Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

AMAFI's contribution to the European Parliament's deliberations

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.**

The Association française des marchés financiers (AMAFI) has more than 120 members employing over 10,000 people which operate in equity and debt securities markets, equity and debt derivatives markets and commodity derivatives markets. They act on behalf of clients or on their own account, and deliver the investment and ancillary services provided for under MiFID. Some members also operate market infrastructure, such as the regulated market and MTFs, as well as clearing and settlement systems.

AMAFI is therefore keenly interested in the MiFID review currently being undertaken by European legislators. AMAFI has been contributing to Europe's thinking in this area from the outset: under its previous name of Association française des sociétés de bourse (AFSB), it took part in the work that led to the Investment Services Directive. It was also active, as Association française des entreprises d'investissement (AFEI), in the discussions and work that brought about the adoption of MiFID. In this capacity, it took part in the working group that helped the European Commission in summer 2000 to decide on the broad framework used the following autumn to start the MiFID drafting process. It of course contributed to the Consultation on the MiFID review carried out by the European Commission at the beginning of 2011.

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?	As a preliminary remark, AMAFI strongly supports the European Commission's objective to narrow the scope of the exemptions for commodity firms. We are convinced that a level playing field for all market players providing liquidity to the market should be ensured. First, we are of the opinion that the proposed regime is too complex and allows too many market participants - including Corporates - to be exempted from the MiFID requirements, Second, the exemptions proposed leave the door open to a certain class of participants that act as intermediaries but do not have the same duties and constraints. In particular, the possibility for firms not regulated as investment firms to be direct members of an RM or MTF (Art. 2 -1.d (ii)) or those acting under the benefit of the "Group" exemption (Art. 2 – 1.i) is not satisfactory. These exemptions are not appropriate since the transactions executed by such firms can contribute to systemic risk. The MiFID review should be the opportunity to avoid any situation where firms contributing to systemic risk and/or providing services to clients are exempt from applying a high level of requirements. To avoid such risks, exemptions should be guided by the spirit of the provisions made in the draft EMIR regulation establishing a scheme based on thresholds for non-financial counterparties. In this context, we think that the regime should focus on a quantitative threshold, to be monitored by ESMA, which would be used to establish whether a firm would become subject to MiFID. In practice, if the firm's positions exceed that threshold, then it would become subject to MiFID for all its transactions. We draw the European Parliament's attention to two issues: - The threshold should be calculated taking into account the sum of gross positions based on the nominal value of each of them in order (1) to avoid any arbitrage and (2) to manage the systemic importance of these firms;

		- The European authorities, especially ESMA, should be appointed to provide regulatory standards aimed at determining the way this quantitative threshold is designed. In addition, in the field of energy markets, we fear that the proposed exemptions could make some stakeholders who are unable (or unwilling) to make the necessary investments to be "MiFID compliant" to turn to intermediaries or to OTC transactions. Should the provisions set up for the draft EMIR regulation be taken into consideration, it would be worthwhile including ACER for determining the thresholds. Some exemptions are subject to the "ancillary activity" criteria. The effectiveness of these exemptions will depend on the definition given by ESMA.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	The emerging markets in emission allowances (CO2) have suffered over the past two years from fraud and thefts due to the lack of suitable regulations. As such, AMAFI sees the proposal of the European Commission (DG Markets) to include emission allowances in the list of financial instruments as a remedy to restore confidence in the developing CO2 markets. But the emission allowances markets are already regulated by the Climate Action Directorate. Regular adaptation will be needed to meet the future developments of the CO2 markets (phase 3, auctions, airplane integration, river transport integration etc). In that context, it would be difficult to adapt specific texts for the emission allowance regulation in the context of a MiFID revision, thanks to the necessary time period needed to enact a modification. Furthermore, the primary market on emission allowances does not fall under the MiFID scope, a specific regulation is already implemented, and several regulatory texts have been issued for the spot secondary markets and these may interfer with MiFID constraints. Accordingly, AMAFI's recommendation would be to keep emission allowances out of the scope of financial instruments. When appropriate, specific regulation on spot emission allowances traded on secondary market should refer to certain MiFID articles without having to comply with the full obligation of the text. This would leave greater flexibility to adapt the regulation for this fast evolving market.

