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 organisation responding to the questionnaire:	The Alternative Investment Management Association Limited (AIMA) 167 Fleet Street London EC4A 2EA

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 proposed exemptions for commodities derivatives (parents and subsidiaries and clients of the main business) are clearly aimed at ensuring that the exemptions are limited to, but still capture, MiFID activities without capturing the truly proprietary or commercial activities undertaken by some commodities derivatives operations. The exemptions are set out in a Directive that was, and is, primarily aimed at equities trading. In addition, the Directive is necessarily broadly drafted. However, these factors do cause us some concern as to the breadth of interpretation that will be left to regulators as to whether or not what are, essentially, risk mitigation activities that hedge exposures generated by physical commodities trading look like

		speculative, MiFID business.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	AIMA makes no comment on this question.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	AIMA makes no comment on this question.
	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?	We do not see any particular deficiencies in the current system, under which third country firms (3CF) access to EU business is governed by each Member State's national law. The financial crisis has not revealed any significant failures due to problems associated with existing third country regimes. Introducing burdensome or inappropriate third country rules, the EU risks isolating itself as well as erecting barriers to investment and trade, barriers which could affect the real economy as it seeks sources of finance from global investors. If changes are to be introduced, whereby access by 3CF to EU markets is to be regulated at EU level, the following principles should apply: • the third country regime should not apply where services are provided at the exclusive initiative of the client; • trading with eligible counterparties should not be subject to any third country restrictions. • 3CF that are required to establish a branch in the EU and comply with certain requirements under MiFID and MiFIR, and meet the preconditions to do so, should have the benefit of a passport to provide services into other Member States; • if 'equivalence' standards (however worded) are to be applied, they should be not be so prescriptive and inflexible as to be effectively incapable of being met. In addition, 'equivalence' assessments should be outcome-based

		and proportionate, having regard to the investor protection and other risks posed by 3CF's access to EU business. 'Equivalence' assessments should also be kept under regular review; Overarching principles should frame the Commission's discretion, so that this is exercised appropriately, consistently and in a non-discriminatory way. While AIMA appreciates that the Commission needs a degree of flexibility when determining whether or not a 3CF should be permitted to provide services to EU residents, the latitude inherent in these provisions clearly has the potential to allow de facto bans on incoming service providers from certain nations. This then creates the obvious risk of reciprocal counter-measures against EU financial services providers who look to third countries for their customers.
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?	We limit our response to the provisions within Article 9, i.e., to the situation as regards investment firms. We support the principle within Art. 9(1) that a Board collectively should have adequate knowledge, skills and experience and also that each member of that Board should act with honesty, integrity and independence of mind. We also agree that members of a Board should be able to commit sufficient time in order to do their job effectively. However, we do not believe that there should be a pre-determined limit as to the number of directorships (either executive or non-executive) that an individual Board member may hold – the 'right' number will depend entirely on the individual concerned. It should be left to the Board to satisfy itself and its competent authority that that individual will be both willing and able to devote sufficient time to perform his or her functions adequately, based on his or her unique qualities and circumstances. Equally, while we firmly believe that diversity among the members of a Board is a source of strength and should be an aim of any well run investment firm, it is critical that the ability to interpret Article 9(2) and 9(3) in a proportionate manner is retained within the final agreed

		text. A great many investment firms are small, with only a few Board members. To require a Board of, say, four members to display the degrees of diversity set out in Article 9(3) would be unduly onerous, if not impossible to achieve in practice. We believe, therefore, that the provisions currently under Article 9(1)(a), 9(2) and 9(3) would be more effective if made less prescriptive in nature and left to be interpreted by competent authorities in a principles-based manner.
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?	AIMA makes no comment on this question.
	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?	AIMA makes no comment on this question.
	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?	AIMA endorses the measures taken to improve the robustness and security of the various execution venues and routes to such venues which are addressed by Articles 17, 19, 20 and 51. AIMA confines its detailed response to this question to Article 17(2), 17(3) and 51 as AIMA's members view these latter provisions as being the most directly relevant to them. In particular, we consider Article 17(3) to be seriously flawed as it does not recognise the wide variety of strategies that fall within the definition of 'algorithmic trading' for many of which its provisions would be extreme and inappropriate. AIMA notes that this proposal had previously formed no part of the MiFID II consultation process. It is not entirely clear from the recitals to the proposed Directive that Article 17(3) seeks to address any of the specific risks identified therein. The provision seems to be designed to ensure that each and every firm employs any form of algorithmic trading strategy should essentially be required to fulfil a market-making role; however, this misunderstands the use that the majority of firms acting as portfolio managers make of algorithmic trading strategies.

