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	**The American Chamber of Commerce to the European Union (AmCham EU)**

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?	AmCham EU supports appropriate exemptions but believes equally, that entities which conduct the same activities should be regulated in the same manner. We wish, therefore, to highlight that exemption 2.1.i could still potentially result in an unlevel playing field between financial and commodity firms, as much will depend on what is considered *'ancillary'*, and which will be determined at Level 2. We believe it is important to deliver a

		regulatory level playing field in order to prevent regulatory arbitrage and provide for consistent treatment of the same activities.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	We agree it is appropriate to bring emission allowances and structured deposits into scope although with regard to the latter, the scope of what may constitute a structured product as drafted seems broad and we would propose using the Joint Associations Committee's (JAC) suggested definition[1] (prepared for the Packaged Retail Investment Products (PRIPS) consultation) instead.
	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?	Given the globalised nature of trading in financial instruments and the rationale behind the MiFID review, AmCham EU agrees with regulating access by third-country operators to EU markets. The regime governing third country access should however be sufficiently flexible so that it does not limit or discourage access to and from third country markets, in order to allow European investors, issuers, and firms to continue their existing access to third country products and services in an appropriately regulated manner.

[1] a deposit paid on terms under which any interest or premium will be paid, or is at risk, according to a formula which involves the performance of:
(i) an index or combination of indices (other than (i) money market indices or (ii) interest rate indices);
(ii) a financial instrument or combination of financial instruments (other than (i) money market instruments, (ii) debt securities issued by a government or central bank or (iii) interest rate derivatives); or
(iii) a commodity (or combination of commodities)".

		We believe that the factors to be considered towards 'equivalence' of regime seem broadly sensible; however, there is a risk that these provisions may be set so high - with "equivalent" being interpreted as identical - that they will be difficult to meet in practice. Consequently the access of EU business and consumers to well regulated non-EU firms may be reduced without providing any additional protections against systemic risk. Broad principles of equivalency should be established within the regulatory and legal framework of a country considered as a whole to determine whether it offers equivalent protection without necessarily being identical. The regime could require, for example, third country firms to be authorised by their home country regulator; that the third country not be included on any anti money laundering/terrorist financing blacklist; and a memorandum of understanding should exist between the EU and the home country regulator (an IOSCO MoU could serve as a template). Such a regime would be more consistent with EU GATS and IOSCO commitments and provide a further platform for further harmonisation if warranted. We do not believe that there should be a specific requirement for reciprocity. MiFID II does not reference how professional clients will be treated with respect to provision of services in the EU by third countries. Given that (1) professional clients are sophisticated investors and (2) third country firms will be subject to 'equivalent' MiFID type requirements under their third country, we do not think it necessary that a firm must also establish a

		branch in the EU for dealing with them. Therefore, we would urge Article 36 of MiFIR be extended to include professional clients so that third countries may also provide services to professional clients within the EU without setting up a branch, providing they meet the registration criteria. For non-retail services, we are not convinced that a lengthy and detailed equivalence procedure is necessary for the services that can be offered. We note that in the case of US legislation, it is generally extra-territorial so US firms operating in the EU will continue to be subject to tight US regulation. Additionally, it is not clear how these requirements will apply to existing authorised third country branches operating in the EU. The legislation should provide for grandfathering for branches already authorised under a Member State's EU regime. Finally, where ESMA decides to withdraw a non-EU firm's registration, de facto implying that the third country competent authority has not taken appropriate actions, the EC will assess whether the issue raises concerns with regard to the third country more generally. In a worst case scenario the EC could reverse its decision on a third country's equivalency which is a pre-requisite for a non-EU firm being allowed to provide services via branching in the EU. We understand and agree with the rationale for the EC reviewing the third country's situation; however, we believe this power should be deployed with due care and consideration for the potential impact on firms.
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading	The text should be clear that governance requirements should not be applied at legal entity level. Where firms operate globally

	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?	and have strong central governance frameworks, replication should be avoided at subsidiary legal entity level. Board committees may be established at parent level and operate across a number of legal entities. The proposals for firms to establish nomination committees made up entirely of Non Executive Directors to assess a management body's compliance with its obligations is inappropriate at sub-parent board level. This requirement should not apply where firms can demonstrate (e.g. at sub level, or even at parent level) other measures are in place to counter 'group think'.
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?	At the outset we would like to underline that AmCham EU supports a legal framework that allows for flexibility and investor choice in terms of trading of financial instruments on various types of trading venues. We support a flexible definition of OTFs. In its current form, however, it is broadly drawn resulting in lack of clarity as to what systems would be captured. Further clarifications are needed for other activities that may be caught inadvertently. We understand that the EC wants to prevent a conflict of interests arising from market-making by an OTF operator. However, the proposal to prohibit use of proprietary capital does not account sufficiently for the benefits of other forms of principal activity which are of benefit to clients. In addition, prohibiting client interaction with proprietary capital will make compliance with certain regulatory requirements more cumbersome (e.g. best execution).

