German Derivatives Association · Pariser Platz 3 · 10117 Berlin

Markus Ferber MEP
Member of the Economic and Monetary
Affairs Committee (ECON)

Parlement européen
Bât. Altiero Spinelli
15E242
60, rue Wiertz / Wiertzstraat 60
B-1047 Bruxelles/Brussel

German Derivatives Association

Berlin Office
Pariser Platz 3
10117 Berlin

Phone +49 (30) 4000 475 - 15
Fax +49 (30) 4000 475 - 66

Frankfurt Office
Feldbergstraße 38
60323 Frankfurt a.M.

Phone +49 (69) 244 33 03 - 60
Fax +49 (69) 244 33 03 - 99

politik@derivateverband.de
www.derivateverband.de

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13 January 2012

Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Dear Mr. Ferber,

Please find enclosed the formal response of Deutscher Derivate Verband (DDV) to your Review of the Markets in Financial Instruments Directive and your related Questionnaire on MiFID/MiFIR 2.

We remain at your disposal to provide additional material on these issues and look forward to discussing these matters further in the near future.

Yours sincerely

Dr. Hartmut Knüppel
CEO and Member of
the Board of Directors

Christian Vollmuth
Managing Director

Deutscher Derivate Verband

RESPONSE

TO

REVIEW OF THE MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE

QUESTIONNAIRE ON MIFID/MIFIR 2 BY MARKUS FERBER MEP

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	Deutscher Derivate Verband (DDV) [German Derivatives Association] Contact Person: Dr. Hartmut Knüppel, Christian Vollmuth Pariser Platz 3, 10117 Berlin GERMANY

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?	

	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	In our view the imposition of the relevant measures, including position limits, may have a severe impact on the addressee as they result in a direct intervention in the business of the affected market participant. We thus are of the opinion that the requirement of a mere "*threat*

	producers and consumers which could be considered as well or instead?	to the orderly functioning and integrity of financial markets" is neither sufficiently clear nor a sufficiently high threshold for such intervention. We strongly suggest to amend the related requirements by applying *mutatis mutandis* the same measures as set out in our comments on Question no. 19) below.
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?	The criteria for complex debt and money market products, i.e. that they "embed a derivative" and "incorporate a structure which makes it difficult for the client to understand the risk involved" are too wide and create uncertainty for all parties concerned, i.e. investors, issuers and distributors. It will be difficult to ascertain which products will be included in that definition and which products will still be considered as being non-complex. We believe that the real problem for clients is not complexity but risk, and that the fear about complexity is rather that the client may not understand the risk of a product because of its complexity. Eventually, complexity may - but does not necessarily have to - entail a higher risk. If a product is complex because it comprises risk reducing features, e.g. FX-hedging or a capital guarantee, it is clearly wrong to treat it as if it were "more risky" than a product without

		such risk reducing feature. On the other hand, a share in a company may have a rather high risk due to the volatility of the markets, even though it is arguably non-complex in its structure. As a matter of fact, the vast majority of certificates have a lower risk profile than e.g. shares. As a consequence, while we believe that the client has to understand all relevant risks inherent to the product, we strongly suggest to distinguish the treatment of products on the basis of their risk profile instead of by measuring their "complexity". Whether or not the risk is caused by the product structure is of minor relevance, such as a client does not need to understand the technical details of the ABS brakes of his car, as long as he understands the effect it has on the driving. Accordingly, we think that already the existing distinction between products with and without an embedded derivative is not appropriate to protect the interests of investors and the market. While we would very much favour an amendment of the existing provisions to remedy this flawed concept, we appreciate that such measure may not be possible. In any case, however, we strongly suggest to avoid further extending the flawed concept of adversely sanctioning "complexity" and ask not to introduce the additional concept to the existing rules.
	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?	The preconditions for a product intervention which may have serious consequences for an issuer or other market participant should be stricter. In view of the potential serious consequences for issuers and other market participants the terms “threat” and “significant concerns” for investor protection are not sufficient. We thus suggest that measures under articles 31 and 32 MiFIR should only be allowed if an activity or product causes sustainable or permanent damage to investor protection which cannot be avoided by any other measure. In addition, measures for investor protection should be limited to the protection of retail investors, as the severe measures allowed under articles 31 and 32 MiFIR would in our view not be proportionate vis-a-vis professional clients and eligible counterparties. With respect to the protection of the functioning and the integrity of the financial markets, not only a serious threat but also a sustainable and permanent threat should exist in order to allow a product intervention. It should also be considered that from a European law perspective, such approach may raise concerns regarding its validity. Both (i) the freedom to provide services and (ii) the freedom of movement of capital could be illegitimately restricted if the thresholds for an intervention would be set too low and/or would provide uncertainty as set out above.

		We also suggest to harmonise the criteria for investor protection under articles 31 and 32 MiFIR but to keep the distinction that measures by ESMA may only be taken if measures of the local supervisory authorities are not suitable to avoid the threat or damage. In case of product intervention by a local supervisory authority, the prohibition or other measure should specify the products, product specifics or even to name certain products which are affected by that measure in as much detail as possible in order to avoid uncertainty among the market participants.
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**
Article ... :	
Article ... :	
Article ... :	
Detailed comments on specific articles of the draft Regulation	
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Article ... :	
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