		On the definition of the financial instruments (Annex 1 – Section C), derivatives on emission allowances have been moved from (10) to (4). Such a move reinforces the financial instrument categorisation of emission allowances and consequently withdraws activities on such instrument from the scope of the position limits process addressed in Title IV.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	Custody and safekeeping are key components of the protection of clients' assets. AMAFI has always considered that custody and safekeeping should be harmonised at the EU level in order to ensure the safety of clients' assets on a notional and cross-border basis. Therefore including custody and safekeeping as a core service in MiFID 2 could be a means to achieve this objective. But it is not sufficient to consider only that custody should be treated as a core service: as with other investment services, a precise definition of safekeeping and custody, together with minimum provisions for investment firms which carry out this activity should be included in the regulation. Having said that, there is a concern linked to third countries' access to EU markets if safekeeping and custody fall into the SI category. There is a risk of lowering the protection of clients' assets if third country providers are not subject to the same rules. See question 4
	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?	The question of how third country access EU markets should be treated as far more than a technical issue. It is an issue which calls for a political decision. What is at stake here is the need to ensure that the two following sets of measures currently under discussion and to be adopted by the European authorities will be consistent with one another: on the one hand, the measures included in CRD 4 and Solvency 2 which will result in increased use of financial markets to finance business needs and on the other hand, those (like the current MiFID review) which aim at increasing the regulatory framework for the provision of financial services. It would be inconsistent and particularly odd, at a time when the EU is raising the constraints applicable to market participants, not to ensure that such participants have the same rights to conduct business outside the EU as those afforded to non EU firms to conduct business within the EU. Ultimately there is a risk that the European financial sector will be less competitive and,

		simultaneously, that Europe will become more dependent on market participants and markets outside the EU for financing its economy and investing its savings. AMAFI firmly believes that reciprocity of rights – just like the equivalence of applicable rules – is the fundamental underlying principle on which the "third country regime" should be built. Europe cannot allow foreign investment firms to set up easily within the EU while no reciprocity exists for EU firms. This was the case, for instance, for several months when EU clearing houses wanted to operate in the US. The protection of EU interests requires that clear rules be established to ensure true reciprocal access to respectively the EU and non EU markets for non EU firms and EU firms which are subject to equivalent rules. On that basis, AMAFI believes that it is very appropriate – even essential – to set up a harmonised framework for granting access to EU markets for third country firms in order to overcome the current fragmentation into national third country regimes and ensure a level playing field for all financial services actors in the EU. But the current proposal should be reviewed to include a non equivocal principle, which is not the case at the moment that EU firms could be granted access under similar conditions to the markets of third countries. It is also necessary to clarify the situation vis-à-vis professional clients, who are not mentioned either in the Directive or in the Regulation. The fact that the provision of services without establishing a branch is permitted for eligible counterparties only leads to the conclusion that the establishment of a branch is required both for non professional and for professional clients. However, it would preferable to say so clearly. More generally, the third country regime, spread out between the Directive and the Regulation, is quite complex and not easy to understand. Simplification/clarification might be useful.
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	The discretionary authority of the management board to organise its affairs and to structure its committees on a proportionate basis should be recognised. The prior approval of the competent authority to authorise the firm to depart from set standards should not be required, especially since such board's decisions may be reviewed by the competent authority as part of its supervisory review. Specifically, the management board's authority should be recognised in two areas: permitting exceptions to criteria

	proportionate and effective, and why?	regarding the number and type of directorships held by any director and deciding whether to create an appointments committee – and whether that committee should be composed only of non-executive leadership and members (other options, including membership of executive directors, are legitimate depending on the specific situation of the firm, especially when it is part of a group). Decisions regarding diversity and how (or if) this should be taken into account by the firm also belong to the management board, as it has to strike a balance with other, equally important criteria of knowledge, skill and experience as well as its specific competitive situation. With respect to regulatory standards, AMAFI does not think that such standards should be set by the Commission, as they have significant importance and consequences for firms. Member States should remain competent in this respect, as they are best placed to take national differences and governance practices into consideration.
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?	The purpose of the MiFID review is two-fold. The first aim is to address some of the shortcomings observed on equity markets four years after the directive came into force, in response to concerns expressed by issuers, investors and regulators about fragmentation and greater opacity in a number of transactions, as well as about the quality of price formation. The second aim is to ensure greater pre-trade and post-trade transparency and better security in fixed income and over-the-counter (OTC) derivatives markets, in line with the G20 recommendations. This twin objective is legitimate, which is why AMAFI fully endorses it. Moreover, these markets are absolutely vital in terms of financing economic activity, hedging risks and allocating savings. That said, it is hard to see how the aims can be achieved by adopting a totally uniform definition of Organised Trading Facilities (OTFs) and systematic internalisers (SIs). While fixed income and OTC derivatives markets are organised mainly on an off-exchange basis, equity trading is based principally on organised markets. Standardising market models without giving sufficient consideration to the special characteristics of each market can lead to the risk of malfunction. Consequently, the aim of introducing the OTF category is unclear. One possible objective may be to better identify and monitor the order-crossing systems set up by

