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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?	
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	
	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?	**Trading Requirement for OTC derivatives** • We believe that any requirement for OTC derivatives to be traded on organized venues needs to be properly calibrated to avoid causing damage to liquidity and functioning of these

		markets. This view is consistent with previous CESR recommendations[1] and the "making Available to Trade" provisions that were included in the Dodd-Frank Act in the US.[2] • The decision whether a specific category of OTC derivative must be traded on an organized venue should mainly be based on its liquidity. However, given the large number of product variations and their low average trade frequency, the use of actual trading volumes of OTC derivatives is of only limited value for this purpose, and one must aim to quantify the "prospective liquidity" of these products instead. The measurement of prospective should be based, for example, on factors such as observed bid/offer spreads, the number of market makers, agreement on the price, etc. • The decision whether an OTC derivative product is sufficiently liquid to mandate its execution on an organized venue should be made centrally, for example by ESMA, on the basis of aggregate data. We do not believe that this decision could or should be made by individual trading venues, not least because of the conflicts of interest that they are exposed to in this respect.
	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?	

[1] CESR/10-882: CESR Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets - Post-trade Transparency Standards. October 2010.

[2] Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade under Section 2(h)(8) of the Commodity Exchange Act, 76 Fed. Reg. 77728 (proposed Dec. 14, 2011).

	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 benchmarks** As an independent index provider we have a long and established history of providing open access to our index licenses to a large and diverse range of parties, including trading and clearing venues, as well as banks, buyside firms, ETF providers, academics and consultants. We are therefore generally supportive of the proposed provisions that require "open access to benchmarks". However, we believe that they could be improved in the following aspects to avoid causing unintended consequences: a) Experience has shown that newly launched tradable index products will often fail unless they can gather a certain minimum level of turnover on one trading venue post launch. Therefore, if a requirement to provide access to index licenses applied also to newly launched tradable products, it might increase the chances of their failure, and might hence discourage innovation in the creation of new index products. To avoid such unintended consequences, a grace period of several years within which the provision of an exclusive license was permitted should be granted for newly launched tradable index products. b) The requirements as proposed risk putting independent index providers at a competitive disadvantage to index providers that are part of a vertically integrated silo. This is because, to finance their index research and development, the former must rely solely on revenues from index licenses (which will be negatively affected) while the latter can cross-subsidize these activities from their trading and clearing businesses. To secure a level playing field between competing index

		providers the provisions should therefore apply only to those index providers that are related to vertically integrated silos. c) The amount of fees and the structure of licensing agreements typically differ depending on whether the licensee is a trading or a clearing venue. The relevant provisions should therefore clearly differentiate between requirements that apply to the licensing conditions for and prices that are charged to CCPs on the one hand, and those that shall apply to licenses provided to trading venues on the other.
	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)?	**Data Service Providers** • As explained in more detail below, we believe that the creation of the CTP category is sensible in principle as it will lay down the principles for and objectives of data consolidation. • However, particularly given the commercial incentives of the stakeholders that are involved in relation to data consolidation, we doubt that any data services providers will actually want to register as CTP.
	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?	**Consolidated Tape** • For transparency to be useful in financial markets where execution of transactions occurs on a variety of venues the relevant information needs to be consolidatable and made available in a consolidated fashion at reasonable cost. • We generally welcome the Consolidated Tape-related provisions in MiFIR as we believe they will form the basis for addressing the major impediments to data consolidation in the European equity markets. However, we believe the following hurdles still need to be overcome: **a) Effectiveness of the standards** Substantial work will be required to ensure the effectiveness of the standards: • Data quality and formatting standards should build on previous industry work such as that of the Market Model Typology (MMT) group, it should apply across all kinds of reporting venues (including Regulated Markets), and it should

		contain mechanisms for regular review and updates. • The APA regime will go a long way to improve data quality and accessibility, but it needs to contain specific data quality requirements for all APAs. One might also need to require increased detail of reported information as a basis. • Principles for the pricing of data that is fed into the CT will need to be established. They should reflect the characteristics of the relevant categories of reporting venues (e.g. APA, RM, MTF, etc.). • One has to ensure that unbundling of pre- and post-trade data does indeed lead to a meaningful reduction in data cost **b) Commercial viability of CTPs** CTPs will only "emerge" if they are commercially viable. However, this is unlikely in the proposed framework, and additional measures need to be considered to address this issue: • The competitive position of CTPs vis-à-vis trading venues in relation to the timeliness of dissemination needs to be improved, e.g. by provisions that prevent trading venues from disseminating information about an OTC derivatives transaction before the real-time disseminator. • One should consider requiring market participants to subscribe to a CTP, for example to provide evidence of best execution • One should consider extending the length of the delay before transaction data has to be made available free-of-charge
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?	**Transaction reporting** • Substantial overlap exists between EMIR and MiFID requirements in relation to the regulatory reporting of OTC derivatives transactions. We believe that this issue should be addressed not only to avoid creating unnecessary compliance burden for firms (e.g. double-reporting) but also to ensure the accuracy and timeliness of the reported data. • It will be helpful to use the relevant Dodd-Frank related rules in the US as a model when clarifying and harmonizing EMIR and MiFID reporting requirements for transactions in OTC derivatives.[3] Proposed approach • Verified key economic terms and confirmation data of all OTC derivatives transactions should be reported to Trade Repositories ("***TRs***") in a timely fashion • TRs should take care both of the public dissemination, where required, and of making such transaction data available to regulatory authorities. This setup would not only be efficient for reporting parties, but it will also limit the degree of fragmentation of the reported data. To achieve this goal

[3] Real-time Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (published January 9, 2012). Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (published January 13, 2012).

		• All TRs should register as Approved Reporting Mechanisms ("***ARMs***") to ensure that they are sufficiently qualified to report transactions to regulatory authorities. • The reportable fields under EMIR and MiFID should be harmonized so that EMIR transaction reports to TRs contain at least all of the details that are required by MiFID transaction reporting • The reporting of OTC derivatives transactions to Competent Authorities by trading venues (proposed under MiFID) should be avoided as it is likely to only lead to unnecessary data fragmentation and double reporting alongside either TRs, or investment firms, or both. However, reporting parties should be allowed to delegate the actual reporting to qualified third parties.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	**Interactions with other jurisdictions** o The Dodd-Frank Act in the US and the related SEC and CFTC rules require real-time post-trade reporting of transactions in OTC derivatives to increase the level of public post-trade transparency in these markets.[4] Compliance with these requirements might start as early as July 2012 for many transactions. This will be several years before the respective MiFID requirements, and will apply to all transactions with at least one US person or registered entity as a counterparty. o For transactions between US and European counterparties these DFA-related requirements could easily overlap and potentially be in conflict with post-trade reporting obligations

[4] Real-time Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (published January 9, 2012). Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information. 75 Fed. Reg. 75208 (proposed December 2, 2010).

		under MiFIR. o Ideally, post-trade reporting obligations in the major jurisdictions were designed in a way that transactions are publicly disseminated only once. o Further, to ensure that there are no differences in the reporting of a transaction depending on the nature of the counterparties (e.g. the reporting delay for the same transaction between 2 US counterparties would differ from one between 2 European counterparties), the reporting regimes in the major jurisdictions should be harmonized in terms of scope, delays, etc.
	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	
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