

Review of the Markets in Financial Instruments Directive

ALFI response to the questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

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?	<p>ALFI would like to express the concern that under the text of article 3 par.1, second bullet point as formulated in the proposal an entity whose only function is to receive and transmit subscription and redemption orders may not be exempted anymore from MiFID, which would be a complete reversal of the present situation. It must be underlined that such entities only perform the maintenance of the fund shareholder register, which is a purely administrative and ancillary function. They do not act in the capacity of intermediaries bound to the end investor by a contractual relationship, and should therefore not be subject as such to fiduciary and conduct of business duties with regard to the latter, given the purely administrative nature of the relationship.</p> <p>Furthermore, as currently formulated the text would have as a consequence that a</p>

ALFI is the representative body of the 2 trillion Euro Luxembourg fund industry. It counts among its members not only investment funds but also a large variety of service providers of the financial sector. There are 3,833 undertakings for collective investment in Luxembourg, of which 2,425 are multiple compartment structures containing 11,920 compartments. With the 1,408 single-compartment UCIs, there are a total of 13,328 active compartments or sub-funds based in Luxembourg.

According to November 2011 EFAMA figures, Luxembourg's fund industry holds a market share of 31.2% of the European Union fund industry, and according to 2009 Lipper Hindsight data, 76.2% of UCITS that are engaged in cross-border business are domiciled in Luxembourg. As one of the main gateways to the European Union and global markets, Luxembourg is the largest cross-border fund centre in the European Union and, indeed, in the world.

		<p>financial adviser whose function is precisely to give advice could be exempted from the scope of the directive, which would be contrary to the spirit of the MiFID.</p> <p>Finally the last sentence of this paragraph refers to the obligation for exempted entities to be covered by an investors compensation scheme recognized in accordance with directive 97/9/EC or under a system ensuring “equivalent protection to their clients”. ALFI wishes to underline that for the moment being UCITS are not covered by Directive 97/9/EC but are subject to a dedicated regime that embeds its own investor protection dimension. In order to avoid undue duplication of liabilities and costs we suggest that art 3 be reworded not to impose an “investor compensation scheme” on products that are already subject to investor protection requirements pursuant to a dedicated regimes such as but not limited to UCITS.</p>
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	<p>ALFI does not see the need to extend MiFID to cover the sale of structured deposits by credit institutions. Our understanding is that the “PRIP” initiative is designed to cover such products.</p>
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	<p>It must be underlined that the text of the directive is contradictory to the extent article 2(h) excludes from the scope of the directive depositaries of undertakings for collective investment and pension funds, whereas the annex to the draft directive considers custody and safekeeping of financial instruments as core services. The exclusion granted by article 2(h) should be maintained in order to ensure consistency with the UCITS directive which considers these functions as ancillary and provides a specific regime for undertakings for collective investment.</p> <p>Furthermore, in our view, the nature of safekeeping and custody services differ significantly from the trading and financial instruments distribution services targeted by MiFID. Safekeeping and custody services are only loosely associated with the</p>

		<p>investment decisions of clients. Placing safekeeping and custody firms under MiFID obligations such as suitability or appropriateness assessment would not enhance investor protection, but instead confront custodians and their clients to new requirements not applicable to custodian activities and therefore lead to uncertainties and additional cost with no added value behind also for the investors.</p>
	<p>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?</p>	<p>ALFI agrees that a common equivalence framework should be elaborated as regards the access of third country entities to EU markets and also agrees that a common regulatory framework as regards the setting up of branches by third country entities in the EU should be developed. Such entities should not be subject to a lower level of regulation than EU ones. In particular, we would recommend that consistency in this regard be ensured with AIFMD.</p> <p>In this context however it must be underlined that UCITS asset managers in Europe often appoint investment managers in third countries which have to comply with the UCITS directive provisions. ALFI would not expect them to comply with the MiFID rules as well. Furthermore, we understand from the proposal that there would be two possible systems, one for eligible counterparties and the other for retail investors, the latter being applicable to professional investors. The proposed Recital 74 of MiFID suggests that European asset managers could receive services from non-European entities at the exclusive initiative of the European asset manager without the need to comply with all requirements of the MiFID and MiFIR. The proposed Article 36 par. 4 of MiFIR repeats the same for eligible counterparties. We would appreciate clarification that this principle also applies to professional investors, since fund managers are most often treated as such.</p> <p>Finally the proposed response time of 180 days (article 36.3 of MiFIR) for a non-EU firm to be approved and added to the approved ESMA list of non-EU investment firms is in our view not reasonable. We suggest that such delay be reduced to a maximum of 3 months.</p>

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Corporate governance	<p>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?</p>	<p>ALFI largely agrees with the proposals to strengthen corporate governance in MiFID II, but is concerned that the Commission text does not sufficiently take into account the specificities of investment management and the different business models and sizes of investment firms. Proportionality and flexibility should be taken into account to a larger extent in the proposal,</p> <p>Moreover some of the provisions are aimed at large corporate entities and will be difficult to implement for small and medium-size firms (i.e. requirement for diversity in the management body of MiFID firms and number of mandates). In particular the requirement for the nomination committee to be composed exclusively of “members of the management body who do not perform any executive function” should be amended. We indeed believe that inside knowledge of a firm and professional experience closely linked to the supervised activities are also very useful to ensure adequate internal oversight.</p>
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Organisation of markets and trading	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	
	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	

