Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Input from

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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	Energie-Nederland is of the opinion that energy companies whose main business is the production or end-user supply of energy, should remain exempted from MiFID. These companies enter the wholesale

	to exempt corporate end users?	market in order to diminish risks from other parts of the energy chain, such as power production and sales to end users. There are several reasons for keeping utilities out of MiFID: 1) There is no theoretical or empirical evidence that energy companies give rise to systemic risk in the economy[1]. If an energy company would go bankrupt, the physical supply will remain in tact. Energy companies have a totally different risk profile than financial institutions. 2) Applying MiFID overlaps with existing and upcoming regulation for energy companies, mainly REMIT, EMIR and rules from the Third Package. The requirements from REMIT and the Third Package will adequately improve trust as well as transparency of wholesale energy markets, whilst taking into account the specifics of these markets. EMIR sufficiently addresses systemic relevance of non-financial players by setting clearing thresholds. 3) The impact of MiFID on energy companies will be disproportionate. Applying MiFID II to energy companies will automatically lead to the obligation to centrally clear all derivative transactions under EMIR. Central clearing requires (initial and variation) margin to be posted for every traded contract. Hence, large amounts of cash would have to be posted on clearing platforms[2]. This would mean that energy companies have less cash available to invest in e.g. (renewable) production capacity. This impact will be exacerbated once the proposed exemption in the Capital Requirements Directive (CRD) will expire in 2014 and

[1] The consequences of the bankruptcies of Enron, LBCI and TXU for other energy firms as well as the financial system have been limited. Besides that, derivative trading on energy does rarely cause price swings that are not in line with market fundamentals. Source: SEO Economic Research; Curtailing Commodity Derivatives Markets, October 2011

[2] A study from Amsterdam-based SEO economic research (see footnote above for reference) concludes that central clearing of all standardised gas and power derivative transactions generates higher social costs than benefits, leading to a negative impact on economic welfare in only the Netherlands of around € 2.4 – 3 billion. Based on these numbers, Bloomberg estimated that “companies from RWE AG to Vattenfall AB may have to find an extra 69 billion euros ($93 billion) to meet unprecedented European Union regulations designed to crack down on speculation in the region’s energy markets”[2]. MiFID II may thus not only affect a utility’s ability to invest, but it will also negatively impact the society as a whole.

		In the MiFID II proposal, the specific exemption for commodity dealers is deleted. The European Commission is clear in its intention that energy companies should be able to make use of the ancillary activity exemption, but to our opinion this is not clear from the legal text. To overcome the current uncertainty, we have the following recommendation. Criteria should be added to MiFID II Article 2(1)(i) to show clearly that trade is an ancillary activity for utilities, with major assets and/or that are selling to end-users as main activity. One criterion should therefore be added that relates to the trading activity compared to the other activities of an energy company (production & supply to end-users). When trading is not a goal in itself, the trading activity should be considered ancillary.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	Energie-Nederland is of the opinion that it is not appropriate to include EU emission allowances (EUAs) unconditionally in MiFID, as it means that overly complicated reporting and capital requirements stemming from the revised MiFID and MAR would become applicable to all EUA trades. This may cause disproportionate burden for energy producers that simply need EUA's for their main activity, power production. Energie-Nederland is of the opinion that the operators of installations subject to the ETS system are effectively forced to trade EU allowances to ensure that they comply with emissions reductions and to avoid sanctions in case of non compliance. EU allowances primarily serve cost efficiency in climate protection and they are not investment products for these operators.
	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?	
	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?	
	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 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?	
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	26) How could better use be made of the European Supervisory	

issues	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 number	**Comments** **Position limits** Finally Energie-Nederland had to like to say something about the introduction of position limits in commodity derivatives markets with MiFID II. Besides position limits, the suggestion is made that position reporting could be a feasible alternative. This document provides a description of both, where especially attention is paid to the working of position limits in the current wording and articles of MiFID.

	General The aim of the European Commission is to ensure the integrity and orderly functioning of the market by introducing (individual) position limits, via which individual companies, positions and therefore the related trading risks of these companies can be limited, ultimately to curb potential price volatility. Position Reporting The discussion on what position reporting exactly should be is not agreed upon. The proposed requirement for position reporting (i.e reporting in real time by commercial firms active as participants or members on regulated trading platforms) is not appropriate. We recommend that proportionate arrangements will be introduced, i.e. that the operators of these platforms will report on behalf of these firms. Position limits A clear link between speculative activity in futures markets and energy price levels has never been proven. Imposing hard limits on energy products should be well balanced to ensure that these limits do not have detrimental effects on the price discovery and hedging functions of futures markets. Energie-Nederland notes several issues that follow from the current MiFID proposal introducing position limits. The introduction of a position limit in a specific product should be carefully assessed, since it could easily have unintended detrimental effects on the market. A position limit regime can only be effective when it is applied market wide and a clear division of competences is in place. This is currently not the case in MiFID. - RMs/MTFs/OTFs have the obligation to set position limits (art. 59(1) MiFID); - Competent authorities might set position limits and request participants to lower their position in a specific product (art. 72)(f) MiFID); - ESMA should coordinate and is responsible for a coherent application of position limits (art. 34 jo. 35 MiFIR); - Only ESMA is obliged to liaise with ACER in relation to limits applicable to wholesale energy products; - The European Commission will be empowered to determine limits etc. (art. 59(3) MiFID) in accordance with paragraph 59(1) MiFID and limits set by RMs/OTFs/MTFs. According to Energie-Nederland this patchwork of competences will proof to be not effective. Position limits should be defined by those authorities/entities that are closest to the market. These are RMs/MTFs/OTFS, competent authorities and ESMA. The European Commission should not be involved in setting these limits. MiFID should provide the framework, to be further implemented by the involved regulatory authorities and market operators. An effective and efficient position limit in a specific product can only be set if the total position of each participant is known and when the overall position in that specific product is known. E.g. market operators only view a part of the trading activities in a specific product. It will be very hard to define adequate position limits based on that information, aggregated individual positions and total positions in the market are a pre-requisite. Efficient definition of position limits based on aggregated positions will allow for a practice already known in relation to the margining of positions

	by Central Counter Parties (CCPs); apply aggregated positions, cross commodity where possible (certain hedges could net the position in a product to 0), and apply a correlation factor. This will provide for a mechanism of position limits with the most efficient manner and with the lowest burden for the market. This is important since position limits as such already have a potential negative effect on the efficient working of the market. Exemptions The current MiFID proposal does not provide for a clear mechanism to have exemptions on position limits allowed. As stated above, position limits may come with unintended detrimental effects; exemptions should be allowed for because not each commodity poses a risk that should be dealt with by a position limit.
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Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
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