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 Association Française de la Gestion financière – AFG** **31 rue de Miromesnil** **75008 Paris** **France** **Tel : +33 (0)1 44 94 94 00** **www.afg.asso.fr**

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?	AFG believes that exempted entities should be subject to analogous MIFID rules as conduct of business for the provision of investment advice and fit and proper criteria. AFG supports the proposal which would harmonize investor protection regimes and enhance fair competition / level playing field among intermediaries.

		Article 2 1. h) MiFID: AFG understands that this Directive shall not apply to depositaries of funds. However, these actors offer a new investment service to funds: safekeeping and administration of financial instruments for the account of clients, including custodianship and related services (annex I section A (9)). Therefore, to ensure the investor protection (the final owner of funds), we believe that depositaries of funds should not be exempted. Article 3 MiFID: AFG believes that this optional exemption will create an unlevel playing field among distribution channels. Indeed, investment advisers would be allowed to receive payments from third parties in Member States which choose not to apply this Directive to them (as per in article 3. Whereas in other Member States which choose to apply MIFID to investment advisors, independent actors would not be allowed to receive payments from third parties (as explained in article 24 of MIFID). In the second case, the local distribution channel of financial products would have to be totally changed, while in the first case it would not be necessary.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	AFG supports the idea to include all substitute investment products in the scope of the Directive in order to ensure a level playing field. An investor should be protected by the same rules (in terms of information, conduct of business rules...) whatever the product he/she buys and whatever the distribution channel he/she chooses. Therefore, in relation with the Commission's consultation on the

		Packaged Retail Investment Products (PRIPs), AFG supports the proposal to extend MIFID rules to cover structured deposits. We strongly support the idea to include structured deposit in the list of financial instruments (Annex I, section C). Such inclusion will ensure a real level playing field. In the same way, it is crucial to ensure a level playing field and make sure that EMTN are also considered as financial instruments (like transferable securities – Annex I, section C) and are included in the scope of MIFID.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	AFG fully supports the proposal to consider as investment services safekeeping and administration of financial instruments for the account of clients (Annex I, section A). However, considering that the activity of "safekeeping and administration of financial instruments for the account of clients" is an investment service requires a full corpus of rules including in particular best practice rules adapted to such a specific service. In addition, the client should be fully informed of the rules and regulation applicable to its own account. In these conditions, considering that the activity of "safekeeping and administration of financial instruments for the account of clients" is an investment service seems to be consistent with the possibility for a third country firm to provide such a service, provided that the same corpus of best practice rules applies to **any** provider of the 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 that market are now global and to ensure the existence of a level playing field among third country and EU entities, AFG believes that it is necessary to regulate third country access to EU markets, especially for retail clients. More specifically, we are of the opinion that **third country firms should comply with <u>all</u> MiFID and MiFIR rules** (please refer to our proposed amendment relating to Article 43 paragraph 2 MiFID). There is no reason for third country entities to be under less strict obligations if they wish to be granted the same benefits as European entities. For instance, the Dodd Frank Act follow this approach: non US financial entities, such as non US banks and non US management companies, have to abide by the rules of the Dodd Frank Act if they wish to exercise their activity in the US. Moreover, many investment managers will be subject to both the MiFID/MiFIR and the AIFMD. Knowing that the AIFMD provides for a regulation of third country access to EU markets, it would make sense if these two pieces of legislation followed the same approach. For instance, we propose to introduce, in line with the AIFMD: • The introduction of the concept of "Member State of Reference" (please refer to our proposed amendments relating to Article 41 paragraph 2 MiFID and Article 41a new MiFID) and the requirement for a legal representative in the EU for non EU entities (please refer

		to our proposed amendment relating to Article 36 paragraph 1 MiFIR); • Relating to third country legal requirements which have an **equivalent effect** to the European regulation, the use of the wording "same effect as" – rather than "equivalent effect". This notion of equivalence would be too vague and subjective, opening a too wide range of interpretation by the Member States used as Member States of reference for granting the passport and consequently access to the whole EU market. This notion would both weaken the protection offered to European investors and create a high risk of disadvantage for European players. The protections that third country service providers offer EU investors should not vary on the Member State of reference that grants them access to the Single Market (please refer to our proposed amendments relating to Article 41 paragraph 3 MiFID and Article 37 paragraph 1 MiFIR). Furthermore, we believe that the Commission should only take an equivalence decision provided that **reciprocal access by EU investment service providers to the relevant third country market** is ensured in order to ensure a fair competition among EU and third country entities (please refer to our proposed amendments relating to Article 41 paragraph 3 MiFID and Article 37 paragraph 1 MiFIR).

		However, **we strongly request to clarify that European professional clients (including asset management firms) are still authorized to make use at their own initiative of investment services provided by a non-EU firm not registered at EU level** (passive marketing): their freedom should not be hindered to use third party service providers even if they are not authorized to perform active marketing. We therefore propose to turn Recital 74 into an Article to give it a higher legal effect (please refer to our proposed amendment relating to Article 40a new MiFID).
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?	AFG agrees with the new high level principles proposed in relation to good corporate governance but find the proposed solutions in Articles 9, and 48.4 to be too detailed and prescriptive. Furthermore as there are numerous measures on these items concerning investment firms, applicable or in the course of elaboration, either at the European level or at the national one, we wonder about the relevance of heaping regulations. Can be so evoked for countries as France measures on diversity (CF French Zimmermann Copé law relating to Women's representation in Corporate Boards) and the coming measures on remunerations. For Article 9.1-a, it seems difficult to establish widely applicable rules rules concerning cumulative number of Directorships that an individual may hold considering all the existing specificities, specifically for individuals with directorships on the Board of corporate-type funds (i.e those with a legal personality).

		Corporate-type funds will not qualify as entities held within the same group as the wider investment firm (even though they are managed by the same investment manager) as they are legally distinct entities. As such directors of the investment firm will not be able to count their directorships of corporate-type funds alongside their directorship of the investment firm as a 'single directorship' – nor will they be able to multiple corporate-type fund directorships as a 'single directorship' - for the purposes of MiFID. Capital investment asset managers companies have also a real specificity towards rules concerning cumulative number of Directorships. We also question the requirements in Articles 9.4 and 48.4 that direct ESMA to develop regulatory standards to specify the notions of knowledge, integrity or diversity, etc. We think these are particularly prescriptive and question whether ESMA should be tasked with codifying abstract concepts into law. Further requirements on these notions would also result in a tick box compliance exercise rather than genuine corporate governance. We would therefore propose the deletion of Articles 9.4 and 48.4 as they currently stand, and support, instead, a more principles-based approach.
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?	Our members do not support the prohibition on the use of proprietary capital in OTFs. This prohibition is disproportionate and is likely to prove damaging to dealer-led liquidity, on which clients place significant reliance in all financial markets, but especially for fixed income and OTC derivatives. Instead, they

		suggest requiring the broker/dealer first to make it clear if it participates in its own crossing network, then to flag proprietary orders and to provide that a client may always decline to allow any interaction with the broker's own market-making in the pool, and finally to require detailed disclosure to the client post-trade from brokers to clients on how trades have been filled. Convert OTFs into MTFs after reaching a specific threshold is not consistent. OTFs as well as MTFs are two different business models for investors. Thus, it makes no sense to change the status due to a change in size. Regulators should consider the service provided instead of the number of transactions.
	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?	We agree with the MIFID II proposal, however, that liquidity and transparency should remain the main focus. Thus, exceptions should be taken into account considering fixed income specificities, pre-trade transparency, and delay in post trade transparency in case of large orders. OTC trading, together with regulated venues, constitutes a possible place to execute orders. Costs or need for bespoke are elements that may contribute to the choice of the execution process and therefore flexibility of choice is valuable.
	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?	First, it is important to distinguish between algorithmic trading and High Frequency Trading. Algorithmic trading refers to order execution by algorithms, whereas High Frequency Trading is a method to deploy strategies in which computers make decisions to initiate orders.

		Investment managers may use algorithms to execute orders, in order to achieve best execution for their clients and manage market impact in a time-efficient way. In some cases investment managers design their own algorithms, while other managers are users of other firms' (typically, investment banks) algorithmic trading facility products. As such, the latter are not able to have deep insight into how another firm's algorithm product works and are confined, in their due diligence, to the information that is made available. The requirements for additional systems and risk controls required to use algorithms should therefore be proportionate to the actual use of algorithms. Furthermore, the current provisions on algorithmic trading are far too broad and would capture many firms that do not use High Frequency Trading. Whereas we acknowledge the need for proper systems and controls and business continuity, investment managers should be carved out, as they undertake only client business and initiate transactions on behalf of clients, therefore they would never be able to meet the obligations to post quotes in Paragraph 3 of 17(3). The definition of "algorithmic trading in Art. 4 (30) of MiFID must therefore be amended to take this into account. Proposed new 17.3 An investment firm whose principal activity is to post quotes (market making activity) using an algorithmic trading strategy

