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.**

Name of the person/ organisation responding to the questionnaire	**ASSOGESTIONI - Italian Association representing the Asset Management Industry**

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?	Assogestioni support the inclusion of structured deposit in MIFID II and the higher level of investor protection granted by this measure. Assogestioni wishes to point out the need to ensure that all proposals be extended to all PRIPs, including insurance product. Such approach would guarantee an effective level

		playing field for substitute investment products, increasing the market competitiveness while providing strong and homogeneous standards of investor protection.
	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?	Firstly, Assogestioni strongly advocate that a third regime, for professional investors, be included into the proposal. With reference to proposed Recital 74 MiFID (that would allow European asset managers to receive services from non-European entities at the exclusive initiative of the European asset manager without the need to comply with all requirements of MiFIR and MiFID, so called "passive marketing"), Assogestioni would appreciate clarification in a main article in the Directive that this principle shall be applicable to all investors (not only eligible counterparties). It should also be clarified what defines so called "passive marketing" (for instance in the case of call for tender organized by an asset manager to select a Japanese broker).
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	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and	Assogestioni is in favour of the introduction of this new category of trading venues but does not support the prohibition in the use

and trading	from systematic internalisers in the proposal? If not, what changes are needed and why?	of proprietary capital in OTFs. This prohibition is disproportionate, and is likely to prove damaging to dealer-led liquidity, on which clients place significant reliance in all financial markets, but especially for fixed income and OTC derivatives. Instead, they suggest requiring the broker/dealer first to make it clear if it participates in its own crossing network, then to flag proprietary orders and to provide that a client may always decline to allow any interaction with the broker's own market-making in the pool, and finally to require detailed disclosure to the client post-trade from brokers to clients on how trades have been filled. Converting OTFs into MTFs after reaching a specific threshold is not consistent. OTFs and MTFs are two distinct business models for investors. Thus, it makes no sense to change of status due to change in size. Regulators should consider the services provided instead of the number of transaction.
	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?	OTC trading is one of the possible ways to execute orders. The choice of process of execution is based on the less costly or possibility of bespoke in case of specific situation.
	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?	It is essential to distinguish between algorithmic trading and High Frequency Trading. Algorithmic trading refers to order execution by algorithms, whereas High Frequency Trading is a method to deploy strategies in which computers make decisions to initiate orders.

		Investment managers may use algorithms to execute orders, in order to achieve best execution for their clients and manage market impact in a time-efficient way. In some cases investment managers design their own algorithms, while other managers are users of other firms' (typically, investment banks) algorithmic trading facility products. As such, the latter are not able to have deep insight into how another firm's algorithm product works and are confined, in their due diligence, to the information that is made available. The requirements for additional systems and risk controls required to use algorithms should therefore be proportionate to the actual use of algorithms. Furthermore, current provisions on algorithmic trading provisions are far too broad and would capture many firms that do not use High Frequency Trading. Whereas we acknowledge the need for proper systems and controls and business continuity, investment managers should be carved out, as they undertake only client business and initiate transactions on behalf of clients, therefore they would never be able to meet the obligations to post quotes in Paragraph 3 of 17(3). The definition of "algorithmic trading in Art. 4 (30) of MiFID must therefore be amended to take this into account that (1) best execution involves more than routing orders and confirming orders and (2) not all users of algorithms have access to the computer code and therefore the workings of the algorithm.

	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?	Assogestioni has no comment so far on this point apart from noting that the requirements set out in article 51 for trading venues and their systems are the preferrable and primary way to control high-frequency trading being market abusive.
	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?	Assogestioni agrees with the extension of the obligations and strongly support the harmonisation of the requirements. This harmonisation shoud be extended to the storage of data to the benefit of regulators undertaking investigations. Whereas the main rationale for record keeping of trades for clients is principally for investor protection, the information on proprietary trades is relevant to competent authorities when fighting market abuse and conflict of interest. Therefore the requirement is appropriate.
	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?	The global move to RMs, MTFs and OTFs should be based on a analysis to favour liquidity and transparency. Thus, it is necessary to define the concept of liquidity for each class assets which require a move. Maintaining liquidity in execution decrease systemic risk and cost of execution. Liquidity will not be created automatically by exchange trading, and many OTC transactions may not be entered into at all if they are forced to move to exchange. The important role of liquidity providers needs to be analyzed in more depth by the Commission, together with the impact of increased transparency. Furthermore, some derivatives are too bespoke to be standardized and therefore are simply not suitable for organised trading.