		Specifically in relation to OTC derivatives, the own account trading prohibition would have the consequence of affecting the ability of single dealer platforms (SDPs) to act as trading venues for OTC derivatives, given the new mandatory trading obligations requiring eligible OTC derivatives to be traded on an RM, MTF or OTF. SDPs will not be able to qualify as OTFs in light of this restriction. In non equity markets, SDPs are an important source of innovation and liquidity as they are the key vehicles for new product launches as well as provision of trading services in less liquid instruments. The legislation should remove this prohibition or at least allow for an exemption or mechanism whereby qualified clients can "opt in" to interacting with the capital of an OTF operator. While we do not support the introduction of the U.S. SEF regime in the EU (as we believe this is too restrictive in terms of investor choice and could damage liquidity in dealer markets), we recommend the European Parliament to take note of ongoing developments in the US when formulating the OTF requirements, in particular the 'SEF Clarification Bill' introduced in the US House of Representatives on 19 July 2011. In particular we highlight that the OTF regime in Europe is mandatory and not self-certifying while the US swap execution facility ("SEF") regime is elective and self-certifying. Additionally, we highlight the difference in overall approach between the EU and the US. In the EU, there is a perception that unless a trade is transacted on a venue, it is "unregulated" hence

		the creation of the OTF category to capture these "leftovers" which ensures that all trading is done on venues and is therefore "regulated". The US approach is different – clearing and a robust post-trade transparency regime ensure that all trading is regulated, regardless of whether or not a trade is done on exchange, a SEF, or other type of venue. This approach allows for investors to have a greater choice of venue which will help them achieve their investment objectives as well as best execution. The EU's more limited approach could foster regulatory arbitrage between the two jurisdictions.
	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?	The description in recital 18 MiFIR (*"ad hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser")* provides a very narrow scope for what would be considered OTC. There is a lack of clarity surrounding what activities fall within the scope of an SI versus what are 'pure' OTC activities with no clear demarcation between what is expected to fall into 'pure' OTC which is very narrow and the description of what should fall in an SI. There would seem to be activity which falls in the middle of these two but it is not clear where it would fit. Further clarification of SI versus OTC activities is required. AmCham EU supports the greater use of trading platforms for OTC derivatives, in line with agreed G20 principles, as we believe that retaining choice and flexibility for investors - rather than a prescriptive approach to execution - best serves the market in terms of competition, cost efficiency and liquidity. In

		this respect we would urge the European Parliament to introduce more clarity in the Level 1 text on the types of derivatives that are to be considered highly liquid and standardised, noting differences in asset classes and the instruments derived from them. We encourage further study on this topic. We strongly believe in the need for a coordinated legislative and regulatory response – and we have consistently urged policy makers both in the EU and the US to observe closely what is being proposed in the other jurisdictions, and to have an open and constructive dialogue, not to place either jurisdiction at a competitive disadvantage.
	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?	We understand the rationale behind the proposals on algorithmic trading which first arose from the 6 May 2010 U,.S. Flash Crash, and which aim to ensure that HFT firms are appropriately regulated, notably through circuit breakers and policies for erroneous trades However we do have concerns around High Frequency Trading and liquidity management. Article 17(3) requires an algorithmic trading strategy to "be in continuous operation" and "post[s] firm quotes at competitive prices with the result of providing liquidity on a regular and ongoing basis to these trading venues at all times, regardless of prevailing market conditions". This may be appropriate for market making algorithms; however, 'facilitation' algorithms trade in one direction only and so it would be impractical from a commercial perspective to provide quotes in the other direction. Equally, the obligation to be in "continuous operation" is a concern given that a number of strategies only trade at certain times of the day e.g. certain strategies operate

		only in the closing auction. We believe the obligation for algorithmic trading strategies to 'be in continuous operation' and post firm quotes should be removed. Furthermore, it would be a significant departure from any regulatory initiative in this space outside of the EU and therefore endanger transatlantic consistency.
	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?	We support the proposal that for standardised OTC transactions the venue of choice should be an organised trading venue which leaves flexibility and choice to investors. However, as we highlight above, client orders in an OTF cannot be executed against the proprietary capital of the operator of the OTF which prevents Single Dealer Platforms ('SDPs') from qualifying as OTFs and means SDPs would not be regarded as organised venues on which eligible OTC derivatives could be traded. In effect firms will be prohibited from using their own proprietary capital in transactions with such designated OTC derivatives. As we note in relation to our views regarding the OTF regime, the EC should provide for, at the least, an