		shall ensure that it remains in continuous operation during the trading hours of the trading venue to which it sends orders or through the systems of which it executes transactions. The trading parameters or limits of such an algorithmic trading strategy shall ensure that the strategy posts 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. All computer programs consist of algorithms. Investment managers may use algorithms to execute orders, in order to achieve best execution for their clients and manage market impact in a time-efficient way. The definition of "algorithmic trading in Art. 4 (30) of MiFID must therefore be amended to take this into account that (1) best execution involves more than routing orders and confirming orders and (2) that not all users of algorithms have access to the computer code and therefore the workings of the algorithm. Explanation: We try to address two issues here, which need to be separated in the answer more clearly: (1) algorithms are used for best execution purposes and for HFT. (2) Algorithms may be proprietary or purchased, i.e. one may or may not have access to the computer code and the inner workings of the algorithm (this is true for both best execution algorithms and HFT algorithms. The definition in art 4(30) excludes algorithms that are used for "routing orders and for order confirmation". But there is more to

		best execution than that. Automated trading has been examined by the Commission (see impact assessment p. 73 and 346).
	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?	We believe that the requirements set out in article 51 for trading venues and their systems are the preferable and primary way to control high-frequency trading being market abusive.
	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?	AFG agrees with the proposed extension. We also strongly support harmonisation of the requirement. This harmonisation should be extended to the storage of data in order to produce marginal benefits for the work of regulators undertaking investigations. The main rationale for the record keeping of trades for clients is investor protection. Information on proprietary trades is relevant to competent authorities when combating market abuse and conflicts of interest. Therefore the proposed requirement is appropriate.
	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?	The global move to RMs, MTFs and OTFs should be based with a view to favour liquidity and transparency. Thus, it is necessary to define the concept of liquidity for each asset class which requires a move. Maintaining liquidity in execution decreases systemic risk and cost of execution. Liquidity will not be created automatically by exchange trading

		and many OTC transactions may not be entered into at all if they are forced to move to exchange. The important role of liquidity providers needs to be analyzed in more depth by the Commission, together with the impact of increased transparency. Furthermore, some derivatives are too bespoke to be standardized and therefore are simply not suitable for organized trading.
	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?	Continuing to enable small companies to access finance on the capital markets is a key element for allowing innovation, creating jobs and supporting the real economy. Thus, we believe that the so called "exchange regulated" market segments should be maintained. Moreover, adding new MTFs could result in a fragmentation of liquidity for SMEs in a market where there are several trading platforms especially designed to provide access to capital in particular for SMEs (Entry Standard in Frankfurt, AIM in London, Alternext in Paris). AFG emphasizes that the same effective investor protection regarding transparency and market abuse is as necessary here as it is in other markets. Otherwise the investment risk would increase in SME markets as opposed to other MTFs. The proposal achieves this goal to a large extent. Conversely, however, when administrative burdens associated with these investor protection rules can be minimized, this should apply to other MTFs and regulated markets as well. AFG believes SME markets may well help SMEs to gain easier access to more capital. But AFG would like to caution against too much optimism on resolving the issues surrounding SME

		access to capital markets (lack of visibility, market liquidity and high costs of IPOs, see p. 11 of the Impact Assessment), because these have to do with characteristics of SMEs as such: they do not usually have very well known brand names, they are not widely analyzed, they cannot absorb large investments from institutional investors (because they are small companies), and their risk/return profile is different from large caps.
	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?	AFG welcomes this provision. Regarding the relation to EMIR, we would avoid to link those discussions considering the difference in timelines. MiFID II proposals appropriately complement EMIR, and together they should ensure non-discriminatory access for all derivatives transactions.
	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?	We do not support possible requirements to introduce limits to how much prices can vary. Some of our members believe that position limits would reduce the efficient functioning of these markets, while others only support a trading interruption (cool down period) as it is currently being implemented on equity exchanges, after which trading resumes. Price discovery is a key driver for market participants in their choice of trading venue and as such, liquidity will move to those venues providing the commodity derivative contracts best satisfying that demand.
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?	<u>1- Advice provided on an independent basis:</u> AFG strongly disagrees with the proposal to ban commissions paid by product providers to intermediaries providing an "independent" advice. We consider that such proposal will

		decrease investor protection : • Firstly, in continental Europe, investors can receive an investment advice service mainly through two main channels: with bank and insurance companies or with financial investment advisors. The competition between these two channels allows investors to get a quality investment advice service. Contrary to the objective of the Commission, banning the commissions paid by product providers to ("independent") financial investment advisors would affect their financial viability, especially for small size ones. **It would lead to a decrease of these advisors and so strongly limit competition**. • This proposal would also **drastically reduce open architecture**. In France, 250 assets managers are "independent" (not tied to a bank or an insurance company). Their main distribution channel is based on ("independent") financial investment advisors. If investment financial advisors disappear, independent asset managers will not sell their products. Moreover, integrated distribution channels would not anymore have any incentives to sell other funds than "in house" funds. • Furthermore, a large majority of retail investors are unwilling (or unable) to pay for advice. Banning commissions paid by product providers to ("independent") intermediaries is likely to reduce access to advice for retail investors, especially those investing small amounts. **It would be a "pro-rich" measure**. • According to the UCITS IV directive, ongoing fees pay

		for asset management and for other service providers such as distributors. **These distribution fees pay for the assistance provided to the investor** (like products selection, adequacy or suitability, eventually reporting and long term assistance…) and the distributors' monitoring on the product (information on evolution or changes…). Banning these distribution fees would deny the entire service that can back a financial product sell (information, reporting, advice…). We think that **clear and fair information disclosed ex-ante to clients on the commissions received by the distributor is the best way to ensure investor protection**, like the Commission services seem to recommend with the review of the Insurance Mediation Directive. It would improve comparability among distributors and so would manage conflicts of interest. 2- Portfolio management: Some portfolio managers chose to deduct the commissions received from the management fees. This is fully transparent and excludes any conflict of interests. It would be forbidden by the present Art 25, Point 6. It is not fair to force those managers to increase the management fees paid by their clients who would not accept this unjustified increase as they would not receive a better service. AFG does not consider that commissions paid by product providers to portfolio managers should be banned. • Firstly, these commissions have allowed for the development of the **open architecture** (which is the real source of competition between product providers). Such

		commissions are the only mean to favour competition between "external" funds/financial products provided by subsidiaries or by third party providers and "in house" financial products. It would be a regression in terms of supply diversification if wealth managers or portfolio managers only proposed "in house" or "low cost" financial products. • Investors expressly consent to these commissions being kept by portfolio managers as these commissions reduce the fees that investors pay. If these commissions were banned, investor fees (which are submitted to the VAT) would have to increase. Consequently, **direct investor charges would increase sharply** yet no improvements would be made to the service. As a result, **portfolio management services (mandates) would only be affordable by wealthier investors**. • Such proposal **would also increase unfair competition** among distribution channels of savings products (via independent or not advice, via mandates, via life insurance…) From AFG's perspective, **strengthening transparency**, as in the case of investment advisors, **is the best way to better manage potential conflicts of interest** relating to portfolio management. Another way would be to ensure that the commissions or financial benefits paid by producers (and actually received by managers) effectively **benefit clients**. In our solution, these commissions may be paid to the portfolio manager provided that: - they are motivated by clients' interest,

		- they are transparent, and - they benefit to the client (most often through a deduction from the management fees). With full transparency and no more conflict of interest, there is no reason to forbid investment managers to receive such commissions
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The industry (at French and European level) has always asserted that preserving the UCITS label was key and has been reluctant to distinguish between complex and non complex UCITS, especially in a context of incomplete level playing field among financial products. Moreover, such a distinction would be difficult to implement. In addition, it would be difficult to assess its potential impact, especially at the level of each Member State. We believe that a UCITS which uses sophisticated management techniques but whose risk reward profile is easy to understand should not be considered as complex, as it would prohibit investors from accessing products whose objective is very often to reduce the risk borne by investors. Indeed, **complexity does not necessarily mean risk**. Moreover, what matters to investors is the risk reward profile of the fund, not its inner workings, as investors do not need to be able to reproduce the management techniques used in the fund. AFG acknowledges that certain UCITS are less easy to understand (but not necessarily more risky) than simple financial instruments such as shares or bonds. But with the UCITS IV directive, the KIID will improve the information for investors.

		Its objective is to make all the UCITS more comprehensible. Investors will have fair, clear and not misleading information about the main characteristics of the product like risk and return In particular, AFG is fully aware that the risk reward profile of certain funds among structured funds, as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010, may be less easy to understand**.** We appreciate that investors should not be sold on an execution-only basis financial instruments whose risk reward profile would be too difficult for them to understand without proper advice. In other words, some specific structured UCITS may be considered as eligible to execution-only, while some others, whose promise is less easy to apprehend may need advice and should rightly be excluded from execution-only. Therefore, AFG proposes not to split UCITS into too wide, too rough categories, to respond to the objective of investor protection. Rather, we propose to define more precisely which are the funds whose risk return profile is more difficult to understand, i.e. to distinguish among structured funds those whose structure does not allow investors to easily understand their "promise" / "payoff". In any case, the non – eligibility of a product for being sold on an execution - only basis should not trigger its automatic "classification" as a complex product, as this would wrongly imply that all products that need to be sold with advice are less appropriate than "non-complex" products. Execution-only is a

		question of determining whether advice is required in order to help the client to understand better the payoff of the product, but should not have the consequence of naming that product "complex".
	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?	Portfolio managers are considered as eligible counterparties and therefore do not enjoy the protection of best execution rules according to Art. 24 of MiFID Level 1, while they have to act in the best interests of the client according to Art. 45 of Level 2. The MiFID revision should require that portfolio managers be provided with best execution by investment firms with whom they place orders notwithstanding the fact that the portfolio manager may be categorized as an eligible counterparty.
	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?	AFG fears that provisions concerning product intervention by competent authorities or by Esma may be inconsistent with the creation of the internal market in financial services through the passporting authorised by other pieces of legislation, in particular the UCITS Directive. MiFIR should not impede the implementation of other European regulations. For this reason, such provisions should only apply to financial instruments or financial activities that are not passported in compliance with another regulation.
Transparency	20) Are any adjustments needed to the pre-trade transparency	AFG members agree with the Commission proposals to extend

