Union Asset Management Holding AG

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?	We are concerned about the impact of the proposed amendments to Article 3 para. 1 for exempted investment advisers. Under Commission's proposal fund intermediaries shall be required to comply with a number of burdensome MiFID rules, in particular: - standards for the management body in Article 9, - notification of qualifying shareholders in Article 10 and foremost, - contribution to an Investor Compensation Scheme (ICS) or an equivalent system. Concerning the latest, it must be kept in mind that the financial strength of individual intermediaries is fairly limited as compared to corporations and different treatment might be necessary for proportionality reasons. **Therefore, we think that investment advisers should not be under all circumstances required to contribute to an investor-compensation scheme, but instead, be allowed to ensure investor protection by means of professional indemnity insurance with certain minimum coverage.** Such

		approach would also warrant a level playing field as compared with distribution of insurance products. **Moreover, we see no reason to exclude the sole reception and transmission of orders from the scope of activities of exempted intermediaries.** From the investor protection point of view, it makes no sense to allow for exemption of investment advice, but not for reception of orders by self-advised clients. Also, the current wording appears to prohibit reception of subsequent subscription orders on the basis of past advice, or even mere redemption orders from clients.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	No comments.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	**Yes, we see the need for additional adjustments in order to provide for non-application of appropriateness test in Article 25 para. 2 of MiFID draft.** Due to safekeeping of assets being qualified as a licensable investment service, the requirements for appropriateness test in the newly drafted Article 25 para. 2 would apply to the opening of client accounts. However, in this case it makes no sense for investment firms to investigate into knowledge and experience of clients as the service of asset safekeeping should be considered appropriate regardless of the client's individual background.
	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?	No comments.
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	We generally agree with the proposal of the COM in order to clarify the requirements for the composition and responsibility of the management body of investment firms. However, we are of the opinion that there should be more flexibility to allow for different

	effective, and why?	kinds of business models that can be observed in the market. For example there should be a possibility for directors of "corporate-type investment funds" (e.g. Investment-AG or SICAV) to have several mandates in case those funds are managed by the same management company. Requirements for geographical diversity within the board should take into account that not every investment firm is operating globally. In case of local savings banks (in German "Sparkassen") or cooperative banks (in German: "Genossenschaftsbanken") there should be no need for geographical diversity since those institutions operate only locally.
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?	The definitions of Organised Trading Facilites (OTF) and Systematic Internalisers (SI) do not allow so-called "Crossing Networks". Crossing Networks are internal venues of market participants currently not being subject to a regulation. Within a Crossing Network, the system determines if another client of the operator or the operator itself might be counterparty to an order provided to the operator (subject to best execution). Using Crossing Networks avoids transaction fees and allows better prices. The current MiFIR-Proposal excludes Crossing Networks because (i) according to the definition of Systematic Internalisers, the investment firm deals on own account by executing client orders outside a regulated market or an MTF or an OTF, while (ii) the operator of an MTF or OTF shall not trade against his own proprietary capital in order to maintain its neutrality (see No. 3.4.1 of the Explanatory Memorandum being part of the MiFIR-Proposal). Banning Crossing Networks means higher transaction costs and a split of liquidity. A smaller liquidity might lead to less efficient order

		execution and higher costs for market participants and clients.
	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?	No comments.
	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?	No comments.
	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?	No comments.
	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?	No comments.
	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?	a) The new obligations of market participants being implemented via MiFIR and EMIR require the usage of software offered by companies respectively organisations who oblige all users to apply the ISDA documentation on the relevant transactions. Since those companies seated in the U.S. are not subject to EU-regulation, they are by-fact allowed to offer their services in a discriminatory manner. Some European market participants favour the usage of a transaction documentation other than the one issued by ISDA, because they are neither speaking English, nor are being interested in agreeing on unnecessary complex provisions governed by US or UK law. Since it will not be possible for COM to enact obligations applying to extraterritorial companies, ESMA should consider details like the kind of the applicable provisions when deciding on the trading obligation