		investment firms, which have expanded significantly in equity markets following the changes brought about by MIFiD. Another possibility may be to limit these systems or outlaw them altogether, which would benefit RMs and MTFs. That analysis is predicated on two factors: first, the possibility of setting up an OTF hinges on the existence of a "detailed explanation why the system does not correspond to and cannot operate as either a regulated market, MTF, or systematic internaliser" (*art. 20.2*); second, an investment firm that operates an OTF is not permitted to use it against its proprietary capital (*art. 20.1*). The latter requirement is apparently prompted by the idea that clients are highly at risk of being mistreated by the firm's proprietary account, despite the obligations stemming from the best execution requirement and the rules on preventing and dealing with conflicts of interest. This overlooks the fact that an investment firm does not initiate all its proprietary trades on a discretionary basis according to the perceived benefit of being counterparty to a client order; some of these trades result from the firm's other needs, especially managing the hedging requirements arising from other activities. From this perspective, the firm's proprietary account can certainly be treated just as any other OTF client. Another overlooked factor is that many markets, especially for bonds and OTC derivatives, have low liquidity. Therefore, interaction with the investment firm's proprietary account can be a useful way of generating substantial amounts of additional liquidity that would enable clients to meet their needs. For these reasons, it is important to clearly state why the OTF category is being introduced (see also the answer to question 7). More particularly, on the non-equity markets, we would like to stress that the definition of OTF appears to capture interdealer broking activities, single dealer platforms and RFQ platforms that are not MTFs or RMs. The main concern comes from the proposed prohibition for investment firms that operate an OTF to use their proprietary capital. Such a prohibition will have the impact of restricting the range of available venues for trading in OTC derivatives subject to the trading obligation and fixed income products, notably limiting the vital role played by the above mentioned platforms. The regulatory objective of the ban on proprietary capital appears to be to ensure the operator's neutrality in relation to any transaction taking place on the OTF and that the duties owed to clients are not compromised. We think that this objective can be achieved

		by other relevant means, such as the implementation of appropriate conflict of interests' rules.
	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?	First AMAFI considers that the first step for defining OTC trading is to define also what is the meant by "trading on own account". Furthermore, the meaning of "execution of client orders against the proprietary capital" and "market making activities" should be defined in accordance with the various interpretations of these concepts within the EU. In particular, it would be useful to distinguish the situations in which the purpose of proprietary is to service clients from those in which it is not. Without a common understanding of these concepts, which are crucial for the proposed regulation, there is a risk of: a) not achieving a level playing field in the EU. b) introducing regulatory loopholes with unexpected outcomes at the expense of the objective of the regulation. Second, the issue of whether introducing the OTF category into the regulatory framework will boost the number of transactions done on organised markets, at the expense of OTC markets, should be assessed according to the category of financial instrument involved. As mentioned in the answer to question 6, the aim of introducing the category is unclear, so the consequences are hard to gauge. For equity and bond markets, an initial assumption is that aside from a semantic shift (i.e. classifying OTFs as organised market systems, along with RMs and MTFs, will inevitably reduce the number of trades classified as OTC), the actual functioning of the market is modified only marginally through closer regulatory supervision of OTFs. But there is also a second assumption: OTFs are subject to such stringent constraints, including a ban on proprietary trading, that investment firms would be deterred from setting them up, for the benefit of RMs or MTFs, or even SIs. The first assumption may be correct, but it is not clear why regulatory supervision could not be set up under existing rules. The second assumption is therefore the more likely, so it is extremely important that the decision be taken in recognition of a clear political resolve to reroute as many transactions as possible to RMs and MTFs. This would have significant consequences in terms of reorienting the MIFiD 1 guidelines; moreover, many investment firms will have to write off the significant investments they have made to

