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.

This response is provided on behalf of the Euroclear group of companies ("Euroclear").

Euroclear comprises the International Central Securities Depository ("ICSD") Euroclear Bank ("EB"), based in Brussels, as well as the national central securities depositories ("CSDs") Euroclear Belgium (EBe) , Euroclear France (EF), Euroclear Nederland (ENL) , Euroclear UK & Ireland Limited (EUI) , Euroclear Finland (EFi) , and Euroclear Sweden (ESw). It also includes Xtrakter, a provider of trade matching and transaction reporting services based in the UK.

ICSDs and CSDs are post-trade financial market infrastructures subject to specific national regulation based on globally agreed CPSS/IOSCO Principles and oversight by National Central Banks. They will be subject to the forthcoming CSD Regulation.

Euroclear is registered on the European Commission's register of interest representatives (ID number 88290282308-75).

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?	No comments
	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?	The requalification of "safekeeping and administration of financial instruments, and related services" (such as cash/collateral management) from an ancillary service to a full investment service would imply that all CSDs would become subject to the organisational and conduct of business rules in MIFID while also being authorised and regulated under the future CSD legislation (Proposal due from the Commission in February 2012). Duplication in the form of overlap between the two texts (eg for outsourcing, record-keeping, protection of client assets) will lead to increased regulatory uncertainty, thus running counter to the objective pursued. In addition, MiFID is not adapted to the two-tier structure in many CSDs where account operators are responsible for the accounts vis-à-vis retail clients. It contains a number of obligations (e.g. requirement to categorise clients; duty to provide information; best execution & client order handling rules; prohibition of inducements; suitability obligations in relation to investment advice and portfolio management; appropriateness test) which are irrelevant, disproportionate or unwarranted for CSDs which do not offer investment services. **Given that the elevation of "safekeeping and administration of financial instruments, and related services" to a full investment service is not accompanied by any new specific requirements in MIFID (meaning that it is unclear exactly how MiFID should be applied to these services) we propose that:** **(a) either "safekeeping and administration of financial**

		instruments, and related services" is maintained as an ancillary service **OR** **(b) if it is elevated to an Investment Service, CSDs authorised under the CSD Regulation (or that are recognised as Securities Settlement System under the Settlement Finality Directive) should be exempted from MiFID, unless they are authorised as credit institutions.**

	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 effective, and why?	The text should consider that any corporate structure is considered according to the size and complexity of the organisation. In this respect the structure, for example, for a data service provider may be considerably different to a major investment institution. It is therefore appropriate to consider that the approach should not be a one size fits all approach. Specifically of concern would be the guidance in respect of geographical and gender implications. A small organisation will clearly need to have a very different approach towards governance and this should be considered. **We propose therefore, that all corporate governance requirements should be qualified by the phrase :** **"where appropriate and proportionate in view of the nature, scale and complexity of their business,"** **in order to give flexibility.**
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?	We have concerns about the lack of precision in some of the proposed definitions of new trading venues which are intended to capture dark pools and high-frequency trading. Some parts of the Euroclear group could run the risk of indirectly being included in new venue classifications (even though they are not trading nor investment firms) and/or being obliged to comply with onerous client protection measures which are targeted at the trading venues and investment firms.

		We propose that the new classifications, such as Organised Trading Facility (OTF), are explicitly defined as *not covering systems such as* : • **Trade matching and regulatory reporting systems, and** • **Order routing systems which do not affect or facilitate price formation.** **This should be explicitly stated in Art. 2 Definitions of MiFIR.**
	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	No comments

	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?	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 the interest of consistency and coherence (specifically in terms of specific provisions such as those relating to access), the authorities must take a holistic view across all legislative initiatives affecting post-trade market infrastructures (EMIR and this MiFID review but also the future CSD Regulation). The current MiFID articles 34, 35 and 46 (together with the Access and Interoperability Guideline of the Code of Conduct) aimed to increase competition both at CCP and CSD level, and to provide investment firms with a real and effective choice of settlement location. Euroclear has experienced some difficulties in exercising its access rights which we believe are related to the way MiFID is implemented in some Member States. These are not yet resolved in the current revised texts Under MiFID Article 57(2) (*old 46(2)*) the competent authority of a regulated market cannot oppose the use of a settlement system in another Member State unless this is "demonstrably necessary in order to maintain the orderly functioning of that regulated market". This gives considerable power to the Competent Authority of the Regulated Market to restrict access to that market. **We would propose that an additional requirement should be added into MiFID Article 57 (2) which should read as**

		follows: **- The competent authority of a regulated market may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that regulated market and taking into account the conditions for settlement systems established in Article 39(2) <u>and where agreed by the competent authority of the relevant central counterparty and/or settlement system</u>** **This addition should also be made to Article 39 (2)b and 40 (2)** MiFID II does not grant a reciprocal right for a settlement system at its request to receive a transaction feed direct from a regulated market or MTF (which might be necessary where that MTF or Regulated Market does not use a CCP). We would propose an additional article covering **<u>Access to Transaction feeds by Settlement Systems</u>** **<u>1. A CCP and a trading venue shall provide transaction feeds on a non-discriminatory and transparent basis to a settlement system upon request.</u>** **2. <u>The competent authority of the regulated market may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that regulated market and taking into account the conditions for settlement systems established</u>**

		in Article 39(2) and where agreed by the competent authority of the relevant central counterparty and/or settlement system
	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?	No comments
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?	No comments
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	No comments
	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?	No comments
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	No comments
	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	No comments

	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?	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 different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	Our key concerns with this review relate mostly to changes or enhancements to the post-trade transparency regimes and specifically to their extension to non-equity markets. 1. Any new transparency regime needs to be proportionate and based on a sound economic analysis of the effects of such a regime. 2. Different instruments have different liquidity profiles and will warrant different regulatory approaches to pre-and post-trade transparency. A further differentiation between instruments with a substantial retail market and those which are purely wholesale is also recommended. 3. If regulators want to deliver greater transparency to the markets, they should, where possible, leverage on existing solutions.
	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)?	The Directive appears to outline a general approach in respect of these service providers. It is important that Directive should clearly differentiate between asset classes and the respective services. For instance, CESR outlined recommendations regarding calibration in its 29 July 2010 paper. We consider that it is appropriate to calibrate post-trade publication for bonds and derivatives in view of liquidity concerns. In this regard the Directive states that APAs must publish the information free of charge 15mins after the trade is reported. This is appropriate for liquid equity instruments, however is not appropriate for other asset classes. The current text makes no reference to the requirement that an approach may dependent upon asset class in respect of APAs. Service providers will not be in a position to provide the information on reasonable commercial basis for example if a trade print required on an end-of-day basis is then to be published free 15 minutes later than this deadline (cf. MiFID Art 66).
	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?	No comments
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing	No comments

	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?	No comments
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	As stated earlier in our response to Q 13 relating specifically to Access to Market Infrastructures, the Authorities must take a holistic view across all legislative initiatives affecting post-trade market infrastructures from trade to settlement (EMIR and the forthcoming CSD Regulation). MiFID II and MiFIR therefore need to be aligned with EMIR and the future CSD Regulation, to ensure that rights of Trading venues, clearing houses and settlement systems are reciprocal and equivalent. Unless amended, the current texts do not achieve this (see Q 13)
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	No comments
	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