		regarding an OTC-Derivative. If this draft would come into force it is likely that European market participants search for work-arounds (e.g. usage of more complex derivatives, purchase of tailored certificates which cannot be collateralised) or abstain from mitigating existing risks via the required financial instruments. b) We also believe that COM should be aware that regulations might be faster than the required adjustments to the markets infrastructure. If ESMA determines a further specified OTC-Derivative being subject to a so-called trading obligation (cf. Art. 24 and 26 MiFIR), because trading is offered by the provider of an OTF, ESMA should consider whether or not the provider is able to setup all market participants before the trading obligation becomes binding. c) Since COM has decided to consider UCITS, AIF and their managers as "Financial Counterparty" (cf. Art. 2 para. 6 of EMIR), it is required that trading venues consider the specifics of investment funds. In some member states, investment funds are constituted in accordance with contract law (cf. Art. 1 para. 3 of Directive 2009/65/EC) and therefore do not have a distinct legal personality. In such cases it is the responsible investment management company who enters into transactions for the joint account of the investors of the relevant investment fund and has to ensure that assets and positions belonging to different investment funds are segregated as set-out in Art. 8 para. 1 of Directive 2010/43/EC. Therefore ESMA should evaluate if UCITS, AIF and their managers can access the trading venue at which this derivative is admitted for trading (cf. Art. 26 para. 2 (a) MiFIR) without breaching their obligation to segregate different investment funds.

	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?	No comments.
	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?	In our view no. Currently market participants and exchanges are working on the implementation of EMIR. An exchange requires the details of the transaction to be cleared. The transmission of these details takes place by software like MarkitServ or DerivServ. Unfortunately the relevant software providers push for the applicability of the ISDA Definitions and discriminate market participants who have agreed on a derivative being subject to definitions other than those issued by ISDA (the software user agreements include provisions by which any transactions become subject to the ISDA terms regardless of the content agreed by the counterparties of the transaction). Without considering this circumstance, European market participants are coerced agreeing on unnecessary complex definitions, not available in their mother language, subject to either UK or US law (also see question no. 11). COM should protect European market participants from any such discrimination and paternalism.
	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?	It should be ensured that any supervisory measures only apply to new transactions and positions. Market participants mitigate existing (market) risk especially by agreeing or on corresponding derivatives. Therefore, interfering these areas may have unintentional consequences.
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	Investment firms classifying themselves as independent would be subject to certain follow-up obligations, pursuant to **Article 24 para. 5** of the COM Draft: Besides a prohibition against accepting any

	services?	monetary benefits from third parties for such services (except when received directly from investors), Article 24 para. 5 (i) of the COM Draft also requires that enterprises providing independent investment advice must ***"assess a sufficiently large number of financial instruments available on the market"***. In our opinion it should be considered sufficient if the investment firm assesses **different types of retail investment funds on the market** (especially UCITS and AIF designed for retail investors, e.g. open-ended real estate funds). Since investment funds cover a wide range of financial markets and asset classes (including alternative asset classes such as real-estate) the offer of such funds should be deemed to meet the requirements of this article. In addition to the requirement to offer a sufficiently large number of financial instruments **Article 24 para. 5** of the COM Draft requires that such financial instruments must be diversified ***"with regard to their type and issuers or product providers, and should not be limited to financial instruments issued or provided by entities having close links with the investment firm"***. The obligation quoted is prone to misunderstandings. The legislative intent to ensure independent investment advice is only to make sure that **those providing investment advice have no close corporate ties with the provider of any financial instrument**, as this might give rise to the threat of influencing the advisor, threatening its independence. **The proposed regulation is not intended to prohibit investment advisors from cooperating with pure execution platforms.** This would not threaten the investment advisor's independence as there is no direct influence being exerted by providers, and due to the fact that order execution constitutes a purely auxiliary service. Moreover, Article 24 para. 5 (ii) of the COM Draft