	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?	the MiFID transparency regime. However, it must be ensured that such extension applies only to true Exchange-Traded Funds (ETFs). It is therefore very important that the definition of ETF be correct. ETFs are open-ended collective investment schemes which are continuously traded on at least one European Regulated Market, with at least one market maker. In Europe, ETFs are not only traded on regulated exchange but also, very much, OTC. According to some estimates, more than 50% of ETF trading is made OTC. AFG does not see any disadvantage in such OTC trading, which contributes to the liquidity of ETFs. However, contrary to the trading of shares, for example, OTC trading of ETF is currently not reported. Our members are in favour of a full disclosure of such trading and therefore support the proposal to apply to ETF trading the post-trade transparency rules of MIFID. Furthermore, all subscription and redemption transactions directly with the fund (as well as share creation and share deletion by ETFs) should be exempted from transparency requirements, maintaining the current understanding of Article 5 of Commission Regulation 1287/2006 (MiFID Level 2). Publication of share issuance and redemption has no relevance for price formation on the secondary market as such transactions take place at Net Asset Value (NAV), but would add considerable costs to fund operations, which would be borne by fund investors. In particular, all transactions carried out directly with the fund

		should be exempted from the transparency requirements when there is no market-making agreement between the market maker and the fund management company.
	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?	MiFID introduced greater competition into European markets. Although trading fragmentation ensued, it is important to separate the effects of greater competition among trading venues from the negative effects of data fragmentation, which also resulted from MiFID I. Lack of data aggregation and data standardization provisions in MiFID I significantly worsened the quality of information available to investors, intermediaries and issuers and must be legislators' top priority. Well-functioning securities markets must find an appropriate balance between trade transparency and protection from public disclosure of trading intentions for large orders. Although trade transparency is clearly key for price formation, the needs of retail and institutional investors are different, and retail investors are a very small percentage of European securities markets. Institutional investors trading in large volumes must try to minimize the negative impact of their orders on the asset price. Depending on the asset type, its liquidity and the characteristics of the market (venue trading vs. market-making/dealer liquidity), the negative impact can vary, but likely includes both a negative price impact (wider spreads) and a loss of liquidity. There are major differences between equity and non-equity markets. Investment managers have a duty of best execution towards their clients (pension funds, insurance companies, retail funds) and market impact minimization is a key part of that duty.

		Knowledge of large orders will move the price very quickly, therefore mechanisms such as waivers/delayed publication, or the possible exemption from pre-trade transparency rules are necessary. Careful calibration of post-trading transparency publication rules is also very important. We support extension of post-trade transparency to non-equity markets (with an appropriate calibration regime at Level 2), but question at this stage the proposed extension of pre-trade transparency beyond equities (Articles 7-8 MiFIR), especially if it is done without taking into account each instrument specificity as well as unintended consequences.. AFG members are concerned by the insufficient impact assessment of the proposed changes, which could severely impact liquidity by imposing equity-like provisions to markets with very different structures, relying on dealer-provided liquidity. As the impact of the provisions on investment banks is unclear, AFG is concerned by indirect negative consequences for investment managers as their clients, and for the economy as a whole. If transparency is deemed necessary for retail clients for some instruments, specific rules could be introduced, tailored to that segment and appropriately calibrated.
	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?	Changes in transparency requirements should always take into account asset and market characteristics, and carefully weigh the possible costs to the final investor (EU pensioners and savers). Furthermore, they should take into account possible structural (not temporary) changes in asset liquidity, which might make such assets less attractive to hold for institutional investors, and

		therefore less easy to sell for issuers. In the case of derivatives, it might become more difficult and more expensive to hedge risks, and also in that case related assets might be less attractive for investors. If securities market mechanisms are not appropriately regulated or implementation is not harmonized at national level (leading to potential regulatory arbitrage), issuers will find it more expensive and more difficult to sell their instruments to finance themselves, and the real economy will suffer. Overall, AFG supports the extension of post-trade transparency to non-equity markets (with an appropriate calibration regime at Level 2), but questions at this stage the proposed extension of pre-trade transparency beyond equities (Articles 7-8 MiFIR), especially if it is done without taking into account each instrument specificity as well as unintended consequences. AFG agrees that these provisions be detailed at Level 2. However, this type of technical measures should definitely take the form of binding technical standards issued by ESMA rather than that of delegated acts of the Commission. Indeed, in order to achieve an efficient transparency (without risking unintentionally to reduce liquidity or to increase bid/ask spreads), it is needed to achieve carefully calibrated technical standards issued by ESMA with proper industry-wide consultation.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	AFG is in favour of Transparency and trust that the proposed rules are sufficient to reach this objective. As stated above, the lack of data aggregation and data standardization provisions in MiFID I significantly worsened the

		quality of information available to investors, intermediaries and issuers and must prioritized.
	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)?	The data service provider provisions through the use of APAs and CTPs, as well as harmonised data standards could be seen as a first step towards better quality of information. However, AFG believes that the current provisions don't go as far as needed. **This came as a surprise for us as the Commission had previously announced a single consolidated tape** and the current provisions do not convey information towards one consolidated place. Without a single tape, the information will keep being fragmented preventing competent authorities and markets from taking advantage from any progress made on post trade transparency. The information can be gathered directly to the single tape or via a fall of intermediaries (APAs, CTPs…), but it will be useful only if the chain is complete and information is gathered in one place in the end. We support the Commission's proposals in Art. 11 MiFIR regarding the obligation to offer trade data on a separate and reasonable commercial basis.
	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?	Investment managers need good quality post-trade information both to value their portfolios and funds, and as valuable input for their trading activities (including proving best execution for clients). Post-trade data must be designed to be consolidated from the outset. Also, appropriate calibration in publication delays is necessary in

		post-trade transparency (to be detailed at Level 2). Calibration of post trade transparency should be done for each asset classes. The proposal should optimize in any case the most liquid solution. Thus, illiquid securities should have an appropriate time delay. Large trade sizes should not be penalised by the post trade transparency regime. An appropriate delay should be accepted before the disclosure of the positions for the global interest of the market mechanism.
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?	We generally support an active role for ESMA in developing guidelines ensuring a smooth and harmonised implementation of MiFID/MiFIR. We also are in favour of ESMA being more effectively involved in the authorisation of third country entities, in order to ensure a harmonised implementation of the rules throughout the EU. For instance, we propose to introduce, in line with the AIFMD: • The possibility for the competent authorities of a Member State to refer to ESMA in case they disagree with the authorisation granted to a non EU entity by a Member State (please refer to our proposed amendment relating to Article 43 paragraph 2a new MiFID) or with the determination of the Member State of reference by a non EU entity (please refer to our proposed amendment relating to Article 41a new MiFID). • The obligation for ESMA to monitor the authorisation and supervision of non EU entities by the different Member States. More specifically, ESMA should

		conduct on an annual basis a peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non EU entities. ESMA should also develop methods to allow for objective assessment and comparison between the authorities reviewed. ESMA may issue guidelines and recommendations and should inform the European Parliament, the Council and the Commission of the guidelines and recommendations issued pursuant to the Article, stating which competent authorities have not complied with them (please refer to our proposed amendment relating to Article 45 MiFID).
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	As explained in our response to question 26, we generally support an active role for ESMA in developing guidelines ensuring a smooth and harmonised implementation of MiFID/MiFIR. We also are in favour of ESMA being more effectively involved in the authorisation of third country entities, in order to ensure a harmonised implementation of the rules throughout the EU. For more details on our proposals in this respect, please see above.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	As representative of French asset managers, AFG would like to stress the crucial need for consistency between MiFID/MiFIR and the UCITS Directive, as well as between MiFID/MiFIR and the AIFMD. For instance, AFG fears that Article 31 paragraph 1 of MiFID and Article 32 paragraph 1 MiFID may be inconsistent with

		the creation of the internal market in financial services through the passporting authorised by other pieces of legislation, in particular the UCITS Directive. For this reason, MiFID provisions should only apply to financial instruments or financial activities that are not passported in compliance with another regulation. We therefore propose to specify that a prohibition or restriction on their marketing, distribution or sale by ESMA or the Member States should only apply to financial instruments or types of activity or financial practices that have not been authorised through freedom of provision of service or freedom of establishment (please refer to our proposed amendments relating to Article 31 paragraph 1 of MiFID and Article 32 paragraph 1 MiFID).
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	As explained in our response to question 4, we generally believe that third country firms should comply with all MiFID and MiFIR rules if they want to benefit from the same passport as EU entities. Nevertheless, **we strongly request to clarify that European professional clients (including asset management firms) are still authorized to make use at their own initiative of investment services provided by a non-EU firm not registered at EU level** (passive marketing): their freedom should not be hindered to use third party service providers even if they are not authorized to perform active marketing. We therefore propose to turn Recital 74 into an Article to give it a higher legal effect (please refer to our proposed amendment relating to Article 40a new MiFID).

