

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@europa.eu by 13 January 2012.

Name of the person/ organisation responding to the questionnaire	<p>ELEXON Limited (ELEXON administers the electricity Balancing and Settlement Code for Great Britain**) Contact: Diane Mailer (diane.mailer@elexon.co.uk)</p> <p>** Fuller description and explanation: ELEXON Limited (ELEXON) administers the Balancing and Settlement Code (BSC) which the Great Britain electricity transmission system operator (TSO), National Grid Electricity Transmission (NGET), is required under the standard conditions of its licence to have in place.</p> <p>The BSC is a legal document which defines the rules and governance for the balancing mechanism and imbalance settlement processes of electricity in Great Britain. It sets out the arrangements by which BSC Parties may make and accept offers or bids for electricity to be delivered to or taken from the wholesale electricity market, and for the settlement of financial obligations arising from the acceptance of such offers or bids. All licensed electricity generators and suppliers in Great Britain are obliged to become signatories to the BSC (BSC Parties).</p>
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	<p>ELEXON is a not-for-profit company whose principal role (together with its subsidiary ELEXON Clear), as set out in the BSC, is to provide and procure the facilities, resources and services required for the proper, effective and efficient implementation of the BSC (including acting as the legal counterparty to balance and imbalance transactions under the BSC). With over 200 BSC Parties, the services of ELEXON and its subsidiaries are critical to the successful balancing mechanism and imbalance settlement processes of electricity in Great Britain.</p> <p>The Balancing and Settlement Code is governed by a BSC Panel and a number of committees and industry groups. The Panel comprises a chair (appointed by the Gas and Electricity Markets Authority (GEMA)) plus five members elected by trading parties, two members appointed by a consumer body nominated by GEMA, a member appointed by the TSO, and two independent members appointed by the Panel chair.</p> <p>The governance arrangements for ELEXON as the BSC Company ('BSCCo'), including its corporate structure and funding, were set up with the sole aim of running the BSC arrangements. ELEXON is wholly-owned by NGET but the management of ELEXON is not controlled by NGET because all of ELEXON's Directors are appointed independently – for example, the chair of the BSC Panel acts as company chairman. ELEXON's independence of NGET is established by the BSC.</p>
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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, the exemptions are not adequate because the scope of MIFID should not capture electricity system management instruments such as ELEXON. Accordingly, we propose that the proposed exemption contained in Article 2.1(n) be extended to cover 'any operator or administrator of an energy balancing mechanism, pipeline network or system' to ensure electricity system managers that are not transmission systems operators are exempted.

		<p>Our proposed amendment to Article 2.1(n) and a related additional proposed recital are included in the detailed comments section at the end of this questionnaire.</p> <p>ELEXON and other electricity system management instruments are currently exempted from MIFID through the EU's MIFID Level 2 Implementing Regulation (Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament). In particular, there is the "safe harbour" provision in Article 38.4 of the MiFID Level 2 Regulation for those contracts entered into with or by operators or administrators of an energy transmission grid, energy balancing mechanism or pipeline network, when it is necessary to keep in balance the supplies and uses of energy.</p> <p>We agree with the Commission that it is now important to include in Level 1 a safe harbour for entities that are operating these core infrastructures and processes, and of course Article 2 of MiFID provides exemptions for persons rather than types of instrument. However, the Commission's proposed Article 2.1(n) falls short in assuming a particular structure of network management in the power and gas sector and in failing to take account of other entities that in some or all models are central to the management of networks and their balancing. Our proposed extension to the exemption in Article 2.1(n) of the proposed MIFID text is consistent with the existing exemption in Article 38.4 of the MiFID Level 2 Regulation. (There might still be a role for a Level 2 provision like Article 38.4 to provide clarity for persons who are party to contracts with 2.1(n) exempted entities.)</p>
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	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	6) Is the Organised Trading Facility category appropriately	

of markets and trading	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?	<p>Given the broader scope of MiFID/MIFIR II and the evolution of the energy sector, we consider that it is more important than in the past that the carve-out of persons who are the transmission systems operators or who otherwise operate or administer energy balancing mechanisms, pipeline networks or systems to keep in balance the supplies and uses of energy, should be set forth clearly in Level 1. Last time the Commission exercised its Level 2 discretion to exclude instruments in this area, but the exemption of the relevant categories of entities from MiFID should be a decision taken by the legislators at Level 1 – which the Commission has acknowledged to a degree by inserting Article 2.1(n).</p> <p>In addition, inclusion of the exemption in Level 1 would provide</p>

		greater and earlier certainty to the entities concerned at a time when the European energy market is undergoing major changes, including increasing liberalisation and cross-border integration, with a new EU regulator (ACER).
Detailed comments on specific articles of the draft Directive		
Article number	Comments	
Article 2.1(n):	<p><i>MiFID II Directive: suggested amended version of draft text of TSO exemption in Article 2.1(n) as discussed in question 1 above (proposed additional words are underlined):</i></p> <p>"(n) transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks."</p>	
Recitals ... :	<p><i>Proposed additional recital to MiFID II Directive incorporating an adaptation of the current text of Article 38.4 of the MiFID Implementing Regulation (Commission Regulation 1287/2006/EC, and part of the proposed exemption Article 2.1(n):</i></p> <p>"Whereas: <u>...(22A) It is necessary to exclude from the scope of this Directive persons who are transmission systems operators or who otherwise operate or administer energy balancing mechanisms, pipeline networks or systems to keep in balance the supplies and uses of energy, and contracts entered into by such persons when carrying out such tasks, since they are subject to specific rules directly adapted to those activities;</u>"</p>	
Article ... :		
Detailed comments on specific articles of the draft Regulation		
Article number	Comments	

Article ... :	
Article ... :	
Article ... :	