		already ensures that investment advisors do not receive any benefits when choosing an execution platform. At present, MiFID provides for a **general prohibition of benefits provided by third parties**. In exceptional cases, and subject to certain criteria, however these are permitted in the context of **financial portfolio management services** (Cf. Article 19 para. 1 of MiFID, and Article 26 of the MiFID Implementation Directive (2006/73/EC)). Pursuant to Article 24 para. 6 of the COM Draft, **investment firms providing financial portfolio management services are prohibited from accepting any monetary benefits paid by a third party** for such services (except when received directly from investors). This obligation does not take into consideration **that retail customers and professional clients generally require a higher level of protection compared to eligible counterparties**. Nonetheless, the COM Draft expressly provides for such a differentiation, and for an adjustment of measure on the basis of this categorisation (Cf. Recital (59) of the COM Draft: *"One of the objectives of this Directive is to protect investors. Measures to protect investors shoul be adapted to the particularies of each category of investors (retail, professional and counterparties). …"*). **Against this background, the scope of this regulation should be limited to situations where portfolio management services are rendered to retail customers and professional clients.**
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	In order to meet the goals of the Commission in terms of **investor protection** and thus addressing the risk that a client may not be able to understand the product risks there is **no need for a differentiation between complex and non-complex UCITS, as all UCITS are typical non-complex instruments**.

		With the **KIID (key investor information document)** investors are made aware of any material UCITS elements in plain language including any possible risk involved. The purpose of the KIID, **provision of which became mandatory from 1 July 2011**, was to enable investors to **understand the nature and the risks of the investment product** (including the risk of losses) and, consequently, to **take investment decisions on an informed basis**. Transparency for structured UCITS is enhanced even further, as Article 36 para. 1 no 2 of EU Regulation 583/2010 requires the KIID for structured UCITS to provide supplementary information, such as scenario analyses. If the proposed distinction between "UCITS" and "structured UCITS" were to be implemented, **investment firms would be obliged to conduct a full appropriateness check before executing customer orders** to buy certain products – even if the customer concerned does not require or ask for investment advice. **Execution-only sales would be excluded in this scenario.** Such an approach would make **investments more expensive, would curtail competition, and likely deter investors from buying such products**. This could be due to lack of time, and the associated discontent with all these formalities. **Moreover, in the interest of customers, products need to take the complexity of risks on the financial markets into account: this requires the use of risk mitigation techniques.** Such restrictions to execution-only sales would however significantly complicate the purchase of products with embedded risk mitigation strategies, whose 'inner workings' are necessarily complex in order to fulfil the

		advertised product's properties – despite the fact that with these products, investors are not exposed to any risk of capital losses since their investment is guaranteed. **All UCITS funds are highly regulated and transparent financial instruments.** Differentiating UCITS into complex and non-complex products, on a case-by-case basis, would merely create unnecessary bureaucracy **without enhancing the effectiveness of investor protection**. For this reason, we recommend retaining the existing classification of all UCITS as non-complex financial instruments, in order to be able to maintain execution-only sales of structured UCITS as well. **Therefore, the addition in Article 25 para. 3a (iv) of the COM Draft should be deleted.** If necessary, the **idea of transparency should be subject of UCITS V** (the product regulation), provided that there is any need, given that a **review on the effectiveness of the KIID** would have to be carried out.
	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?	We think that the best-execution requirements put in place under MiFID are sufficient. Therefore we welcome the additions made in the COM-Draft in regards to MTFs and OTFs. The additional obligation for investment firms under Article 27 para. 5 to *"summarize and make public on an annual basis, (…), the top five execution venues (…)"* goes too far. **Investment firms already publish their best-execution policies in order to inform their clients about their execution principles.** Any additional information would be of **no additional value** for most of the clients and would only produce a costly and burdensome publication process for the investment firm. **Therefore, we propose to introduce a provision for investment firms to give additional information upon the client's request** and to let it be sufficient to provide this information via