		It should be remembered that algorithmic trading in many cases reflects trading strategies and patterns that have been employed by portfolio managers for many years - in some cases, decades - without controversy; the use of modern technology simply permits such trading to take place potentially more efficiently and rapidly than was previously the case. As investors in financial instruments, generally on behalf of their clients, AIMA members trade in these instruments in order to achieve investment objectives and comply with mandates given to them by their clients. Our members' use of algorithmic trading strategies - in order to manage positions established in accordance with these mandates and objectives - is for the benefit of those investors (and normally to comply with our members' obligation to provide best execution under existing MiFID rules - or the analogous obligation of acting in the best interests of their clients). Whether these trading strategies are employed by a portfolio manager itself using a proprietary algorithm or by an investment firm executing an order on behalf of a portfolio manager by the use of an algorithm, we do not understand why the Commission believes such forms of – essentially - agency trading should be required to assume a market-making obligation or the risk which would thereby be addressed. We note that many of the algorithmic trading strategies which are used for these uncontroversial purposes would not be viable if they were subject to the irrelevant and disproportionately onerous obligation contained in Article 17(3). This state of affairs would be detrimental to the execution quality achievable for investors (which is, of course, counter to the intentions for best executive contained within Article 27 of the proposed revised Directive). AIMA believes that the focus of attention should, instead, be on defining trading strategies through their potential to disrupt the markets should problems arise, regardless of whether carried out on a human or an automated basis, by algorithm or manually or at a high or low speed. The algorithmic strategies employed by portfolio managers on behalf of their clients have, by their nature, low potential to cause such disruption; on the other hand, they achieve

		desirable regulatory outcomes and the Commission's proposal as it stands would be a retrograde step. We suggest that the Commission should clearly describe which measures apply to what kind of investment firm (e.g., market maker, executing broker, asset manager, portfolio manager) and which measures apply to which kind of investment activity (order execution, order generation, agency trading). Also if Article 17(3) is introduced only to a sub-set of market participants then we would emphasise that an obligation to post firm quotes on a regular and ongoing basis at all times, regardless of prevailing market conditions would create significant issues from a risk management perspective. As described in Article 17(1), each investment firm should have in place effective systems and risk controls and its trading systems should be properly monitored in order to protect market stability. It is only worthwhile to have in place a proper monitoring system, in case there is a remedial action procedure to react on. One important remedial action is that the investment firm is able, at any time, to withdraw outstanding orders from the market, in order not to destabilize markets. But if the same investment firm is required to post firm quotes on an ongoing basis (Article 17(3)) then its systems and risk controls can not definitely work 'effectively' and would destabilize markets (the opposite effect). One reason why investment firms (need to) withdraw their orders from an exchange is because exchange rules currently allow exchanges to cancel or adjust transactions especially in volatile markets. If the policy aim is to prevent investment firms from withdrawing orders, it would be more appropriate to remove the need for them to do so by requiring exchanges to define their rules that maintain fair markets even in volatile environments. In case Article 17(3) is introduced in its current form, we request the Commission to act against these exchange rules in order to safeguard a fairer price formation process. As a less significant point, we note that while, under Article 17(2)

		competent authorities would have the right to recover further information from a firm at any time about its algorithmic trading and systems, it is unclear what use such competent authorities would be able to make of such information. We believe the limits on such use should be clarified. Whilst AIMA members espouse the principle of being open and co-operative with regulatory bodies, they question the value of providing the detailed information on trading parameters and limits suggested in the proposal and note that these can change frequently (it is unclear whether every such change would require a further notification to the relevant competent authority). We suggest that only information related to the nature and objective of the algorithm, along with the key compliance and risk controls, would be helpful to the authorities. The details of computer algorithms can include valuable proprietary information and safeguards should be included to ensure that their confidential nature will be respected and appropriately protected. With regard to Article 51, we believe that the use of a limited ratio (unexecuted orders to transactions) would have unintended negative consequences and would lead to an increase in market price volatility. The introduction of this rule decreases the number of orders that deviate from the current market price. In other words it will decrease the size of buy orders further below the current market price and will decrease the size of sell orders further above the current market price. Those orders that deviate from current market prices form an important cushion in case of large market price movements and increase market stability. By limiting the ratio of unexecuted orders to transactions, we predict an increase in market price volatility and market instability.
	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?	AIMA makes no comment on this question.
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for	AIMA makes no comment on this question.

