends the following. – The OTF category should be maintained. Where derivatives trading has to be moved to regulated venues, then the range of venues that can host these trades should include voice brokers.

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		– The liquidity test should be strengthened. The Commission's proposal specifies that ESMA should assess the liquidity of a class of derivatives by reference to the size and frequency of trades and the type and number of counterparties. EFET would recommend adding the bid/offer spread to this list of criteria as it is in the main indicator of liquidity used by energy market participants."
	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?	We consider that before imposing position limits, an assessment of the distribution and size of positions in the market must be done (based on information from trade repositories imposed by EMIR). In particular, use of position limits must focus on markets in the days before contract expiry when liquidity declines rapidly.
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient	

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	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	

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	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?	

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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	**Comments**	

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Detailed comments on specific articles of the draft Regulation	
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