	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?	Continuing to enable small companies to access finance on the capital markets is a key element for allowing innovation, creating jobs and supporting real economy. Thus, we consider it appropriate to maintain the so call "exchange regulated" market segments. However adding new MTFs could result in fragmentation of liquidity for SMEs in a market where there are several trading platforms especially designed to provide access to capital in particular for SMEs (Entry Standard in Frankfurt, AIM in London and Milan, Alternext in Paris) Assogestioni emphasizes that the same effective investor protection regarding transparency and market abuse is necessary as it is in other markets. Otherwise the investment risk would increase in SME markets as opposed to other MTFs. The proposal achieves that to a large extent. Conversely, however, when administrative burdens associated with these investor protection rules can be minimized, this should apply to other MTFs and regulated markets as well. Assogestioni believes SME markets may well help SMEs to gain easier access to more capital. But Assogestioni would like to caution against too much optimism on resolving the issues surrounding SME access to capital markets (lack of visibility, market liquidity and high costs of IPOs, see p. 11 of the Impact Assessment), because these have to do with characteristics of SMEs as such: they do not usually have very well known brand names, they are not widely analyzed, they cannot absorb large investments from institutional investors (because they are small companies), and their risk/return profile is different from large caps.

	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?	Assogestioni welcomes this provision. Regarding the relation to EMIR, we would avoid linking those discussions considering the difference in timelines. MiFID II proposals appropriately complement EMIR, and together they should ensure non-discriminatory access for all derivatives transactions.
	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?	From a general perspective, we believe that the new requirements set out in Article 24 are appropriate in order to increase investors protection. However, with respect to investment advice, it should be clarified that an investment firm can provide, not only independent advice, but also advice assessing a large number of financial instruments available on the market, receiving inducements from third parties. We deem that the suggested clarification is important in order to leave to investment firms and clients the opportunity to choose the ways in which they intend to respectively provide and receive investment advice. Moreover, we consider it appropriate to clarify that an investment firm is not obliged to inform its clients that it does

		not provide independent advice. In other words, an investment firm must inform its clients only when and if it does provide independent advice. Furthermore, regarding the portfolio management service, it should be specified that the rule according to which, in providing the abovementioned investment service, an “investment firm shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients” should be considered respected also when the portfolio manager accepts or receives inducements from third parties and, in the meantime, it transfers such inducements to clients. In fact, the latter situation materially corresponds to the situation in which the portfolio manager does not accept nor receive inducements from third parties.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	Assogestioni believes that all UCITS should continue to be considered as non complex products. Such classification is based on their specific characteristics which guarantee a high standard of investor protection, certainly not affected by the adoption of complex portfolio management techniques. However, should the Commission intend to introduce a distinction within UCITS products, Assogestioni agrees that such differentiation should regard only the so called “structured” UCITS.
	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?	Yes, we believe that the distinctions among the level of protection granted to the three categories of clients identified by MiFID discipline are appropriate given that they take into due account the differences between such categories while ensuring, at the same time, a minimum level of safeguards for all kind of clients (see Article 30 of the proposal).
	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?	Assogestioni agrees with the Commission proposals to extend the MiFID transparency regime. However, it must be ensured that such extension applies only to true Exchange-Traded Funds (ETFs), not to all other open-ended funds (mostly UCITS) that – depending on national trading models – may be admitted to trading or are listed on a market for various reasons. It is therefore very important that the definition of ETF be correct. The definition of Exchange-Traded Funds (ETFs) as currently included in MiFIR is too broad and would catch too many funds besides ETFs. As the purpose of MiFID is very different (the definition is only required for the extension of trade transparency) and in order not to set legal precedents which may jeopardize ESMA’s work, Assogestioni recommends deleting the reference to “exchange-traded funds in the MiFIR definitions (Art. 2 (1) (11)), and

		simply referring to “units of open-ended collective investment schemes”, for example “units of open-ended collective investment schemes which are actively traded on at least one European Regulated Market, with at least one market maker”. Furthermore, all subscription and redemption transactions directly with the fund (as well as share creation and share deletion by ETFs) should be exempted from transparency requirements, maintaining the current understanding of Article 5 of Commission Regulation 1287/2006 (MiFID Level 2). Publication of share issuance and redemption has no relevance for price formation on the secondary market as such transactions take place at Net Asset Value (NAV), but would add considerable costs to fund operations, which would be borne by fund investors. In particular, all transactions carried out directly with the fund should be exempted from the transparency requirements when there is no market-making agreement between the market maker and the fund management company. In some Member States some UCITS are traded on secondary markets (with low volumes) without the permission of the fund management company. It would be excessively burdensome to impose an obligation on the fund management company resulting from the action of unrelated parties acting without its consent.
	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	Assogestioni, while supporting the extension of post-trade transparency to non-equity markets (with an appropriate calibration regime at Level 2), opposes the extension of pre-trade transparency beyond equities (Articles 7-8 MiFIR).