	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?	AIMA broadly supports the proposal to place obligations on market participants to trade specified OTC derivatives only on organised venues. However, this trading obligation should only be applied to those classes of derivatives that are 'sufficiently liquid' and otherwise suitable for trading on organised venues. EMIR should make it clear that it is not to be presumed that OTC derivatives which are suitable for the clearing obligation under EMIR will be suitable for trading on an organized venue. AIMA also concerned that non-EU counterparties may be subject to unnecessary new obligations under the broad extraterritorial scope of Title V of the proposed Regulation. MiFIR should also make it clear that EU market participants should be permitted to trade OTC derivatives on any third party trading venue which is subject to a regulatory regime broadly equivalent rather than equivalent and with reciprocal recognition.
	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?	AIMA makes no comment on this question.
	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?	AIMA strongly supports the Title VI non-discriminatory access provisions and believes that the proposal will provide for effective competition between market infrastructure providers. Free competition, that allows buyside firms to choose to trade on any available trading venue or to clear with any available clearing house, will ensure that buyside firms receive the best possible services and the most cost-efficient prices, to the ultimate benefit of their clients. We would oppose any attempts to reduce the effect of this provision - for example, by introducing further conditions or requirements before access can be granted - as may be advocated by those market infrastructure providers which currently have monopolistic positions in the market. Should they be successful, the effects for the market are likely to be: • increased costs for end-users of financial services; • reduced choice in financial instruments and services;

		• less innovation and efficiency in the provision of services; and • a concentration of risk in the largest central counterparties (CCPs). When a trading venue or a CCP under Articles 28 or 29 refuses access to another CCP or trading venue, they must provided a fully reasoned written response setting out the reasons for denying access. There is currently no mechanism for ESMA or the Commission to look at those written reasons and judge whether the decision is reasonable or not. We believe a key amendment to the provisions of Title VI would be a mechanism whereby ESMA or the Commission could review a decision to deny access to a CCP or trading venue based on the fully reasoned written response given. ESMA or the Commission should be able to overturn the decision where they disagree with the analysis that granting access would threaten the smooth or orderly functioning of the financial markets. The proposals in MiFIR are broadly equivalent to the requirements in Articles 5 (Commission and European Parliament (EP) texts), 8 (Council text), 8a (Council text) and 48a (EP text) of EMIR. It is difficult to assess whether the MiFIR proposals fit entirely with EMIR, as agreement on a common position for EMIR has yet to be reached. Comparing the proposals in EMIR with those in MiFIR, the latter are more specific that non-discriminatory access includes, for CCPs, collateral requirements and clearing fees and, for trading venues, trading fees. This additional clarity is welcomed. EMIR, on the other hand, is more specific about the conditions which would constitute a threat to the smooth and orderly functioning of the markets (e.g., liquidity fragmentation). In general, greater clarity about what constitutes such a threat is welcomed as it provides less scope for a decision that access may be denied. Despite these differences, overall the MiFIR proposals do fit broadly with those in EMIR. Where the current proposals in MiFIR cover access to CCPs and traded venues for all financial instruments trading on a trading venue and EMIR proposes to covers access for OTC derivatives (i.e., derivatives not traded on regulated markets), there would appear to be a lack of provision regarding other non-derivative financial instruments which are not traded on a trading venue (i.e., a regulated market, MTF or