		internet.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	Please see our answer to question no. 15 in regards to Article 24 para. 6 of the COM Draft.
	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?	According to the COM Draft the powers of ESMA to intervene in financial products or activities shall be more limited compared to those of the competent authorities at national level. ESMA shall only take a coordinating role and intervene in case national authorities are not taking any or no adequate action. Furthermore, ESMA's powers are temporary in nature, while those of competent authorities have no such explicit limitation. ESMA's *"facilitation and coordination role"* in Article 33 seems inadequate. **We are concerned that this approach would lead to a further amplification of national differences and hence represent a real threat to the Single Market in financial services.** The COM draft proposals should therefore be amended to include a stronger role for ESMA, providing for a better balance in powers and wider cooperation at European level. Furthermore, any restriction or ban should not change the effect of other existing financial regulation, and a clear process to appeal ESMA decisions should be foreseen.
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?	No comments.
	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	One has to bear in mind that at illiquid non-equity markets certain transparency aspects might have a harmful effect, because already relatively small transactions may have a deep impact on the price of the traded financial instrument which might lead to negative effects

	different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	like market manipulation via so-called “front running”. A decline in trading in illiquid financial instruments could be the consequence, which might have a negative impact on the issuers but also investors and therefore on the refinancing of private enterprises but also of the refinancing of the Member States. If the COM especially intends to create pre trade transparency obligations regarding non-Equity markets, only non-Equity financial instruments being **sufficiently liquid** should be subject to such obligation. In this case, it is required that ESMA publishes a list of sufficiently liquid non-Equity financial instruments to be updated on a regular basis, because Non-Equity financial instruments being liquid today might not be liquid tomorrow.
	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?	No comments.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	No comments.
	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)?	No comments.
	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	No comments.

	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?	No comments.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	No comments.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	In terms of political coherence, regulators should not run before they walk, meaning that instruments which have been implemented for the purpose of investor protection and product transparency, like the KIID via UCITS IV, should get the chance to prove its worth. By taking into account that the KIID is mandatory from 1 July 2011in Germany and will be mandatory in general for all Member States by 1 July 2012, regulators consequently should refrain from hastily duplicating the same objectives again by other means (for example by removing structured UCITS or UCITS making use of derivatives from the list of those financial instruments, which are exempted from a test of appropriateness). **Therefore the idea of transparency should be subject of UCITS V, provided that there is any need, given that a review on the effectiveness of the KIID still has to be carried out.** Any other approach would make investments more expensive, would curtail competition and would likely deter retail clients from buying products (like guarantee funds) which make use of instruments to mitigate risks for the purpose of capital preservation.
	29) Which, if any, interactions with similar requirements in major	Although UCITS were initially intended only to be marketed across

	jurisdictions outside the EU need to be borne in mind and why?	the European Union, the UCITS brand is now recognized as the only truly globally distributed investment fund product. UCITS assets worldwide amount to €18 trillion and are distributed in 58 countries including USA, Africa, Asia and Latin America. The UCITS brand has been one of the bedrocks of the growth and prosperity in terms of Europe's real economy, its wealth creation for small class investors and its level of innovation in the past decades. Hence UCITS are very clearly a success story for the European Union which should not lightly put at risk by European legislators. European regulators therefore should refrain from any disproportionate interventions resulting in a loss of the acceptance of UCITS in and outside of Europe by splitting the brand. Therefore any further regulation on UCITS must ensure the right balance in terms of investor protection, whilst protecting the attractiveness of UCITS by avoiding possible fragmentations and by ensuring investment flexibility and cost-efficiency. Consequently it must be guaranteed that retail clients and investors still recognize the UCITS brand as a label of high quality, but not as a “cumbersome” brand due to redundancies which are the result of “double regulation” (compare our answers to questions 16 and 28).
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	No comments.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	No comments.
Detailed comments on specific articles of the draft Directive		

Article number	**Comments**
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Article ... :	
Article ... :	
Detailed comments on specific articles of the draft Regulation	
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