		adjust to the directive. Whatever the outcome, there is no room for differing interpretations among national authorities as to how OTFs should function in Europe. For OTC derivatives markets, only contracts that are eligible for clearing under EMIR rules and are sufficiently liquid will be traded on organised platforms. An initial analysis suggests that very few products are likely to meet both criteria.
	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?	AMAFI welcomes the introduction of new organisational safeguards and risk controls on investment firms engaged in "algo trading". Having said that, AMAFI is totally opposed to the provision which requires each entity to provide "liquidity on a regular and ongoing basis to these trading venues at all times, regardless of prevailing market conditions". Indeed "algo trading" comprises a broad range of activities and in particular is carried out by investment firms in order to execute orders for their clients. Companies that use algorithmic trading strategies for order facilitation purposes should not be mandated to act as market makers. But even "algo traders" which deal only on own account should not be treated as market makers, as the strategies they pursue do not systematically result in providing liquidity to the market. Moreover, the proposed regulation imposes rules that go well beyond those that apply to ISs and traditional market making activity. This would be inconsistent with the rules of risk management imposed on investment firms. But if the goal of the regulation is to limit or ban HFT, it should be clearly stated. AMAFI also welcomes the setting up of rules for RMs and MTFs concerning market resilience. Concerning "circuit breakers" in particular, they should be harmonized within Europe and based on "volatility interruptions".Circuit breakers should be put in place, on behalf of ESMA, in order to ensure that an order sent to the market does not change the price of the financial instrument by more than a given percentage of the previous quote. AMAFI also welcomes the provision requiring all entities involved in HFT to be regulated when they are members of an RM or MTF. However, we consider that all members of these venues should be firms with a MIFID licence to provide client order execution or to deal on own account. Indeed, since members of the markets are essential components

		of the markets' overall security, there is no reason why entities which do not have a MiFID licence should be able to access them. Besides, for AMAFI, one way to monitor HFT, and maybe the best one, is to adjust the tick size in order to prevent useless HFT. It would be necessary to give ESMA the power to determine and monitor a harmonised tick size. Ultimately, AMAFI considers that the rules applicable to direct electronic access to markets should state more clearly that any arrangement without pre-trade controls done by the investment firm should be prohibited. Furthermore the regulation should a recorded, legally binding contract between the intermediary and the DEA customer.
	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?	AMAFI welcomes the proposals. The only comment we would like to raise is that the wording should be amended in order to clarify that circuit breakers should be coordinated between venues as far as possible, as already suggested above.
	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?	The recording of client orders outside of trading rooms (i.e. in the retail business) would in our view not generate benefits commensurate with the costs involved, considering that this recording essentially serves to prevent market abuse. On the contrary, this could contribute to higher barriers to entry and the crowding out of smaller firms, reinforcing the concentration of the European financial industry on few large firms. One way to make the change less onerous for a number of firms could be to permit contractual reliance on the recording made by other firms they are dealing with (for transmission of orders or execution). The requirement in the Regulation (art. 22.1) to keep records of relevant transaction data for five years is not consistent with the requirement in the Directive (art. 16.7) to keep telephone conversations and electronic communications for three years (a type of record which presumably is included in the concept of "relevant transaction data" in the Regulation). Telephone conversations or electronic communications should be explicitly dealt with in art. 22 of the Regulation to exempt them from a 5-year record keeping

		period, as we concur that a three-year period is appropriate for these, the statute of limitation for market abuse being three years in France. We regret that this is not a maximum harmonisation rule, as the disparate requirements across the EEA are a source of inconsistencies within firms and among regulators that is not easily understandable by clients (for example the record keeping period for a branch's communications is set according to its parent's home state rules, which may differ from the ones of the Member State in which the branch is established).
	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?	AMAFI supports the principle of centralised derivatives trading provided the criteria set out in art. 24 of the draft Regulation, notably those on standardisation and liquidity, are clearly established. Furthermore, standardised contracts, harmonised settlement procedures and the interposition of a clearing house are all vital factors in keeping systemic risk under control. That said, to meet the specific needs involved in managing clients' counterparty risk, it is important that investment firms should be allowed to continue executing certain over-the-counter trades and clearing certain transactions bilaterally (netting / collateral agreement). Moreover, it seems fairly unrealistic to suppose that liquidity for a particular contract or place of execution could be decreed. Liquidity can also vary over time, meaning that the assessment of liquidity must be dynamic in nature. More, only a limited number of OTC derivatives contracts will be sufficiently liquid for trading on an organised platform**.** That is why we believe that for the transparency to be increased, the European Parliament should focus on post-trade reporting to trade repositories rather than the trading obligation. That being said, we do support the fact that the trading obligation does not apply to transactions that are not in fact cleared due to an exemption from the clearing obligation under EMIR. This will help ensure that the needs of end users are suitably accommodated.