		OTF). Article 28 should be amended to ensure that, where it is safe to do so and where it does not create undue and unmanageable risks, CCPs would be required to accept any financial instruments for clearing that has been traded OTC.
	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?	In general, AIMA supports the goals of Article 59, which are to (i) support liquidity; (ii) prevent market abuse; and (iii) support orderly pricing and settlement conditions. However, we believe the Commission has proposed position limits in order to prevent excessive market activity that increases market volatility or prices in the **cash** commodity markets (not the commodity derivatives market). Article 59 suggests that the goals are designed to address issues with liquidity, abuse, pricing and settlement in the **derivatives** markets – we are not aware of any parties suggesting that these issues exist or that they are prevalent in the derivatives markets. If Article 59 is designed to address issues in the underlying cash commodity markets, we are concerned by the possible imposition of positions limits for commodity derivatives as the method to achieve the stated goals. The evidence to date has proven inconclusive that prices in the cash markets are driven by investments in the derivatives markets, as opposed to the fundamental interplay between supply and demand in the physical commodity. Even if it is accepted that there is a direct correlation between the two markets, imposing hard position limits should be considered with caution as the derivatives markets provide value to a number of different types of party (e.g., manufacturers and producers who want stable prices and revenues). Financial investors, including those acting on behalf of institutional investors such as pension funds and insurance companies, enter into commodity derivatives trades with other financial institutions as a way of diversifying their portfolios away from the equities and bond markets, thus reducing risk. As well as the benefits to these parties in using derivative contracts, other participants who hold themselves out as willing buyers and sellers give others parties someone with whom to trade, creating liquidity in the markets, which aids price discovery. AIMA believes the fair price of a particular commodity should be determined by the interaction of the supply and the demand for that

		commodity. Where hard position limits disrupt the demand for a commodity by reducing the position a party can hold (in the derivatives market), this will not necessarily result in reduced market volatility. If a large supply is newly put on to the market, unless there is sufficient demand, prices will drop rapidly and may quickly increase again in future once supply is exhausted. This volatility is bad for both manufacturers, producers and, ultimately, consumers. Artificially reducing prices in this way also significantly reduces the amount of money which, say, agricultural producers get for their crop. If it is accepted (i) that investment in the commodity derivatives market does have a direct impact on prices and volatility in the cash commodity markets and (ii) that the benefits of intervening in those markets outweighs the benefits that will be lost from the derivatives market, it must be considered what provisions are appropriate. AIMA strongly backs measures aimed at preventing market abuse and any attempts by market participants to unfairly distort supply and demand in the market should be considered abusive and dealt with appropriately. This, though, should be done via the Market Abuse Directive and cannot be effectively addressed by position limits which apply to all parties. To address possible increases in the price or price volatility in the cash commodity markets resulting from the commodity derivatives markets, we would favour the use of position management requirements. Position management sets 'soft' position limits, which can be determined by trading venues that are able to monitor the prices and trading volume in the market. If a trader is reaching a position above a soft limit (set by the market operator based on current supply and demand), or has the intention to do so, the trader must discuss the situation with the market operator. The market operator could then either accept or reject the request to take a large position, or could propose mechanisms that would dampen the effects on the market. The market operator would be given flexibility to control positions held by single traders, taking into account the necessary goals included at Article 59. Such a regime could also be created with a trader's market regulator, if done in tandem with a position reporting regime. However, regulators are

		likely to have less information (or less up-to-date information) than market exchanges and may find it a challenge to set appropriate soft limits. The majority of commodity derivatives exchanges, however, already undertake position management and have gained experience in this practice. In general, and as a principle, we would note that price volatility is not caused by parties 'owning' large positions but, rather, it is the result of trading 'activity' in a small time frame. By way of example, an investor who gradually, over a number of days, increases its number of coffee contracts up to a sizeable position of 1000 lots would cause less volatility in coffee prices then an investor which acquires only 100 lots of coffee but in a short time frame (e.g., 5 seconds). In other words, it is not the position but the transaction-size in relation to the time period involved that could (abusively) influence market prices. If 'hard' position limits are introduced, we would suggest that: • be set for each type of commodity derivative contract individually, based upon available market information (which must be collected). The limit should be set sufficiently high that market liquidity is not significantly adversely impacted but sufficiently low that extremely large individual positions do not significantly impact the cash market price. These limits should be reviewed and revised regularly to ensure they remain appropriate. Further, it should not be mandatory for member states to implement position limits for every type of commodity derivative contract. Instead, Member States should impose position limits on those contracts where they consider that it is necessary to (a) support liquidity; (b) prevent market abuse; and (c) support orderly pricing and settlement conditions. Where the limits will not be helpful or aid these goals, they should not be required to be imposed; • only apply in the spot-month (i.e., the month prior to the date at which the contract would settled) to prevent parties cornering the market ('squeezes') that would impact the cash market. Non-spot month positions will have very little (if any) impact on the cash