		exemption or mechanism whereby sophisticated clients can opt to make trades with a firm operating an OTF. Given our transatlantic focus, AmCham EU urges both the European Parliament and U.S. policy makers to observe closely what is being proposed in the other jurisdiction. In this context we note that the proposals do not provide for a 'block trade' exemption from the obligation to trade OTC derivatives on a trading venue (i.e. RM, MTF and OTF). The US SEF rules provide for a 'block trade' exemption so that above standard size trades can be privately negotiated through trading voice or on an SDP. Without this exemption, under EU rules firms will have to rely on large-in-scale waivers and deferrals being permitted but this will still require the trade to be executed over a trading platform without the use of proprietary capital. The EU legislation should therefore provide for a similar 'block trade' exemption from the obligation to trade OTC derivatives on trading venues. The exemption is also important in ensuring best execution for large institutional clients wishing to execute large trades: if such large trades were made public, the market would move against the market maker increasing the risk they take and consequently increasing the price of execution, which would ultimately, filter through to the end client (e.g. members of pension funds). Lastly, we have particular concerns around Article 24 MiFIR,

		which seems to introduce a regime around third country reciprocity and extra-territoriality provisions. We believe this is unhelpful and likely to cause considerable regulatory uncertainty.
	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?	With reference to EMIR, we believe that market efficiency should be protected by ensuring non-discriminatory access to CCPs by trading venues – this is particularly important in light of the requirement to use CCPs in the future. However, it is important that those seeking access to market infrastructure and to benchmarks should make all reasonable efforts to comply with relevant technical and operational requirements. We are firmly of the view that non-discriminatory access must be subject to reasonable commercial negotiation, when and where appropriate.
	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?	AmCham EU considers that there is no evidence that position limits will be effective in preventing the risks listed by the Commission, such as manipulative behaviour or market volatility. We therefore underline our support for alternative arrangements such as position management, rather than the use of position limits. While acknowledging the objectives of reducing systemic risk and combat disorderly trading, we are concerned by any proposals which seek to intervene in relation to positions in all

		derivatives and commodities. We believe position management as an overall tool is the right approach and do not see the need for any further alternative approaches. We consider that a pragmatic approach consisting of granting regulators powers to put in place position management rules with the capacity, under certain conditions such as market dislocation, to set temporary position limits, is the right one. Position limits should therefore only be, within a position management regime, the last option to tackle market dislocation. We have concerns regarding the granularity envisaged under Article 34(2) MiFIR with regard to publication by ESMA of position management measures. We are concerned that providing "*details on the person*" would entail naming the firm concerned, including where that firm may have a position it is required to reduce. We agree ESMA should publish details of position management arrangements in place but that the level of information provided should be made sufficiently anonymous so that the firm concerned is not at undue market risk. Publishing the firm's name in combination with details of the financial instruments and measures imposed would alert the market to a firm's position and could move against it, particularly given the limited number of participants in certain commodities. We would also highlight that the imposition of position limits/ management arrangements should not be viewed as disciplinary measures but rather as a measure to manage orderly markets if a firm has built up a position for *bonafide* reasons. The imposition of position limits should not be seen to result in reputational

		damage to the firm. Lastly, we are also concerned by the provision under Article 60(2) MiFID II which requires Members to report details of their positions "*in real-time*" to the trading venue (RM/MTF/OTF). It will be highly difficult for industry to meet this requirement to report positions in real time (unlike trades).
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?	We believe the current tiered approach to customer categorisation introduced under MiFID I, provides appropriate levels of investor protection to the three categories. From a third-country perspective on counterparties, we further refer to our answer to question 4 above.
	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	We believe that the current drafting is too wide with regards to authorities' ability to intervene in "*certain financial instruments or types of financial activity or practice*".

	financial markets?	In our view there should be considerably stricter parameters around the scope and operation of such powers (e.g. obligation to monitor conditions leading to intervention, obligation to consult with industry in some form, rights of appeal/due process).
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?	AmCham EU believes pre-trade transparency requirements should have the intended purpose of aiding investor protection through supporting price discovery and best execution. While we support pre-trade transparency in equities and equity-like instruments, we underline the need to ensure that the legislative framework appropriately balances transparency and liquidity. We are therefore pleased that the reasons for allowing waivers from pre-trade transparency for equities remain valid, including the large-in-scale waiver. However, it is not clear from Level 1 whether the reference price waiver will be permitted. The reference price waiver is a key waiver used in the equities business and its removal would stop a substantial amount of transactions executed in broker crossing networks. We would therefore welcome an explicit statement that this waiver will be permitted. We are also of the view that the 6 month notification period to ESMA before a waiver, deemed necessary by the market and the competent authority, can come into force seems unduly long and should be reduced to 3 months.