	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?	In light of the new prudential regulatory framework being put in place, which will limit SME's access to credit, AMAFI strongly believes that it is crucial for the development of the European economy, to have a suitable and specific regime for SMEs. In this perspective AMAFI considers that many of the provisions of the "Small Business Act" proposed by Fabrice Demarigny should be put in place rapidly. The setting up of a specific SME market regime proposed by the Commission could be a useful tool but it is far from sufficient. The main issues related to the SME market will be addressed in the Prospectus Directive and the Market Abuse Directive.
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	AMAFI clearly supports the language in the proposed Regulation calling for the removal of barriers and discriminatory practices that can prevent competition in the provision of clearing services for all financial instruments. In particular, AMAFI strongly supports the introduction of explicit and detailed requirements for open access by trading venues to clearing services.

	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?	1. Position limits can contribute to the security of the markets, particularly in the commodities markets. But to be effective, limits must be appropriate, fair and accurate in defining the goal. They cannot be set ex-ante. They must rely on : o An analysis of historical data; o A detailed survey of the main market members and participants; o Good knowledge of the fundamentals on the underlying physical markets. On that basis, Art. 1 & 2 - Section 59 are not satisfactory as regards the way position limits could be set up. In particular, the willingness to impose limits at the trading level on the number of contracts is inappropriate. This could be detrimental for market liquidity and the capacity for the market to perform its price discovery mechanism. 2. We think that limits at the position management level are more appropriate. In our view, the MiFID review should be the opportunity to create position management rules which give powers to market operators to determine - dynamically and according to alternative arrangements – whether a participant is potentially building a position which raises a threat to the orderly functioning and integrity of financial markets, given the specific circumstances of the underlying market and taking into account such factors as the levels of open interest, liquidity and the supply of the underlying commodity. In that context, hard/ex-ante position limits would be used only as last resort measure in individual cases, if there is a threat to orderly functioning and integrity. 3. One point that has not been highlighted by the various stakeholders is that position limits are already in place on several markets. However, these limits are at the level of the CCP which, by registering the trade, is the first to acknowledge and be able to act on the final prime contractor.

		To be efficient, position limits for a firm should be set using - at least in Europe - a common standard identification process. Pending a more precise definition to be fixed by ESMA about the expected goals of such a mechanism, limits should be considered based on the global exposure resulting from outstanding positions on the spot (physical) market, as well as derivatives positions held on the underlying instrument, regardless of whether they are traded on an RM, MTF or OTF. Procedures and definitions for limits must be set up at ESMA level to maintain a comprehensive and identical methodology regardless of the European country in which the booking of the transactions is supported. With respect to commodity products/markets, ESMA should validate limits with the competent sectoral regulator when available. **4.** Looking at the difficulty faced by the US CFTC in getting its position limits regulation to comply with the Dodd-Frank Act, we recommend that European Parliament set appropriate aggregation rules. Any aggregation regime should recognize that market participants having a minimal common stakeholders but that have completely separate management should not be aggregated. For entities having common stakeholders but that are governed through totally independent management, the real-time follow-up of the various accounts with regard to the global position limit is irrelevant in terms of confidentiality and conflict of interests. It would be impossible to know or request information about positions taken by entities in which a company holds an equity interest since they are independently operated and regulated.
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?	The focus on inducements as regards managing conflicts of interest seems rather disproportionate: the key element in investor protection is to ensure that the advice provided is good for the client (honest, unbiased and suited to the client's situation), as there is an inherent conflict in the selling act. In respect more specifically of independent advice, it is questionable whether the concept in itself is valued by clients (few firms in France market themselves on this basis). In addition, the measure is unlikely to be a solution to conflicts of interests, as using the "independent advice" label may create a greater incentive to churn the client's assets or to provide advice on investments generating greater revenues.