		market price (e.g., a trader who holds a position in contracts which settled in 6 months' time cannot impact today's market prices); • only apply to commodity derivatives which actually settle (or have the possibility to settle) in the underlying commodity at their conclusion. Those contracts which may settle in the commodity will obviously impact the supply and demand in the physical cash market as the seller of the derivative will have to obtain the commodity in order to provide it at the point of settlement. The limits should not apply to commodity derivative contracts which at their settlement only have the ability to be settled in cash (i.e., the cash value that the commodity would be worth in the market if the derivative did settle in the commodity). Cash settled contracts have no direct impact on the cash market prices and in no way directly impact the supply and demand of the underlying commodity; • only apply to the net, rather than gross, positions held by the trader; and • only be applied to traders who have control and knowledge of the positions taken. Limits should not be applied to parties who only beneficially own a position but have no knowledge or control of the position. Otherwise, parties may be subject to position limits and breach them without their knowledge, where their money is managed by a third party. The aim of position limits, if introduced, should be to apply limits to decision makers to prevent them taking large positions, not to prevent parties inadvertently 'owning' large positions. For investment funds, fund managers should not have to aggregate the position they take for a fund with the positions of: – other fund managers run separately but owned by the same parent company; – other funds managed by the fund manager; – the underlying investors of the fund; or – the fund managers themselves (i.e., proprietary positions).

		In all cases, it is important that MiFID provides for a clear definition of 'commodity derivative' that indicates which contracts are to be subject to position limits. The current definition is ambiguous and misleading.
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?	AIMA makes no comment on this question.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	AIMA makes no comment on this question.
	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?	It is not clear what benefit will be achieved by the proposed requirement for investment firms to publish annually their top five execution venues for each class of financial instrument or, indeed, how the top five venues are to be identified. AIMA is of the view that this requirement would increase costs for firms without providing the client with any identifiable reciprocal benefit.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	An effective client classification regime involves clear distinctions in client categories and in the protections applicable to each. The objective of the reforms is to tighten the protections available to non-retail clients in order to provide sufficient or appropriate levels of protection. Sufficiently clear protection will be available for eligible counterparties through the extension of the overarching principle to act honestly, fairly and professionally towards them and to communicate in a way that is fair, clear and not misleading. We do not consider it appropriate, however, to extend this principle, as suggested in Article 30(1) of the Directive, to take into account the nature of the client and its investment business. However, the core distinctions between the various client classifications may be lost or blurred through the proposal to extend or increase information and reporting requirements to relationships involving eligible counterparties. In view of the requirements that must be met before eligible counterparty status can apply, it is difficult to see how an eligible counterparty will benefit in practical terms from the imposition of information and reporting requirements set out in

		Articles 24(3) and 25(5). Classification as an eligible counterparty means that the entity must already have the knowledge and experience to ask for any further information it may want. Moreover, it has the choice of electing to opt down to a more protection client classification in order to gain extra protection should it so wish. Those protections provide an effective and adequate balance for eligible counterparties in terms of protection. Narrowing the regime to restrict municipalities and local authorities from classification as eligible counterparties or per se professional clients clarifies and ensures the protection for these sub-categories. This carve out still recognises that some of these types of clients may be capable of operating with less protection, but only where they request and have succeeded in meeting the elective professional client requirements. Due to the varied nature and expertise of these types of clients (both within and between Member States), there needs to be some flexibility in determining the protections that should surround their activities. For those falling within this sub-category, appropriate differentiation as between those who can and those who cannot operate with less protection by means of an opt up will be provided by the Annex II proposal which allows Member States to adopt specific criteria for the assessment of the expertise and knowledge of these clients. Suitability and appropriateness are obviously two key areas of the MiFID conduct of business regime. Although the operation of presumptions may at first appear cumbersome where a firm has reached the determination that the client has met the criteria for professional client classification, then it is consistent that the firm should be able to assume that a professional client has the necessary experience and knowledge in relation to the products and services involved with that classification On a practical level, it eliminates duplication or unnecessary requirements which may be more appropriate to retail clients and thus maintains the distinction between professional and retail clients.
	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	Striking a workable and sensible balance between investor protection and undue damage to the financial markets must be fundamental to any provision which provides the power to impose prohibitions and