		In particular, in relation to the equivalence assessment of third country jurisdictions by the Commission, we believe that the requirement for cooperation arrangements is a crucial tool to ensure an appropriate level of investor protection under the proposed active marketing regime, as it would strongly encourage third countries to enhance their standards.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	We support in principle a harmonisation of the sanctions regime among Member States. Indeed, in case of a breach of rule, sanctions should be the same regardless of the Member State where the entity is registered.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	AFG supports level 1 measures as far as possible as they allow for more legal certainty and a higher role for the European Parliament's scrutiny.

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Detailed comments on specific articles of the draft Directive

Article number	**Comments** **Please find hereafter some AFG amendment proposals to the Directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council.**

Recital 53 :	Text proposed by the Commission	Amendment proposed by AFG
	(53) Investment firms are allowed to provide investment services that only consist of execution and/or the reception and transmission of client orders, without the need to obtain	(53) Investment firms are allowed to provide investment services that only consist of execution and/or the reception and transmission of client orders, without the need to obtain

	information regarding the knowledge and experience of the client in order to assess the appropriateness of the service or the instrument for the client. Since these services entail a relevant reduction of clients' protections, it is appropriate to improve the conditions for their provision. In particular, it is appropriate to exclude the possibility to provide these services in conjunction with the ancillary service consisting of granting credits or loans to investors to allow them to carry out a transaction in which the investment firm is involved, since this increases the complexity of the transaction and makes more difficult the understanding of the risk involved. It is also appropriate to better define the criteria for the selection of the financial instruments to which these services should relate in order to exclude the financial instruments**, including collective investment in transferable securities (UCITS),** which **embed a derivative or** incorporate a structure which makes it difficult for the client to understand the risk involved.	information regarding the knowledge and experience of the client in order to assess the appropriateness of the service or the instrument for the client. Since these services entail a relevant reduction of clients' protections, it is appropriate to improve the conditions for their provision. In particular, it is appropriate to exclude the possibility to provide these services in conjunction with the ancillary service consisting of granting credits or loans to investors to allow them to carry out a transaction in which the investment firm is involved, since this increases the complexity of the transaction and makes more difficult the understanding of the risk involved. It is also appropriate to better define the criteria for the selection of the financial instruments to which these services should relate in order to exclude the financial instruments which embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved. **In the specific case of share or units in Undertakings for Collective Investment in Transferable Securities (UCITS), the exclusion should only apply to those funds among structured UCITS, as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010, which incorporate a structure which makes it difficult for the client to understand the risk involved and the reward to be expected**.
	Justification *The industry (at French and European level) has always asserted that preserving the UCITS label was key and has been reluctant to*	

	distinguish between complex and non complex UCITS, especially in a context of incomplete level playing field among financial products. Moreover, such a distinction would be difficult to implement. In addition, it would be difficult to assess its potential impact, especially at the level of each Member State. *We believe that a UCITS which uses sophisticated management techniques but whose risk reward profile is easy to understand should not be considered as complex, as it would prohibit investors from accessing products whose objective is very often to reduce the risk borne by investors. Indeed, complexity does not necessarily mean risk. Moreover, what matters to investors is the risk reward profile of the fund, not its inner workings, as investors do not need to be able to reproduce the management techniques used in the fund.* *AFG acknowledges that certain UCITS are less easy to understand (but not necessarily more risky) than simple financial instruments such as shares or bonds. But with the UCITS IV directive, the KIID will improve the information for investors. Its objective is to make all the UCITS more comprehensible. Investors will have fair, clear and not misleading information about the main characteristics of the product like risk and return* *In particular, AFG is fully aware that the risk reward profile of certain funds among structured funds, as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010, may be less easy to understand. We appreciate that investors should not be sold on an execution-only basis financial instruments whose risk reward profile would be too difficult for them to understand without proper advice. In other words, some specific structured UCITS may be considered as eligible to execution-only, while some others, whose promise is less easy to apprehend may need advice and should rightly be excluded from execution-only.* *Therefore, AFG proposes not to split UCITS into too wide, too rough categories, to respond to the objective of investor protection. Rather, we propose to define more precisely which are the funds whose risk return profile is more difficult to understand, i.e. to distinguish among structured funds those whose structure does not allow investors to easily understand their "promise" / "payoff".* *In any case, the non – eligibility of a product for being sold on an execution - only basis should not trigger its automatic "classification" as a complex product, as this would wrongly imply that all products that need to be sold with advice are less appropriate than "non-complex" products. Execution-only is a question of determining whether advice is required in order to help the client to understand better the payoff of the product, but should not have the consequence of naming that product "complex".*

Recital 74 :

Provision of services by third country firms (passive marketing)

Text proposed by the Commission	Amendment proposed by AFG
The provision of this directive regulating the provision of services by third country firms in the Union should not affect the possibility for persons established in the Union to make use of investment services by a third country firm at their own exclusive initiative. When a third country firm provides services at own exclusive initiative of a professional established in the Union, the services should not be deemed as provided in the territory of the Union. In case a third country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.	**Removed and replaced by Article 40a (new)**

Justification

We understand that the proposed recital 74 of MiFID allows investors to receive investment services by a third country firm not registered by ESMA only at their own exclusive initiative. However, we believe that it should be made clear that such ***passive marketing regime*** *applies to all European clients and allows them to benefit from investment services provided by third country firms. Indeed, we believe that in particular asset managers should remain free to solicit third country service providers (e.g. third country brokers).*

Therefore, we propose to turn recital 74 of the proposed MiFID into an Article 40a (new) to make this provision clearly binding.

Article 24 :	**General principles and information to clients**

Text proposed by the Commission	Amendment proposed by AFG
1. Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in this Article and in Article 25.	1. Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in this Article and in Article 25.
2. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.	2. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.
3. Appropriate information shall be provided to clients or potential clients about: – the investment firm and its services when investment advice is provided, information shall specify whether the advice is provided on an independent basis and whether it is based on a broad or on a more restricted analysis of the market and shall indicate whether the investment firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended to clients, – financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,	3. Appropriate information shall be provided to clients or potential clients about: – the investment firm and its services when investment advice is provided, information shall specify whether the advice is provided on an independent basis and whether it is based on a broad or on a more restricted analysis of the market and shall indicate whether the investment firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended to clients, – financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,

		– execution venues, – costs and associated charges. The information referred to in the first subparagraph should be provided in a comprehensible form in such a manner that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format. 4. In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Union legislation or common European standards related to credit institutions and consumer credits with respect to information requirements, this service shall not be additionally subject to the obligations set out in paragraphs 2 and 3 5. When the investment firm informs the client that investment advice is provided on an independent basis, the firm: (i) shall assess a sufficiently large number of financial instruments available on the market. The financial instruments should be diversified with regard to their type and issuers or product providers and should not be limited to financial instruments issued or provided by entities having close links with the investment firm, (ii) shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the	– execution venues, – costs and associated charges. The information referred to in the first subparagraph should be provided in a comprehensible form in such a manner that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format. 4. In cases where an investment service is offered as part of a financial product which is already subject to other provisions of Union legislation or common European standards related to credit institutions and consumer credits with respect to information requirements, this service shall not be additionally subject to the obligations set out in paragraphs 2 and 3 5. When the investment firm informs the client that investment advice is provided on an independent basis, the firm: (i) shall assess a sufficiently large number of financial instruments available on the market. The financial instruments should be diversified with regard to their type and issuers or product providers and should not be limited to financial instruments issued or provided by entities having close links with the investment firm, (ii) shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the

		provision of the service to clients. 6. When providing portfolio management the investment firm shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients. 7. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component. ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations in paragraph 1. 8. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to ensure that investment firms comply with the principles set out therein	provision of the service to clients. 6. When providing portfolio management the investment firm shall not accept or receive fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients**, except if:** **(a) these fees, commissions or monetary benefits are to the ultimate benefit of the client; and** **(b) the client has been duly informed of such fees, commissions or monetary benefits before the provision of the relevant service**. 7. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component. ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations in paragraph 1. 8. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 concerning measures to ensure

	when providing investment or ancillary services to their clients. Those delegated acts shall take into account: (a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions; (b) the nature of the products being offered or considered including different types of financial instruments and deposits referred to in Article 1 (2) ; (c) the retail or professional nature of the client or potential clients or, in the case of paragraph 3, their classification as eligible counterparties.	that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those delegated acts shall take into account: (a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions; (b) the nature of the products being offered or considered including different types of financial instruments and deposits referred to in Article 1 (2) ; (c) the retail or professional nature of the client or potential clients or, in the case of paragraph 3, their classification as eligible counterparties.

Justification

Paragraph 6

AFG is strongly opposed to the Commission's proposal to prohibit financial product producers from remunerating discretionary mandates' investment managers:

- *These commissions allow the development of the open architecture model (which generates a real competition among producers) which has officially been promoted by the European Commission for many years. They actually allow "third party" products to compete with "in house" products. A ban would be a step back in terms of diversification of the range of products offered to investors/savers, as discretionary mandates' investment managers would only be able to offer "in house" or low cost products.*
- *In compliance with MiFID, investors are clearly informed of the existence of such commissions and expressly agree to them. These commissions are deducted from the management fees that investors pay to managers directly. Were they to be abolished, management fees, which are subject to VAT, would have to increase significantly, with no improvement in the service offered to investors. Such an increase would in practice result in restricting the benefit of discretionary mandates to*

affluent investors, which is definitely not the aim pursued.