	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	AMAFI has not identified any point of significant interest to be brought to the attention of the European Parliament It would like however to stress that in determining which products are "complex" or "non complex" within the meaning of the Directive, the focus should be on the risk involved for the investor rather than simply on the complexity of the product. Indeed, a product may be complex but not risky if, for instance, the amount of the investment is fully guaranteed.
	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?	AMAFI has not identified any point of significant interest to be brought to the attention of the European Parliament regarding the new scope of the best execution requirements in Directive Article 27. Incidentally, there is a need to clarify the definition of the venues concerned. The only term that is defined (in the Regulation, not in the Directive) is "trading venue" whereas the Directive often uses the word "execution venue" (particularly in Article 27).
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	Yes they are. The most important feature in this respect is the proper categorisation of clients (and their ability to change category on request). The changes contemplated in this respect are sufficient in our view to deal with any failures that may have been experienced. However, the addition to Art. 30 of the Directive that communications with eligible counterparties should take into account the "*nature of the eligible counterparty and of its business*" is disturbing since it implies that there may be different levels of eligible counterparties, hence questioning the very definition of this category. It is true that the category can include different types of entities with different businesses but the rationale for this categorisation is such (i.e. entities possessing the experience, knowledge and expertise to make their own investment decisions and properly assess the risks they incur) that eligible counterparties ought to know when they do not know and therefore request additional information when needed.

	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	The proposed arrangements relating to the authorities' powers on product intervention are not satisfactory. AMAFI is concerned that this provision creates the potential for national differences on product distribution (and access) within the EU. We are also of the opinion that the current rules on investor protection are wide-ranging and precise enough that such harmful situations, even if they cannot be totally averted, should certainly be limited and in any case, subject to prosecution within the existing rules. AMAFI therefore believes that the issue at stake can be dealt with via increased supervisory scrutiny rather than an amendment to the rules and the powers of competent authorities, which are likely to have more significant side-effects in terms of the single rulebook the Commission is trying to achieve. If, however, this provision is maintained, AMAFI feels that the proposed conditions in which ESMA can intervene are too complex, and the proposed framework should be modified to limit the risk of an uneven playing field within the Union. ESMA does not have binding control over national competent authorities' decisions and as a result, we may have situations where the same product or activity is not subject to the same regime across the EU. This kind of situation should be avoided with respect to the MiFID review's objectives, which are the setting up of a single market and rulebook (see recital 2) as well as the removal of "distortions of competition resulting from divergences between national laws" (recital 3). Therefore, we suggest that powers be split between ESMA and national authorities, taking into account criteria such as the geographical scope of the products or activities (local or pan-European) and/or the nature of investor (professional or retail) the products/activities are aimed at. Such a proposal would be simpler, more operational and efficient as regards the objective of market integrity and investor protection.

Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	AMAFI has always considered that pre-trade transparency is a key element of a sound equity market. The current "large in scale" and "negotiated trade" waivers of pre-trade transparency obligations do not raise major concerns. The "imported price" transparency waiver could be reassessed. According to responses to questions 6 and 7, there may be a need to limit this waiver but, in any case, it should be interpreted in the same way in all Member States. AMAFI agrees that transparency requirements should be extended to depositary receipts and certificates issued by companies but not to exchange traded funds, where the trading process differs completely from the process used to trade in equities. For ETFs the rule should be calibrated differently.
	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?	AMAFI is in favour of greater transparency in principle, but rules must be specific to each asset class and there must be safeguards to protect liquidity. Where the number of market participants is relatively small and the transaction sizes relatively large, greater price and trade transparency creates incentives for 'gaming of orders', front running and pushing the market to create a squeeze on the player holding the significant risk. This will become a damper to growing additional liquidity. Regulators should consider the following: a) Each asset class needs to be reviewed separately to determine the correct approach. b) Any transparency regime needs to take liquidity into account. c) The current equity framework is not necessarily appropriate for other instruments. d) In many cases, execution prices are negotiated bilaterally due to constraints in supply and the ability to liquidate inventory. e) Too much price discovery/transparency in these instruments could be detrimental to liquidity. In any case, AMAFI considers that the waivers should be given by ESMA and not by competent authorities in order to ensure a level playing field in the EU.