	financial markets?	restrictions on products. Considerable uncertainty, triggering significant damage, will result if the application of product intervention powers cannot be reasonably predicted. To this end, the following adjustments to the language are needed to the broad powers contained in Articles 31 and 32: • the temporary prohibition or restriction in Article 31(1)(b) covering "a type of financial activity or practice" is extremely wide. (We note that the same phrase reoccurs in Article 32(1)(b)). Such a broad power will give rise to uncertainty for market users and will potentially reduce the willingness of parties to trade in European markets because the power to intervene appears capable of application to any activity, or even whole markets. The fundamental uncertainties created by this wide language are not necessarily removed by the Article 31(2) conditions that ESMA is required to consider before making a decision, although these do provide some limited assistance and appear to the correct criteria for assessing whether a temporary prohibition should be imposed; • Article 31(6) should be adjusted to remove the possibility that a temporary prohibition can be imposed indefinitely by continual renewals. All temporary prohibitions should have clear end dates; • Article 31 should also make it clear that ESMA must ensure, in the exercise of its discretion, a level playing field exists in its application of any prohibition or restriction. As some flexibility in approach may be justified in some cases, any exemptions should be carefully reviewed and criteria should be provided. To ensure that ESMA does not, for example, exempt certain countries, target one jurisdiction or exempt certain financial institutions; • the Article 32(1)(a) power enabling a Member State to impose a permanent and unilateral prohibition or restriction on certain financial instruments or types of instruments should be amended to reduce the scope for regulatory arbitrage to arise and to preserve a level playing field for different financial institutions in the free market; • when assessing the potential application of this power, Article 32(2)(a) should be amended to ensure that a Member State must

		consider whether there is a "significant" (i.e., likely) threat in addition to the requirement that it assess whether or not the threat would be "serious". Otherwise, the current wording leaves open the possibility that many unlikely events could lead to prohibition or restriction by a Member State; • as in the case of Article 31, we do not believe that permitting Member States to prohibit certain "activities" on a permanent basis is a sensible approach to regulating the market as it will be unduly weighed towards investor protection. Significant damage could be caused for financial markets through the resulting uncertainty. Article 32 should be amended.
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?	AIMA supports the extension of existing pre-trade transparency requirements for shares to depositary receipts, ETFs, certificates and similar financial instruments. As these financial instruments have different characteristics from shares and trade in different manners, we believe that MiFIR should provide for Level 2 measures which allow these instruments to be subject to certain appropriate differentiations in order to reflect their different natures. We also support the extension of pre-trade transparency requirements to actionable indications of interests (IoIs). However, we are concerned that the definition of 'actionable IoI' is too imprecise and may lead to order providers reducing their use of IOIs, to the detriment of end clients. The definition of 'actionable IoI' in Article 2(1)(16) includes a provision that IoIs must include "all necessary information to agree on a trade". We believe that MiFIR should include further details as to precisely what information is necessary to 'agree on a trade' so that participants can have certainty in this regard.
	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?	AIMA, in principle, supports the extension of pre-trade transparency requirements to non-equities markets. However, we are concerned that, for many products, such requirements will not be appropriate. Many non-equity products are far less liquid than the majority of equity instruments listed in European markets and, as such, requiring publication of pre-trade quotes may create significant price volatility while fair price determinations may be impaired. To some extent, the Commission proposal addresses this concern through the ability of a competent authority to grant waivers from the requirements for

		certain products based on their liquidity profiles. The use of waivers should be given detailed consideration by competent authorities and ESMA before the Article 7 requirements take effect. Given that after consultation with ESMA, waivers will take at least six months to be approved by the competent authority, we believe that no pre-trade transparency requirements should be applied to non-equity products until all products have been assessed and all appropriate waivers have been granted. It is likely that simple, highly liquid bonds should be first subject to the pre-trade transparency requirements, followed by less liquid bonds and other more complex, less-frequently traded non-equities.
	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?	As stated above, it is important that all instruments are assessed to ensure pre-trade transparency requirements are appropriate and that requirements are not effected until such assessments have taken place. Competent authorities, coordinated by ESMA, should study those non-equities traded on EU markets and should determine appropriate criteria for assessing the minimum liquidity necessary for pre-trade transparency requirements to not unduly impact market prices. Non-equity products should be regularly assessed to ensure that the waivers from pre-trade transparency requirements are appropriate.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	AIMA continues to believe that pre-trade transparency waivers for equities and non-equities are appropriate and should be used where pre-trade transparency requirements would be detrimental to determining an accurate market price.
	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)?	AIMA supports the introduction of regulatory regimes for CTPs, ARMs and APAs and believes that the registration and organisational requirements are appropriate. We also support the introduction of a post-trade consolidated tape for equities and equity-like instruments, which will provide much greater transparency on equity prices in the market. However, although we agree that consolidated tapes should operate on a commercial basis, we do not believe that having multiple tape providers would be of real benefit to the market. The existence of multiple tapes is likely to create additional costs and burdens for market operators, when all the tape providers can do is present identical products to the market. Competition is