- *Last, this would considerably increase the unlevel playing field for distribution channels of savings products (advice through an integrated network, discretionary mandate, life insurance…) as only entities offering the service of discretionary mandate would be negatively impacted.*

Actually, the best way to solve any potential conflict of interest (we would like to highlight here that we are not aware of any actual cases of reprehensible behaviour) without any unintended consequences would be to increase the level of transparency on the remunerations received by discretionary mandates' investment managers.

Our solution is based on two conditions: it must be motivated by clients' interest and such fees must be transparent.

Such a system would not harm the open architecture model.

This would also allow to maintain the availability of the service of portfolio management to less affluent clients (who are less inclined to pay for that very service) thanks to an actual decrease in the management fees they pay thanks to a more "industrialised" management (indirectly remunerated). However, clients looking for a more tailored management (mainly through direct investment in securities) would then pay higher total fees.

Last, such a solution would allow avoiding the tax frictions that an increase in management fees - corresponding to the profits waived by the proposed regulation - would inevitably generate (fees relating to mandates are not always deductible from taxable revenues, in spite of AFG's repeated requests). However, this is only valid if no financial flow goes through the clients' account.

Article 25:

Assessment of suitability and appropriateness and reporting to clients

Text proposed by the Commission	Amendment proposed by AFG
1. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or	1. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or

		potential client the investment services and financial instruments that are suitable for him. 2. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 1, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client. Where the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format. Where clients or potential clients do not to provide the information referred to under the first subparagraph, or where they provide insufficient information regarding their knowledge and experience, the investment firm shall warn them that the firm is not in a position to determine whether the service or product envisaged is appropriate for them. This warning may be provided in a standardised format. 3. Member States shall allow investment firms when providing investment services that only consist of execution or the reception and transmission of client orders with or without ancillary services, with the exclusion of the ancillary service	potential client the investment services and financial instruments that are suitable for him. 2. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 1, ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client. Where the investment firm considers, on the basis of the information received under the previous subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. This warning may be provided in a standardised format. Where clients or potential clients do not to provide the information referred to under the first subparagraph, or where they provide insufficient information regarding their knowledge and experience, the investment firm shall warn them that the firm is not in a position to determine whether the service or product envisaged is appropriate for them. This warning may be provided in a standardised format. 3. Member States shall allow investment firms when providing investment services that only consist of execution or the reception and transmission of client orders with or without ancillary services, with the exclusion of the ancillary service

		specified in Section B (1) of Annex 1, to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 2 where all the following conditions are met: a)- the services referred to any of the following financial instruments: (i) shares admitted to trading on a regulated market or on an equivalent third country market, or on a MTF, where these are shares in companies, and excluding shares in non-UCITS collective investment undertakings and shares that embed a derivative; (ii) bonds or other forms of securitised debt, admitted to trading on a regulated market or on an equivalent third country market or on a MTF, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved; (iii) money market instruments, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved; (iv) shares or units in UCITS excluding structured UCITS as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010; (v) other non-complex financial instruments for the purpose of this paragraph. For the purpose of this point, if the requirements and the	specified in Section B (1) of Annex 1, to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 2 where all the following conditions are met: a)- the services referred to any of the following financial instruments: (i) shares admitted to trading on a regulated market or on an equivalent third country market, or on a MTF, where these are shares in companies, and excluding shares in non-UCITS collective investment undertakings and shares that embed a derivative; (ii) bonds or other forms of securitised debt, admitted to trading on a regulated market or on an equivalent third country market or on a MTF, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved; (iii) money market instruments, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved; (iv) shares or units in UCITS excluding **among** structured UCITS, as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010, **those that incorporate such a structure which makes it difficult for the client to understand the risk involved and the reward to be expected**; (v) other non-complex financial instruments for the purpose of this paragraph. For the purpose of this point, if the requirements and the

		procedure laid down under subparagraphs 3 and 4 of paragraph 1 of Article 4 of Directive 2003/71/EC [*Prospectus Directive*] are fulfilled, a third-country market shall be considered as equivalent to a regulated market. b) the service is provided at the initiative of the client or potential client, c) the client or potential client has been clearly informed that in the provision of this service the investment firm is not required to assess the suitability or appropriateness of the instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules. This warning may be provided in a standardised format, d) the investment firm complies with its obligations under Article 23. 4. The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts. 5. The client must receive from the investment firm adequate reports on the service provided to its clients. These reports shall include periodic communications to clients, taking into account the type and the complexity of financial instruments involved and the nature of the service provided to the client and shall	procedure laid down under subparagraphs 3 and 4 of paragraph 1 of Article 4 of Directive 2003/71/EC [*Prospectus Directive*] are fulfilled, a third-country market shall be considered as equivalent to a regulated market. b) the service is provided at the initiative of the client or potential client, c) the client or potential client has been clearly informed that in the provision of this service the investment firm is not required to assess the suitability or appropriateness of the instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules. This warning may be provided in a standardised format, d) the investment firm complies with its obligations under Article 23. 4. The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts. 5. The client must receive from the investment firm adequate reports on the service provided to its clients. These reports shall include periodic communications to clients, taking into account the type and the complexity of financial instruments involved and the nature of the service provided to the client and shall

	include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client. When providing investment advice, the investment firm shall specify how the advice given meets the personal characteristics of the client. 6. The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those delegated acts shall take into account: (a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions; (b) the nature of the products being offered or considered, including different types of financial instruments and banking deposits referred to in Article 1 (2); (c) the retail or professional nature of the client or potential clients or, in the case of paragraphs 5, their classification as eligible counterparties. 7. ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment of financial instruments incorporating a structure which makes it difficult for the client to understand the risk involved in accordance with paragraph 3 (a).	include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client. When providing investment advice, the investment firm shall specify how the advice given meets the personal characteristics of the client. 6. The Commission shall be empowered to adopt by means of delegated acts in accordance with Article 94 measures to ensure that investment firms comply with the principles set out therein when providing investment or ancillary services to their clients. Those delegated acts shall take into account: (a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions; (b) the nature of the products being offered or considered, including different types of financial instruments and banking deposits referred to in Article 1 (2); (c) the retail or professional nature of the client or potential clients or, in the case of paragraphs 5, their classification as eligible counterparties. 7. ESMA shall develop by [] at the latest, and update periodically, guidelines for the assessment of financial instruments incorporating a structure which makes it difficult for the client to understand the risk involved in accordance with paragraph 3 (a).
	Justification	

	<u>Paragraph 3</u> *The industry (at French and European level) has always asserted that preserving the UCITS label was key and has been reluctant to distinguish between complex and non complex UCITS, especially in a context of incomplete level playing field among financial products. Moreover, such a distinction would be difficult to implement. In addition, it would be difficult to assess its potential impact, especially at the level of each Member State.* *We believe that a UCITS which uses sophisticated management techniques but whose risk reward profile is easy to understand should not be considered as complex, as it would prohibit investors from accessing products whose objective is very often to reduce the risk borne by investors. Indeed, <u>complexity does not necessarily mean risk. Moreover, w</u>hat matters to investors is the risk reward profile of the fund, not its inner workings, as investors do not need to be able to reproduce the management techniques used in the fund.* *AFG acknowledges that certain UCITS are less easy to understand (but not necessarily more risky) than simple financial instruments such as shares or bonds. But with the UCITS IV directive, the KIID will improve the information for investors. Its objective is to make all the UCITS more comprehensible. Investors will have fair, clear and not misleading information about the main characteristics of the product like risk and return* *In particular, AFG is fully aware that the risk reward profile of certain funds among structured funds, as referred to in Article 36 paragraph 1 subparagraph 2 of Commission Regulation 583/2010, may be less easy to understand. We appreciate that investors should not be sold on an execution-only basis financial instruments whose risk reward profile would be too difficult for them to understand without proper advice. In other words, some specific structured UCITS may be considered as eligible to execution-only, while some others, whose promise is less easy to apprehend may need advice and should rightly be excluded from execution-only.* *Therefore, AFG proposes not to split UCITS into too wide, too rough categories, to respond to the objective of investor protection. Rather, we propose to define more precisely which are the funds whose risk return profile is more difficult to understand, i.e. to distinguish among structured funds those whose structure does not allow investors to easily understand their "promise" / "payoff".*

<table>
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<tr><td>Article 40a (new):</td><td>Provision of services by third country firms (passive marketing)

<table>
<tr><td>Text proposed by the Commission</td><td>Amendment proposed by AFG</td></tr>
<tr><td>Recital 74 removed and replaced by Article 40a (new)</td><td>The provision of this Directive regulating the provision of services by third country firms in the Union should not affect the possibility for persons established in the Union to make use of investment services provided by a third country firm at their own exclusive initiative. When a third country firm provides services at own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. In case a third country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.</td></tr>
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Justification

We understand that the proposed recital 74 of MiFID allows investors to receive investment services by a third country firm not registered by ESMA only at their own exclusive initiative. However, we believe that it should be made clear that such passive marketing regime applies to all European clients and allows them to benefit from investment services provided by third country</td></tr>
</table>