	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?	MiFIR sets out broad criteria for allowing waivers and appropriate calibration of pre-trade transparency requirements at Level 2 will be key in delivering a workable outcome. Our key concern in this context is finding an appropriate balance between transparency and liquidity.
	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?	The high-level transparency obligations proposed at Level 1, are drafted with an order book mechanism in mind (with calibration to happen at Level 2). Neither the draft recitals nor articles make it clear whether or how the continuum of other existing execution models (such as request-for-quote (RFQ-based models) would be supported which is critical for non-equity products. We believe that this difference needs to be taken into account when setting pre-trade transparency requirements and MiFID II should include an explicit statement that RFQ based trading models will be supported. We also believe that there is sufficient pre-trade transparency in the institutional fixed income, credit and derivative markets, particularly through electronic trading systems offering these products. We therefore believe that further pre-trade transparency in this regard is unnecessary and would therefore suggest that the proposals focus on consolidating the existing transparency that exists in the market for investors and end users.

	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	Pre-trade price discovery in large-scale trades could lead to a reduction in liquidity, in particular for less liquid asset classes. AmCham EU welcomes the envisaged waiver regime for classes of financial instruments laid down in Article 8 MiFIR, but we urge the European Parliament to ensure that where appropriate, waivers are based on the individual characteristics of a financial product, rather than per asset classes.
	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)?	AmCham EU supports the provisions around data service providers with view to enhance the efficiency of markets and detect possible market abuse. We believe that a consolidated tape is suitable for products such as cash equities and bonds but we also underline that its workability and suitability will have to be proven for many bond and derivatives products. We suggest that policymakers focus on getting the consolidated tape for equities right and implemented first and then conduct a further study on the appropriateness of such a mechanism for bonds and derivatives. We would in this context recommend that the European Parliament when formulating rules on the consolidated tape in the EU takes into account experience gained with consolidated tapes in the US.
	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	Regarding post-trade transparency for derivatives and structured market products, AmCham EU urges the European Parliament to take into account the specificities of each financial instrument rather than asset classes in order to avoid detrimental impacts on

	that competent authorities receive the right data?	liquidity, particularly in less liquid markets. From a fixed-income, rates and credit perspective, AmCham EU believes that is important that post-trade transparency rules take into account the need for liquidity when calibrating regulations and that there should be recognition of the legitimate need for permitted delays in reporting, exemptions for illiquid instruments and the use of block trades in certain circumstances. We underline that it is important that any reform in this area looks not only at the asset classes but also at the financial instruments. This is important in order to promote a sound price formation process and to improve the monitoring of systemic risk. We believe that CESR's summer 2010 report on this topic provides a good starting point for an appropriately calibrated regime. AmCham EU in this respect welcomes that a mechanism is included in the Article 10 MiFIR that prevents such trades from being immediately disseminated with full trade details. The US TRACE system uses bucket amounts for disclosing trade sizes; we would encourage the European Parliament to adopt a similar system with bucket amounts for trades in non-equities. We therefore propose to establish a European classification of bond liquidity thresholds and would be pleased to assist in its development.
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?	Our key concern around the creation of a globally coherent set of robust standards for derivatives clearing is to ensure that in addressing this under MiFID II and MiFIR, European co-legislators do not undermine similar efforts undertaken under EMIR, notably work on determining which derivatives are deemed eligible for trading and clearing (Article 4 EMIR). As a general point we urge policy makers in the EU and in the US to closely follow developments in either jurisdiction when developing regulation, in order to achieve the same implementation of G20 commitments.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	The major reforms that we believe the EU should consider in MiFID are the US Dodd-Frank Act, as well as any relevant standards that are produced by international organisations such as the Financial Stability Board, the Basel Committees and the International Organisation of Securities Commissions. AmCham EU would prefer to avoid lengthy equivalence processes wherever possible. We believe that automatic third country recognition should be achievable in many cases, such as with clearing houses. Where automatic recognition is not feasible we consider that a fast-track equivalence process is desirable but we also warn

		against the risk that equivalence provisions are used as protectionist tools and that end users will suffer from a lack of competition and choice as a result.
	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**
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Article ... :	
Article ... :	
Detailed comments on specific articles of the draft Regulation	
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