		often beneficial to the market; however, the simplicity of the product combined with the fact that costs must be 'reasonable' in any case, means that multiple tape operators are unnecessary in practice. The European authorities should consider whether it would be more beneficial for the market to have a single consolidated tape (as exists in the US). A post-trade consolidated tape for non-equities may also be beneficial in the market; however, given that no such tape exists today, we believe further investigation is needed as to how this would operate before such providers may establish themselves. This issue should be revisited after the introduction of one or more equity market consolidated tapes, building on the experience of their implementation.
	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?	AIMA supports provisions requiring the publication of post-trade data on a 'reasonable commercial basis'. We assume that this term requires some form of control over the price with which the information can be made publicly available. However, it is difficult to see how prices could be fairly set in delegated acts and reasonableness is likely to be determined by the price market participants would be willing to pay for the information. We would prefer that no further clarification be given in this regard in delegated acts and that prices be set by the market to determine what is reasonable.
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?	AIMA makes no comment on this question.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	AIMA makes no comment on this question.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	It will be important to ensure alignment, to the extent appropriate, between provisions of MiFID 2 and the AIFM and UCITS Directives. For example, alignment may be appropriate in the field of conduct of business requirements. It will also be important to ensure consistency of approach between MiFID/MiFIR 2 and the AIFM

		Directive as regards 3CF access to EU business (e.g., in respect of co-operation arrangements). This is not to advocate a 'one size fits all' approach, however. Regard should be had to the fact that the UCITS Directive relates to retail funds, whilst the AIFM Directive relates to professional funds. It will also be important to ensure that MiFID 2 is consistent with certain provisions of EMIR. We welcome the provision in Article 23(6) of MiFIR which recognises that derivative transactions reported to a trade repository under EMIR can constitute a firm's transaction reporting requirements. We also note the cross references to EMIR in Articles 24 to 29 of MiFIR and the attempts to ensure that similar provisions relating to access to CCPs do not overlap, and trust that these will be updated as EMIR is finalised. In particular, we believe it would make sense for the same scope of derivatives transactions between third country counterparties to be subject to both the trading and the clearing obligations and note that the power to specify the types of contracts which could have a direct, substantial and foreseeable effect within the EU is delegated to the Commission.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	AIMA makes no comment on this question.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	AIMA makes no comment on this question.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	AIMA makes no comment on this question.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article … :	AIMA makes no comments in respect of other articles within the draft Directive.
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 21, 22 and 23:	We have concerns regarding some of the information that is to be required in the regime established under these Articles, including the identity of clients and the designation of the party responsible for the investment decision. Hedge fund managers manage assets of their clients, which are pooled investment funds. These funds may or may not be affiliated with the manager. In all cases, the fund is the client of the manager. It is not clear whether the proposal envisages that the requested information in the required report would include a look-through of the fund vehicle to the underlying investors. We would be strongly against such a position since this creates particular difficulties when making such reports – for example, investors join or redeem from a fund on a regular basis and it is difficult to say which specific underlying investors the investment has been made "on behalf of". Moreover, it is frequently the case that the contractual arrangements which exist between the manager and the fund contain confidentiality clauses which prevent the disclosure of certain information relating to the investor – this may be because, for example, the information is commercially sensitive or is the investor's intellectual property. While there is no regulatory or supervisory benefit to be gained by making such information generally available to the competent authority, to include such a provision within MiFIR would cause harm to the relationship between the manager and its client. The final text should clarify that the look-through approach for reporting purposes be limited so that it goes no further than the level of the regulated fund manager. A designation of the computer algorithm responsible for executing a transaction is also difficult to provide. An algorithm is likely to run through other computer systems before the order is sent to the electronic trading venue, including risk control and portfolio level control programs. Each system may alter and control the trade order before it is submitted and could be considered 'responsible' for the execution of a transaction. This requirement should only include the identity of the person responsible for trading at the firm – in the case of automated trading, the person responsible for approving execution of trades via the algorithm. This will allow competent authorities to identify the person that they would need to speak with should they have any concerns about the trading occurring as a result of a firm's use of algorithmic trading.