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<tr><td>Article 41:</td><td>Establishment of a branch

<table>
<tr><td>Text proposed by the Commission</td><td>Amendment proposed by AFG</td></tr>
<tr><td>1. Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services in their territory through a branch acquire a prior authorisation by the competent authorities of those Member States in accordance with the following provisions:
(a) the Commission has adopted a decision in accordance with paragraph 3;
(b) the provision of services for which the third country firm requests authorisation is subject to authorisation and supervision in the third country where the firm is established and the requesting firm is properly authorised. The third country where the third country firm is established shall not be listed as Non- Cooperative Country and Territory by the Financial Action Task Force on antimony laundering and terrorist financing;
(c) cooperation arrangements, that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors, are in place between the competent authorities in the Member State</td><td>1. Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services in their territory through a branch acquire a prior authorisation by the competent authorities of those Member States in accordance with the following provisions:
(a) the Commission has adopted a decision in accordance with paragraph 3;
(b) the provision of services for which the third country firm requests authorisation is subject to authorisation and supervision in the third country where the firm is established and the requesting firm is properly authorised. The third country where the third country firm is established shall not be listed as Non- Cooperative Country and Territory by the Financial Action Task Force on antimony laundering and terrorist financing;
(c) cooperation arrangements, that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors, are in place between the competent authorities in the Member State</td></tr>
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</table>

		concerned and competent supervisory authorities of the third country where the firm is established; (d) sufficient initial capital is at free disposal of the branch; (e) one or more persons responsible for the management of the branch are appointed and they comply with the requirement established under Article 9 (1); (f) the third country where the third country firm is established has signed an agreement with the Member State where the branch should be established, which fully comply with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements; (g) the firm has requested membership of an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on Investor-Compensation Schemes. 2. Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services to retail clients in those Member States' territory shall establish a branch in the Union. 3. The Commission may adopt a decision in accordance with the procedure referred to in Article 95 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third comply with legally binding requirements which have **equivalent** effect **to** the requirements set out in this Directive, in Regulation (EU)	concerned and competent supervisory authorities of the third country where the firm is established; (d) sufficient initial capital is at free disposal of the branch; (e) one or more persons responsible for the management of the branch are appointed and they comply with the requirement established under Article 9 (1); (f) the third country where the third country firm is established has signed an agreement with the Member State where the branch should be established, which fully comply with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements; (g) the firm has requested membership of an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on Investor-Compensation Schemes. 2. Member States shall require that a third country firm intending to provide investment services or activities together with any ancillary services to retail clients in those Member States' territory shall establish a branch in **its Member State of Reference**. 3. The Commission may adopt a decision in accordance with the procedure referred to in Article 95 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third comply with legally binding requirements which have **the same** effect **as** the

		No …/… [MiFIR] and in Directive 2006/49/EC [Capital Adequacy Directive] and their implementing measures and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this directive. The prudential framework of a third country may be considered equivalent where that framework fulfils all the following conditions: (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis; (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body; (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions; (d) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation. 4. The third country firm referred to in paragraph 1 shall submit its application to the competent authority of the Member State where it intends to establish a branch after the adoption by the Commission of the decision determining that the legal and	requirements set out in this Directive, in Regulation (EU) No …/… [MiFIR] and in Directive 2006/49/EC [Capital Adequacy Directive] and their implementing measures and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this directive **as well as for reciprocal access by EU investment service providers to that third country market**. The prudential framework of a third country may be considered equivalent where that framework fulfils all the following conditions: (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis; (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body; (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions; (d) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation. 4. The third country firm referred to in paragraph 1 shall submit its application to the competent authority of the Member State where it intends to establish a branch after the adoption by the

supervisory framework of the third country in which the third country firm is authorised is equivalent to the requirements described in paragraph 3.	Commission of the decision determining that the legal and supervisory framework of the third country in which the third country firm is authorised is equivalent to the requirements described in paragraph 3.

Justification

Paragraph 2

The proposed MiFID regime does not specify in which Member State the branch should be established. Such approach might allow third country firms to establish a branch in the less stringent Member State (and not necessarily the Member State where most of the firm's clients are located). In other words, this might create an ***opportunity for regulatory dumping*** *– which is concerning given that the third country entity will be granted a passport allowing it to provide its services throughout the EU. We therefore propose to introduce the concept of "Member State of Reference" used in the AIFMD (moreover, this would allow more consistency between the two pieces of legislation).*

Paragraph 3

1- The new proposed MiFID active marketing regime is based on a preliminary equivalence assessment of third country jurisdictions by the Commission. Where the Commission makes an equivalence decision in respect of a third country jurisdiction, firms located in that jurisdiction will be authorised to apply for passporting their services in the EU.

AFG strongly supports the idea that the ***Commission*** *- and not a Member State - makes that equivalence decision.*

However, as per the Commission's proposal, this equivalence assessment would be based on legal requirements which have an ***equivalent effect*** *to the European regulation. AFG believes that this assessment would be passed by too large a number of countries and thus weaken the protection offered to European investors, creating also a very uneven playing field for European investment managers. The rules that service providers offer European investors should not vary depending on the country where these providers are located: the rules to be complied with by third country entities should therefore have* ***the same effect*** *as those*

<table>
<tr><td></td><td>prevailing in Europe. In addition, this would allow more consistency with the provisions of the AIFMD.

2- We believe that the obligation of having cooperation arrangements in place is a crucial tool to ensure an appropriate level of investor protection under the proposed active marketing regime, as it would strongly encourage third countries to enhance their standards. However, we appreciate that it might take some time to have these arrangements in place and for this reason we would support the introduction of a grandfathering clause. EFAMA currently expresses the view that third countries may not agree to such arrangements but we fail to see why they would not. On the contrary, we are concerned that the conditions attached to granting the passport to third country entities may be too lax.
In any case, AFG believes that the authorization of third country entities should be subject to <u>reciprocity agreements</u> on the offering of investment services in order to ensure fair competition.</td></tr>
<tr><td>Article 41a (new):</td><td>Determination of the Member State of reference of a non EU entity

<table><tr><td>Text proposed by the Commission</td><td>Amendment proposed by AFG</td></tr><tr><td></td><td>The Member State of reference of a non-EU entity shall be determined as follows:

(a) if the non-EU entity intends to provide services in only one EU Member State, that Member State is deemed its Member State of reference ;

(b) if the non-EU entity intends to provide services in different Member States, the Member State of reference is either:

(i) the Member State where it intends to have or has the most clients; or

(ii) the Member State where it intends to have or has the highest turnover.</td></tr></table></td></tr>
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		After receiving the application for authorisation, the competent authorities shall assess whether the determination by the non EU entity as regards its Member State of reference complies with the criteria laid down above. If the competent authorities consider that this is not the case, they shall refuse the authorisation request of the non-EU entity explaining the reasons for their refusal. **Where a competent authority of a Member State disagrees with the determination of the Member State of reference by the non EU entity, the competent authorities concerned may refer the matter to the ESMA.**

Justification

The proposed MiFID regime does not specify in which Member State the legal representative / branch of the non EU entity should be established. Such approach might allow third country firms to establish it in the less stringent Member State (and not necessarily the Member State where most of the firm's clients are located). In other words, this might create an opportunity for regulatory dumping – which is concerning given that the third country entity will be granted a passport allowing it to provide its services throughout the EU. We therefore propose to include provisions in order to determine in which Member State the legal entity / branch should be established, based on the provisions of the AIFMD. Furthermore, we believe that, in order to ensure a harmonized implementation of the rules throughout the EU, it would make sense if ESMA could be called upon in case a Member State disagreed with the choice of Member State of reference made by a third country entity.

Article 43: **Granting of the authorisation**

Text proposed by the Commission	Amendment proposed by AFG
1. The competent authority of the Member State where the third country firm intends to establish its branch shall only grant the	1. The competent authority of the Member State where the third country firm intends to establish its branch shall only grant the

	authorisation when the following conditions are met: (a) the competent authority is satisfied that conditions under Article 41 are fulfilled; (b) the competent authority is satisfied that the branch of the third country firm will be able to comply with the provisions under paragraph 3. The third country firm shall be informed, within six months of the submission of a complete application, whether or not the authorisation has been granted. 2. The branch of the third country firm authorised in accordance with paragraph 1, shall comply with the obligations **laid down in Articles 16, 17, 23, 24, 25, 27, 28(1) and 30** of this Directive and **in Articles 13 to 23** of Regulation (EU) No …/… [MiFIR] and the measures adopted pursuant thereto and shall be subject to the supervision of the competent authority in the Member State where the authorisation was granted. Member States shall not impose any additional requirements on the organisation and operation of the branch in respect of the matters covered by this directive.	authorisation when the following conditions are met: (a) the competent authority is satisfied that conditions under Article 41 are fulfilled; (b) the competent authority is satisfied that the branch of the third country firm will be able to comply with the provisions under paragraph 3. The third country firm shall be informed, within six months of the submission of a complete application, whether or not the authorisation has been granted. 2. The branch of the third country firm authorised in accordance with paragraph 1, shall comply with **all** the obligations of this Directive and of Regulation (EU) No …/… [MiFIR] and the measures adopted pursuant thereto and shall be subject to the supervision of the competent authority in the Member State where the authorisation was granted. Member States shall not impose any additional requirements on the organisation and operation of the branch in respect of the matters covered by this directive. **2a (new). Where a competent authority of another Member State disagrees with the authorisation of the third country entity by the competent authorities of its Member State of Reference, the competent authorities concerned may refer the matter to the ESMA.**

<table>
<tr><td></td><td>Justification

<u>Paragraph 2</u>

Under the new proposed MiFID active marketing regime, third country firms would only have to comply with the main MiFID rules (exhaustive list). In particular, the provisions on the use of tied agents that apply to EU entities would not apply to third country entities. We think on the contrary that, to ensure a level playing field, third country firms should comply with <u>all</u> MiFID rules. There is no reason for third country entities to be under less strict obligations if they wish to be granted the same benefits as European entities. In the US, the Dodd Frank Act follows this approach. Non US banks and management companies have to abide by the rules of the Dodd Frank Act if they wish to exercise their activity in the US. In addition, the recently adopted AIFMD follows a similar approach. In any case, European professionals (including asset management firms) should still be authorized to make use of investment services provided by a non registered third country firm at their own initiative (passive marketing) so it would not hinder our freedom to use third party service providers even if they are not authorized to perform active marketing.