	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?	See question 21 above.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	See questions 20 and 21 above.
	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)?	When assessing the outcomes of MIFID 1, there was a broad consensus among various stakeholders (issuers, investors, regulators, market members) on the need for a single tape where all the transactions would be consolidated in an organised and sound manner. Therefore the proposal of the Commission is very disappointing and will not achieve this goal, even though progress can be noticed compared to the current framework. AMAFI does not believe that “market forces” will succeed in providing a European tape within two years, since they have been unable to do so in the last four years. AMAFI considers that the regulation should : a) Require ESMA to set up regulatory technical standards on data standards and reference data. b) Define the conditions for setting up a consolidated tape comprising all transactions carried out on equity markets.

	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?	
	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	Among the European Supervisory Authorities, ESMA is to play a key role in achieving a single-rule book as well as ensuring a level European playing field for market players. However, not all the consequences have been drawn from this situation. Taking into account the ambitious objectives of the MiFID review, ESMA is unfortunately under-organised, under-funded and under-exploited. It is the political responsibility of the European Parliament to take care of this issue. More specifically, ESMA has been granted technical regulatory powers as well as supervisory powers, but in some critical areas, which are highly likely to distort competition, jurisdiction remains with the national competent authorities (granting pre-trade transparency waivers, delay for post-trade publication, and intervention on products / activities). In other areas, ESMA's powers are not binding enough to ensure harmonised implementation at the national level (reporting to the EC). In many areas, the national competent authorities' powers are legitimate, but this is not the case in areas where ESMA's powers are more efficient (transaction reporting for example) or more likely to ensure harmonised practices.

	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	In our view, the transaction reporting mechanism is not efficient because it implies the development of reporting mechanisms in the 27 Member States, with inevitable national differences leading to inconsistencies and double reporting by financial institutions. Since the effectiveness and accuracy of reporting is absolutely fundamental to fight market abuse, the revision of the Directive is a missed opportunity to get things right in this area, i.e. the creation of a central reporting system with free access by competent authorities. An independent cost/benefit analysis of a mechanism based on 27 systems (expanded further to deal with all instruments and markets) with interconnected links versus a central reporting system should be performed.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	In the area of European financial services legislation, several legislations need to be considered: MAR for example, for the definition of spot markets), the Transparency Directive (e.g. definition of market making) EMIR, CRD 4, REMIT (transaction reporting), etc. It is also particularly important to ensure consistency between the definitions and the concepts across the different texts. For an example, the definition of the spot commodities contract is not consistent between the draft MiFIR and the draft MAR. Besides, other legislation which does not deal directly with financial services may be more appropriate to regulate specific areas currently encompassed in the MIFIR/ MIFID framework. This is the case for the European Climate Action Directorate, which is far more appropriate for regulating emission allowances
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	The need for convergence between the European and US provisions relating to derivatives is absolutely vital. The different timelines across Europe and the US for implementing the G-20 requirements in this area may lead to a competitive disadvantage for European players. Adjustment of timetables as well as convergence of requirements are crucial for the European industry and should be ensured under, for example, the transatlantic dialogue framework. More generally, considering the economic model that Europe is built on as regards the financing of the economy, as well as the restrictive prudential regulatory framework

		Europe is adopting, there will be a growing reliance on the markets to finance the economy. It will then be crucial for Europe to have strong markets over which the European authorities and stakeholders will keep control. In this field, too, the European institutions have a key role to play.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	AMAFI approves the principles set out in these articles, which aim at harmonizing the sanctions regime with minimum rules to be applied throughout the EU. It would like to point out however that in Article 75.2(e), the reference to the consolidated turnover of the group as a basis for establishing the amount of the sanctions applicable to subsidiaries of a parent undertaking is likely to be disproportionate in many cases. Whether the sanctions regime foreseen in Articles 73-78 will be effective, proportionate and dissuasive will depend, to a large extent, on the way in which it will be applied by each Member State. Therefore it is important to ensure that ESMA will have the authority to control the proper implementation of these principles (i.e. not only their proper transposition in the legal systems of all the Member States but also their effective application by their competent authorities). In this connection, AMAFI thinks it would useful to provide from the outset that ESMA will formally report to the European Commission within, say, three years of the ultimate transposition date set out in Article 97, on the effective application of the new sanctions regime.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	In general, a substantial, determining and technical part of the legislation will be drafted later on by the European Commission in the context of delegated acts. These acts are new in the usual Lamfalussy law-making process that has been in place up to now in the financial services area. While the legitimacy of these acts is not questioned, stakeholders are not familiar with them. It is crucial to ensure that, under this legislative framework, stakeholders are properly consulted. As a general observation, the understanding and hence the assessment of the balance between the different levels of the mechanism, as well as the role of the different authorities, is made difficult by the complexity of the proposed arrangements. The two texts (Regulation and Directive) are of different nature as regards implementation but whereas the Regulation is supposed to be of direct effect, it refers in many and substantial instances to delegated acts, which makes it impossible to assess the