	are the highest priority for the introduction of pre-trade transparency requirements and why?	Assogestioni is concerned with the insufficient impact assessment of the proposed changes, which could severely impact liquidity by imposing equity-like provisions to markets with very different structures, relying on dealer-provided liquidity. As the impact of the provisions on investment banks is unclear, Assogestioni is concerned by indirect negative consequences for investment managers as their clients, and for the economy as a whole. Assogestioni also stresses that it is crucial to assess the impact structural changes to financial markets could have before introducing potentially highly disruptive regulation: markets must continue to serve the interests of the users (issuers and investors), thereby providing capitals for the real economy and long-term saving opportunities for EU citizens. Well-functioning securities markets must find an appropriate balance between trade transparency and protection from public disclosure of trading intentions for large orders. Although trade transparency is clearly key for price formation, the needs of retail and institutional investors are different, and retail investors are a very small percentage of European securities markets. Institutional investors trading in large volumes must try to minimize the negative impact of their orders on the asset price. Depending on the asset type, its liquidity and the characteristics of the market (venue trading vs. market-making/dealer liquidity), the negative impact can vary, but likely includes both a negative price impact (wider spreads) and a loss of liquidity. There are major differences between equity and non-equity markets.

		Investment managers have a duty of best execution towards their clients (pension funds, insurance companies, retail funds) and market impact minimization is a key part of that duty. Knowledge of large orders will move the price very quickly, therefore mechanisms such as waivers/delayed publication, or the possible exemption from pre-trade transparency rules are necessary. If transparency is deemed necessary for retail clients for some instruments, specific rules could be introduced, tailored to that segment and appropriately calibrated. Careful calibration of post-trading transparency publication rules is also very important.
	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?	Changes in transparency requirements should always take into account asset and market characteristics, and carefully weigh the possible costs to the final investor (EU pensioners and savers). Furthermore, they should take into account possible structural (not temporary) changes in asset liquidity, which might make such assets less attractive to hold for institutional investors, and therefore less easy to sell for issuers. In the case of derivatives, it might become more difficult and more expensive to hedge risks, and also in that case related assets might be less attractive for investors. If securities market mechanisms are not appropriately regulated or implementation is not harmonized at national level (leading to potential regulatory arbitrage), issuers will find it more expensive and more difficult to sell their instruments to finance themselves, and the real economy will suffer.

	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)?	Assogestioni supports the proposals to require a functioning consolidated tape for post-trade data through the use of APAs and CTPs, as well as harmonised data standards. We also support commercial solutions for CTPs in principle, but fear that commercial drivers towards comprehensive CTPs will be insufficient. We therefore consider that the European Commission should be equipped to mandate a single consolidated tape if necessary, and a review clause should be included in MiFID II for this purpose. Assogestioni strongly supports the Commission's proposals in Art. 11 MiFIR regarding the obligation to offer trade data on a separate and reasonable commercial basis.
	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?	The post-trade transparency proposals for fixed income and OTC derivative are welcomed by our members. Investment managers need good quality post-trade information both to value their portfolios and funds, and as valuable input for their trading activities (including proving best execution for clients). Appropriate calibration in publication delays is necessary in post-trade transparency (to be detailed at Level 2). Calibration of post trade transparency should be done for each asset classes. The proposal should optimize in any case the most liquid solution. Thus, illiquid securities should have an appropriate time delay. Large trade sizes should not be penalised

		by the post trade transparency regime. An appropriate delay should be accepted before the disclosure of the positions for the global interest of the market mechanism.
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?	We deem extremely important, in order to ensure an effective level playing field among products included in the PRIPs initiative, that proposals included in MiFID II are extended to other frameworks such as, for example, the Insurance Mediation Directive. From the viewpoint of the asset management industry, there are also important interactions with provisions of AIFMD and UCITS Directive relating to delegation of tasks to third country providers.
	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**
Article ... :	
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Article ... :	

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