<u>Paragraph 2a (new)</u>

Under the proposed MIFID, when third country firms establish a branch, Member States have no possibility to disagree with the authorization granted by another Member State to a non EU entity. We would therefore welcome the introduction of a provision in this respect, in order to solve any potential conflict among Member States.</td></tr>
<tr><td>Article 45:</td><td>Registration

<table>
<tr><th>Text proposed by the Commission</th><th>Amendment proposed by AFG</th></tr>
<tr><td>Member States shall register the firms authorised in accordance with Articles 41. The register shall be publicly accessible and shall contain information on the services or activities which the third country firms are authorised to provide. It shall be updated on a regular basis. Every authorisation shall be notified to the ESMA.</td><td>Member States shall register the firms authorised in accordance with Articles 41. The register shall be publicly accessible and shall contain information on the services or activities which the third country firms are authorised to provide. It shall be updated on a regular basis. Every authorisation shall be notified to the ESMA.</td></tr>
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	ESMA shall establish a list of all third country firms authorised to provide services and activities in the Union. The list shall contain information on the services or activities for which the non-EU firm is authorised and it shall be updated on a regular basis. ESMA shall publish that list on its website and update it.	ESMA shall establish a list of all third country firms authorised to provide services and activities in the Union. The list shall contain information on the services or activities for which the non-EU firm is authorised and it shall be updated on a regular basis. ESMA shall publish that list on its website and update it. **ESMA shall, on an annual basis, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non EU entities. ESMA shall develop methods to allow for objective assessment and comparison between the authorities reviewed. ESMA may issue guidelines and recommendations. ESMA shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations issued pursuant to the Article, stating which competent authorities have not complied with them.**
	Justification *We believe it would be useful if ESMA were required to a conduct peer review analysis of the supervisory activities of the competent authorities in relation to the authorization and the supervision of third country entity branches. We would welcome a more active role for ESMA regarding the monitoring of the granting and withdrawal of authorizations in order to ensure a more harmonised implementation of the rules at European level.*	
	* * * *	
Detailed comments on specific articles of the draft Regulation		

Article number	Comments **Please find hereafter some AFG amendment proposals to the Regulation on markets in financial instruments and amending EMIR.**

Article 35a (new):

Provision of services without a branch by third country firms

Text proposed by the Commission	Amendment proposed by AFG
	The provision of this Regulation regulating the provision of services by third country firms in the Union should not affect the possibility for persons established in the Union to make use of investment services provided by a third country firm at their own exclusive initiative. When a third country firm provides services at own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. In case a third country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.

Justification

We understand that the proposed recital 74 of MiFID allows investors to receive investment services by a third country firm not registered by ESMA only at their own exclusive initiative. However, we believe that it should be made clear that such ***passive***

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<tr><td></td><td>marketing regime applies to all European clients and allows them to benefit from investment services provided by third country firms. Indeed, we believe that in particular asset managers should remain free to solicit third country service providers (e.g. third country brokers).

Therefore, we propose to turn recital 74 of the proposed MiFID into an Article to make this provision clearly binding.</td></tr>
<tr><td>Article 31:</td><td>ESMA powers to temporarily intervene

<table>
<tr><th>Text proposed by the Commission</th><th>Amendment proposed by AFG</th></tr>
<tr><td>1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:
(a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or
(b) a type of financial activity or practice.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by ESMA.

2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:</td><td>1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may where it is satisfied on reasonable grounds that the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:
(a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or
(b) a type of financial activity or practice.

A prohibition or restriction shall only apply to financial instruments or types of activity or financial practices that have not been authorised through freedom of provision of service or freedom of establishment under another EU Directive or Regulation.

A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by ESMA.

2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:</td></tr>
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		(a) the proposed action addresses a threat to investor protection or to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union; (b) regulatory requirements under Union legislation that are applicable to the relevant financial instrument or activity do not address the threat; (c) a competent authority or competent authorities have not taken action to address the threat or actions that have been taken do not adequately address the threat. 3. When taking action under this Article ESMA shall take into account the extent to which the action: (a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action; and (b) does not create a risk of regulatory arbitrage. Where a competent authority or competent authorities have taken a measure under Article 32, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 33. 4. Before deciding to take any action under this Article, ESMA shall notify competent authorities of the action it proposes. 5. ESMA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after	(a) the proposed action addresses a threat to investor protection or to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union; (b) regulatory requirements under Union legislation that are applicable to the relevant financial instrument or activity do not address the threat; (c) a competent authority or competent authorities have not taken action to address the threat or actions that have been taken do not adequately address the threat. 3. When taking action under this Article ESMA shall take into account the extent to which the action: (a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action; and (b) does not create a risk of regulatory arbitrage. Where a competent authority or competent authorities have taken a measure under Article 32, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 33. 4. Before deciding to take any action under this Article, ESMA shall notify competent authorities of the action it proposes. 5. ESMA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after

	the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect. 6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three month period it shall expire. 7. Action adopted by ESMA under this Article shall prevail over any previous action taken by a competent authority. 8. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by ESMA in determining when the threats to investor protection or to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) arise.	the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect. 6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three month period it shall expire. 7. Action adopted by ESMA under this Article shall prevail over any previous action taken by a competent authority. 8. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by ESMA in determining when the threats to investor protection or to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) arise.
	Justification *<u>Paragraph 1</u>* *AFG fears that such provisions may be inconsistent with the creation of the internal market in financial services through the passporting authorised by other pieces of legislation, in particular the UCITS Directive. MiFIR should not impede the implementation of other European regulations. For this reason, such provisions should only apply to financial instruments or financial activities that are not passported in compliance with another regulation.*	

Article 32:	**Product intervention by competent authorities**

Text proposed by the Commission	Amendment proposed by AFG
1. A competent authority may prohibit or restrict in or from that Member State: (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or (b) a type of financial activity or practice.	1. A competent authority may prohibit or restrict in or from that Member State: (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain features; or (b) a type of financial activity or practice. **A prohibition or restriction shall only apply to financial instruments or types of activity or financial practices that have not been authorised through freedom of provision of service or freedom of establishment under another EU Directive or Regulation.**
2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that: (a) a financial instrument or activity or practice gives rise to significant investor protection concerns or poses a serious threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system; (b) existing regulatory requirements under Union legislation applicable to the financial instrument or activity or practice do not sufficiently address the risks referred to in paragraph (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements; (c) the action is proportionate taking into account the nature of	2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that: (a) a financial instrument or activity or practice gives rise to significant investor protection concerns or poses a serious threat to the orderly functioning and integrity of financial markets or the stability of whole or part of the financial system; (b) existing regulatory requirements under Union legislation applicable to the financial instrument or activity or practice do not sufficiently address the risks referred to in paragraph (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements; (c) the action is proportionate taking into account the nature of

		the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument or activity; (d) it has properly consulted with competent authorities in other Member States that may be significantly affected by the action; and (e) the action does not have a discriminatory effect on services or activities provided from another Member State. A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority. 3. The competent authority shall not take action under this Article unless, not less than one month before it takes the action, it has notified all other competent authorities and ESMA in writing of details of: (a) the financial instrument or activity or practice to which the proposed action relates; (b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and (c) the evidence upon which it has based its decision and upon which is satisfied that each of the conditions in paragraph 1 are met. 4. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the	the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument or activity; (d) it has properly consulted with competent authorities in other Member States that may be significantly affected by the action; and (e) the action does not have a discriminatory effect on services or activities provided from another Member State. A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by the competent authority. 3. The competent authority shall not take action under this Article unless, not less than one month before it takes the action, it has notified all other competent authorities and ESMA in writing of details of: (a) the financial instrument or activity or practice to which the proposed action relates; (b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and (c) the evidence upon which it has based its decision and upon which is satisfied that each of the conditions in paragraph 1 are met. 4. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the

	notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 1 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice. 5. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 1 no longer apply. 6. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by competent authorities in determining when the threats to investor protection or to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) arise.	notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 1 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice. 5. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 1 no longer apply. 6. The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by competent authorities in determining when the threats to investor protection or to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a) arise.
	Justification *<u>Paragraph 1</u>* *AFG fears that such provisions may be inconsistent with the creation of the internal market in financial services through the passporting authorised by other pieces of legislation, in particular the UCITS Directive. MiFIR should not impede the implementation of other European regulations. For this reason, such provisions should only apply to financial instruments or financial activities that are passported in compliance with another regulation.*	
Article 36:	**General provisions (Provision of services without a branch by third country firms)**	