		provision. Also, in some areas, the regulation's provisions will only apply when the directive comes into force in Member States. As a result, reading and assessing the scope of some of the substantive provisions of the two texts is particularly complex and uncertain, and the decision-making process is hard to understand. Finally and most important, level 1 should concentrate on the general principles, objectives and orientations which will underpin the achievement of the single market. For example, it is at level 1 that important choices such as the general principles of market organisation should be clearly made. The implementing rules should be laid down at levels 2 and 3.
Detailed comments on specific articles of the draft Directive		
Article number	**Comments**	
Art.16.10	This article prohibits investment firms from concluding title transfer collateral arrangements with retail clients for the purpose of securing or covering clients' obligations. AMAFI believes that the objective of this provision - which is to protect retail clients' assets - does not justify such a broad prohibition. Furthermore, this broad wording is not consistent with the objective of this provision as explained in Recital 37 which only points out : "*at least when retail clients' assets are involved, it is appropriate to limit the possibility of investment firms to conclude title transfer financial collateral arrangements as defined under Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements for the purpose of securing or otherwise covering their obligations*". Therefore, AMAFI believes that such a prohibition should not apply to the situation where the sole purpose of the title transfer collateral arrangement to be entered into with a client is to secure or otherwise cover that particular client's obligations. Indeed, if entering into such an arrangement with a client in that case were not permitted, it would mean that an investment firm acting as an intermediary for a retail client could not use his or her assets to guarantee, by a transfer collateral arrangement (in most cases, a clearing house), the transaction entered into by the investment firm on his/her (the client's) behalf. In consequence, the investment firm would have to set up this collateral with its own funds or instruments, which would make the transaction costlier for the retail client in question. Therefore, it is necessary to redraft paragraph 10 as follows: "*An investment firm shall not conclude title transfer collateral arrangements with a retail client unless the purpose of such arrangements is to secure or cover present or future, actual or contingent or prospective obligations of that client in connection with an investment service provided to him or her*".	
Art. 24.7	This Article requires that when an investment service is provided together with another service (not defined as an investment service) or a product (not	

	defined) as part of a package, the firm informs the client as to whether it is possible to buy the various components separately and provides for separate evidence of the costs and charges of each component. This measure is not commented in the recitals, or in the explanatory memorandum of the proposal, hence it is difficult to understand what it is aiming at. As written, it covers a wide spectrum of activities and could therefore extend to products or activities beyond those for which the measure would seem beneficial for investor protection. Notably, it should not extend to wholesale markets for which the logic of singling out components and costs is not relevant (for example, there is no logic for a firm offering reception and transmission of orders, execution of orders and carrying out the settlement to decompose the overall cost as it is absurd to imagine that a client could use one firm for reception and transmission of orders and another one for execution). This Article needs amending in several respects: two terms should be clarified - service (is this targeting investment service?) and product (is this targeting financial instruments?) – the separate evidence to be provided to clients should only be provided "if possible", "costs" should be replaced by "prices" and finally, it should be aimed at clients who are not professionals.
Art. 80	This article makes it mandatory for firms to "adhere to" one or more bodies charged with out of court settlements of consumer disputes. We are concerned that the concept of "adherence" to such a body may lead to unnecessary difficulties in implementing this measure. Such procedures can be put in place via the national competent authority or another national public body without the need for firms to adhere to it, as they are within the scope of these mechanisms as soon as they are authorised to provide investment services (this is the case in France for example with the AMF offering a redress service automatically applicable to any authorised firm).
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	