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	**Project Developers Forum (www.pd-forum.net)** The Project Developer Forum is the single largest group of Clean Development Mechanism (CDM) project developers and our members account for a very significant proportion of all registered CDM projects and issued CERs. Our response therefore focuses on the addition of a new class of "financial instruments" given in Annex 1 Section C Paragraph 11 of the MiFID 2 and defined as: *"Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme)"*

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?	The Project Developer Forum ("PD Forum") considers it necessary to amend the legislation to allow PD Forum members to continue its crucial work without being subject to MiFID 2 regulation. This may be achieved by excluding the delivery of Certified Emission Reductions ("CERs") (together with Emission Reduction Units ("ERUs"), "Compliance Units") from the scope of "Investment Activity" as discussed further below, or creating an exemption which PD Forum members can rely on to deliver Compliance Units in to the European Union Emissions Trading Scheme ("EU ETS") without compliance with MiFID 2. That exemption does not currently exist in the draft and therefore we consider that the exemptions as currently drafted are not appropriate. We set out our position in more detail below.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	PD Forum appreciates the need for market oversight, security and the prevention of fraud in the EU ETS and commends the good intentions of MiFID 2 in this respect. It is in the interest of the global carbon market, in which PD Forum members are an integral part, that the integrity of the EU ETS, the largest carbon market in the world, is maintained into the future. However, the PD Forum believes that despite good intentions, MiFID 2 will result in unforeseen over-regulation of the supply and transfer of Compliance Units , activities which are already regulated by the United Nations and present no risk to the European financial markets. PD Forum members believe there are very clear differences between EUAs and Compliance Units which demand that they be treated differently for the purposes of financial regulation and specifically excluded from the MiFID 2. It may be helpful to explain the role that PD Forum members play in the EU ETS. PD Forum members are not investment firms, financial traders or speculators, but suppliers of an essential commodity. PD Forum members are engaged in developing Compliance Units from projects outside the EU, and once developed they deliver the resulting Compliance Units to purchasers operating within the EU ETS. Compliance Units are usually priced at a discount to EUAs, and thus the availability of Compliance Units supplied by PD Forum members provides EU ETS compliance buyers with a cost effective way to offset emissions thus ensuring that the goal of lowest cost abatement of emissions is achieved. As a result of the investment PD Forum members make in emission reduction projects

		outside Europe, and the expertise that they bring to the process of registering projects in accordance with the stringent protocols of the United Nations Framework Convention on Climate Change ("UNFCCC") Secretariat, PD Forum members are providing an essential service to ensure that the compliance cost of the EU ETS is kept to a minimum for regulated installations in Europe. The availability of Compliance Units from PD Forum members for installations to achieve emissions reductions at the lowest cost is a fundamental pillar of the EU ETS and is enshrined in the EU ETS Directive (2003/87/EC) (the "Directive") supported by the Linking Directive (2004/101/EC) If this process of supplying Compliance Units into the EU ETS is regulated by the MiFID 2, it will impose a requirement on PD Forum members to meet compliance and reporting obligations of "investment firms". PD Forum members feel this is an unforeseen and unduly onerous outcome not intended by the authors of MiFID 2. PD Forum members consider that EU-based financial market legislation is not intended or designed to capture the supply of Compliance Units from primary project developers into the EU ETS. It is clear from the explanations accompanying the draft MiFID 2 that Kyoto Unit supply is not intended to be the focus of this financial markets legislation. The Commission's explanation for the proposals (paragraph 3.4.15) and in the new preamble to MiFID 2 (paragraph 9) specifically refer to EUAs but fail to mention Compliance Units, indicating that the focus of the provisions is rightly on EUA trading, rather than Compliance Unit supply. To clarify this point, PD Forum members believe that MiFID 2 should be amended to specifically exclude or exempt primary deliveries of Compliance Units into the EU ETS from the definition of "investment services and activities" in MiFID 2. There are several reasons why the delivery of Compliance Units is different from trading of EUAs and should therefore be treated differently in financial markets regulation: • The generation and route to market of Compliance Units is via a heavily scrutinised UNFCCC process which provides diligent oversight, as compared with the allocation and auctioning process applicable to EUAs;

		• Compliance Units are an essential physical commodity that facilitates the efficient operation of the EU ETS, rather than facilitating financial speculation or the concentration of risk. Financial markets regulation is therefore an inappropriate means of regulating these commodities. • In executing transfers that bring Compliance Units into the EU ETS ("Primary Trades"), PD Forum members are operating in an equivalent way to manufacturers or producers of a physical commodity. This supply chain and the participants in it do not present a risk to financial markets. Financial markets regulation is therefore an inappropriate way to oversee these transfers. • Compliance Units are a globally fungible instrument, unlike EUAs which are limited to use as a compliance instrument only within the EU ETS. Regulating the supply of Compliance Units as an "investment activity" in Europe will increase the cost for PD Forum members of supplying the EU ETS and force PD Forum members to hold back units to supply other markets. For these reasons PD Forum members suggest that Primary Trades should be excluded or exempted from the definition of "investment activity" and treated differently from trading in EUAs for the purposes of MiFID 2. The consequence of including Primary Trades within the definition of "investment activity" would be that PD Forum members would be required to conform to the regulatory regime applicable to "investment firms". The burden of this compliance responsibility for PD Forum members would be disproportionately onerous and expensive given the risk they pose to financial markets. For the reasons set out above, such a reclassification would not achieve any benefits in terms of security, fraud prevention or market oversight in exchange for meeting this burden.
	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?	
	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 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?	
	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**
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Detailed comments on specific articles of the draft Regulation	
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