	Text proposed by the Commission	Amendment proposed by AFG
	1. A third country firm may provide the services listed in Article 30 of Directive [new MiFID] to eligible counterparties established in the Union without the establishment of a branch only where it is registered in the register of third country firms kept by ESMA in accordance with Article 37.	1. A third country firm may provide the services listed in Article 30 of Directive [new MiFID] to eligible counterparties established in the Union without the establishment of a branch only where **it has a legal representative established in its Member State of Reference** and it is registered in the register of third country firms kept by ESMA in accordance with Article 37.
	2. ESMA can register a third country firm that has applied for the provision of investment services and activities in the Union in accordance with paragraph 1 only where the following conditions are met: (a) the Commission has adopted a decision in accordance with Article 37, paragraph 1; (b) the firm is authorised in the jurisdiction where it is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country; (c) co-operation arrangements have been established pursuant to Article 37, paragraph 2.	2. ESMA can register a third country firm that has applied for the provision of investment services and activities in the Union in accordance with paragraph 1 only where the following conditions are met: (a) the Commission has adopted a decision in accordance with Article 37, paragraph 1; (b) the firm is authorised in the jurisdiction where it is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country; (c) co-operation arrangements have been established pursuant to Article 37, paragraph 2.
	3. The third country firm referred to in paragraph 1 shall submit its application to ESMA after the adoption by the Commission of the decision referred to in Article 37 determining that the legal and supervisory framework of the third country in which the third country firm is authorised is equivalent to the requirements described in Article 37 (1).	3. The third country firm referred to in paragraph 1 shall submit its application to ESMA after the adoption by the Commission of the decision referred to in Article 37 determining that the legal and supervisory framework of the third country in which the third country firm is authorised is equivalent to the

		The applicant third country firm shall provide ESMA with all information deemed necessary for its registration. Within 30 working days of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant third country firm has to provide additional information. The registration decision shall be based on the conditions set out in paragraph 2. Within 180 working days of the submission of a complete application, ESMA shall inform the applicant non-EU firm in writing with a fully reasoned explanation whether the registration has been granted or refused. 4. Third country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country. The information in the first subparagraph shall be provided in writing and in a prominent way. **Persons** established in the Union shall be allowed to **receive** investment services by a third country firm not registered in	requirements described in Article 37 (1). The applicant third country firm shall provide ESMA with all information deemed necessary for its registration. Within 30 working days of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the applicant third country firm has to provide additional information. The registration decision shall be based on the conditions set out in paragraph 2. Within 180 working days of the submission of a complete application, ESMA shall inform the applicant non-EU firm in writing with a fully reasoned explanation whether the registration has been granted or refused. 4. Third country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country. The information in the first subparagraph shall be provided in writing and in a prominent way. **Professionals** established in the Union shall be allowed to

	accordance with paragraph 1 only at their own exclusive initiative. 5. Any disputes between the third country firms and EU investors shall be settled in accordance with the law of and subject to the jurisdiction of **a** Member State. 6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the information that the applicant third country firm shall provide to ESMA in its application for registration in accordance with paragraph 3 and the format of information to be provided in accordance with paragraph 4. The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Article 10 to 14 of Regulation (EU) No 1095/2010. ESMA shall submit a draft to the Commission for those regulatory technical standards by [].	**make use** investment services **provided** by a third country firm not registered in accordance with paragraph 1 only at their own exclusive initiative. 5. Any disputes between the third country firms and EU investors shall be settled in accordance with the law of and subject to the jurisdiction of **the** Member State **where the legal representative of the third country firm is established**. 6. Powers are delegated to the Commission to adopt regulatory technical standards specifying the information that the applicant third country firm shall provide to ESMA in its application for registration in accordance with paragraph 3 and the format of information to be provided in accordance with paragraph 4. The regulatory technical standards referred to in the first subparagraph shall be adopted in accordance with Article 10 to 14 of Regulation (EU) No 1095/2010. ESMA shall submit a draft to the Commission for those regulatory technical standards by [].

Justification

Paragraph 1 & 5

We believe that the MiFID regime should require the establishment of a legal representative in the EU, in the same way the AIFMD requires the establishment of a legal representative in the EU of a third country alternative investment fund manager using the passport. Indeed, this would not only allow more consistency between the two pieces of legislation, but more importantly reduce

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legal uncertainty and potential conflicts of laws, as the applicable law would be that of the Member State where the legal representative is established.

Furthermore, we believe that the choice of the Member State where the legal representative is located should be regulated. Indeed, with no such requirement, third country firms might establish their legal representative in the less stringent Member State (and not necessarily the Member State where most of the firm's clients are located). In other words, this might create an ***opportunity for regulatory dumping*** *– which is concerning given that the third country entity will be granted a passport allowing it to provide its services throughout the EU. We therefore propose to introduce the concept of "Member State of Reference" used in the AIFMD (moreover, this would allow more consistency between the two pieces of legislation).*

Paragraph 4

In our view, as ***passive marketing regime*** *allows all European clients to make use of investment services provided by third country firms, we believe that the obligations set in the Commission's proposal would not hinder asset managers' businesses. Similarly, all European clients would still be able to choose service providers in third countries.*

However, article 36 of MiFIR could be subject to a different interpretation. We believe this article could be usefully clarified because this point is crucial particularly for professional clients or eligible counterpart like asset managers.

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<tr><td>Article 37:</td><td>

Equivalence decision (Provision of services without a branch by third country firms)

<table>
<tr><th>Text proposed by the Commission</th><th>Amendment proposed by AFG</th></tr>
<tr><td>1. The Commission may adopt a decision in accordance with the procedure referred to in Article 42 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding requirements which have equivalent effect to the requirements set out in Directive No [MiFID], in this Regulation and in Directive 2006/49/EC</td><td>1. The Commission may adopt a decision in accordance with the procedure referred to in Article 42 in relation to a third country if the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding requirements which have the same effect as the requirements set out in Directive No [MiFID], in this Regulation and in Directive 2006/49/EC [Capital Adequacy</td></tr>
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		[Capital Adequacy Directive] and in their implementing measures and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this directive. The prudential framework of a third country may be considered equivalent where that framework fulfils all the following conditions: (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis; (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body; (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions; (d) firms providing investment services and activities are subject to appropriate conduct of business rules; (e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation. 2. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent in accordance with paragraph 1. Such arrangements	Directive] and in their implementing measures and that third country provides for equivalent reciprocal recognition of the prudential framework applicable to investment firms authorised in accordance with this directive **as well as for reciprocal access by EU investment service providers to that third country market**. The prudential framework of a third country may be considered equivalent where that framework fulfils all the following conditions: (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis; (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body; (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions; (d) firms providing investment services and activities are subject to appropriate conduct of business rules; (e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation. 2. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent in accordance with paragraph 1. Such arrangements

	shall specify at least: (a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all information regarding the non-EU firms authorised in third countries that is requested by ESMA; (b) the mechanism for prompt notification to ESMA where a third country competent authority deems that a third country firm that it is supervising and ESMA has registered in the register provided for in Article 38 is in breach of the conditions of its authorisation or other legislation to which it is obliged to adhere; (c) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.	shall specify at least: (a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all information regarding the non-EU firms authorised in third countries that is requested by ESMA; (b) the mechanism for prompt notification to ESMA where a third country competent authority deems that a third country firm that it is supervising and ESMA has registered in the register provided for in Article 38 is in breach of the conditions of its authorisation or other legislation to which it is obliged to adhere; (c) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.

Justification

Paragraph 1

1- The new proposed MiFID active marketing regime is based on a preliminary equivalence assessment of third country jurisdictions by the Commission. Where the Commission makes an equivalence decision in respect of a third country jurisdiction, firms located in that jurisdiction will be authorised to apply for passporting their services in the EU.

AFG strongly supports the idea that the ***Commission*** *- and not a Member State - makes that equivalent decision.*

However, under the Commission's proposal, this equivalence assessment should be based on legal requirements which have an ***equivalent effect*** *to the European regulation. AFG believes that this assessment would be passed by too large a number of countries and thus weaken the protection offered to European investors, creating also a very uneven playing field for European investment*

	managers. The rules that service providers offer European investors should not vary depending on the country where these providers are located: the rules to be complied with by third country entities should therefore have ***the same effect*** *as those prevailing in Europe. In addition, this would allow more consistency with the provisions of the AIFMD.* *2- We believe that the obligation of having* ***cooperation arrangements*** *in place is a crucial tool to ensure an appropriate level of investor protection under the proposed active marketing regime, as it would strongly encourage third countries to enhance their standards. However, we appreciate that it might take some time to have these arrangements in place and for this reason we would support the introduction of a grandfathering clause. EFAMA currently expresses the view that third countries may not agree to such arrangements but we fail to see why they would not. On the contrary, we are concerned that the conditions attached to granting the passport to third country entities may be too lax.* *In any case, AFG believes that the authorization of third country entities should be subject to* ***reciprocity agreements*** *on the offering of investment services.*