	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	
	<p>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?</p> <p>If not, what else is needed and why? Do the proposals fit appropriately with EMIR?</p>	

	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	The proposed text will threaten the continuance of the open-architecture environment which is well known in the fund industry. Open architecture plays in favour of the end investor by driving competition, offering more choice and easy access to the best products available. The current proposal will potentially limit the investors' choice of the most appropriate investment fund to meet their investment requirements. A ban on the acceptance of monetary inducements for advice "provided on an independent basis" will lead to a reduction in competition among distribution channels and/or a reduction in the number of products offered to investors. It may result in a serious step backwards in terms of transparency and potential conflicts of interest if this leads financial groups to refocus their product offering on internally produced products with potentially all key functions such as product design, asset management, administrations, depository and distribution being ultimately controlled by the same group.

		<p>ALFI believes that it is an overarching principle that each professional must act in the best interest of his/her clients and any assessment should be made taking this principle into account. It is the distributor's responsibility to ensure that they provide the right service to the end client. As regards collective investment undertakings in particular, boards of directors of management companies or fund promoters should in our opinion ensure that fees remain competitive and are paid in the interest of the fund, in accordance with applicable rules of conduct.</p> <p>Additionally it should be noted, that MiFID's suitability obligation already applies, therefore we fail to understand the conclusion that the quality of advice provided to a client should be depending on whether or not the advisor receives fees / commissions / benefits by any third party. We rather think that the quality of the advice is related to analysis to the advice. So the suitability test in combination with appropriate disclosure around the characteristics of the advice should be the appropriate means to ensure high quality of advice.</p> <p>Therefore, in ALFI's view focus should rather be put on improving transparency to investors and enable them to better assess the quality of the service. This could include more disclosure on the amounts received from different product providers on the precise products recommended to the investor, and on the amounts being paid to intermediaries on an on-going basis as well as the services justifying these fees.</p>
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	<p>16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?</p>	<p>As an industry association ALFI shares the European legislator's concern about ensuring the highest possible investor protection while at the same time allowing choice and easy access to the best products available. Speaking about UCITS that have been designed and are regulated for a widest possible distribution to retail investors we believe that the most efficient way to achieve this objective is to impose strict risk mitigating and management rules through legislation as it is currently the case for UCITS.</p> <p>However it must be underlined that MiFID looks at financial instruments, including UCITS from a complexity view only, and in doing so unfortunately seems to add to the general confusion between complexity and risk. We would like to underline that where complexity can add certain risks (for example operational risks), such complexity does not make a product inappropriate per se for retail investor. Therefore the priority should rather be to improve the disclosure of potential risks and act in a way that, should such risk materialize, their impact on investors be minimized or possibly avoided. The approach contemplated in the current proposal might miss the target if only the complexity aspect of the financial instruments is addressed. Moreover one should carefully understand all the impacts and consequences of the current proposal before imposing changes to a well established framework, given the importance of UCITS as a major retail investment product in Europe and increasingly worldwide, in order not close down existing distribution channels or unduly restrict the access of retail investors to</p>
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		innovative and efficient products.
		ALFI would therefore rather propose to leave the MiFID framework unchanged regarding the definition of UCITS as non-complex, and to proactively work with regulators on addressing the risk factors that may result from certain structures or investment techniques and identify the according steps or measures which should be taken in this regard.
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	ALFI welcomes a clarification and harmonization of supervisory powers across the Union. However, we are very concerned by the fact that in the draft ESMA powers are much more limited than those granted to competent authorities at national level, and are conditional upon national authorities not taking any action or not adequately addressing possible threats. Furthermore, ESMA's powers are temporary in nature, while those of competent authorities have no such explicit limitation. ESMA's "facilitation and coordination

		<p>role” in Article 33 seems inadequate.</p> <p>ALFI understands that competent authorities are in a better position to evaluate problems related to retail investor protection, and propose solutions. However, in view of the pan-European nature of the distribution of financial services and instruments, it seems that if a product or service presents a danger to investors or systemic risk, supervisory measures should be taken in coordination with other regulators concerned as well as with ESMA, rather than undertaken solely at national level. ALFI members would also recommend an equal focus on product governance for all retail products under the PRIPs initiative.</p> <p>Uncoordinated national measures would also represent a real threat to the Single Market in financial services, and could conflict with other financial regulation, for example the UCITS Directive. The UCITS Directive is based on the principle of the passporting of funds cross-border on the basis of the authorisation by the home Member State authority. This key principle could now be overruled by any host State competent authority under MiFID rules.</p> <p>MiFID II proposals should therefore be amended to include a stronger role for ESMA vis-à-vis national authorities, providing for a better balance in powers and wider cooperation at European level. Furthermore, any restriction or ban should not change the effect of other existing financial regulation, and a clear process to appeal ESMA decisions should be foreseen.</p>
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs,	Although lack of data aggregation and data standardization provisions in MiFID I worsened the quality of information

	<p>certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?</p>	<p>available to investors, intermediaries and issuers , ALFI is of the opinion that the same cannot be said for the impact of trading venue innovation and transparency provisions. Existing market structures are overall well-functioning, and improvements are already being promoted by the G20 and Dodd-Frank initiatives. One should therefore assess the impact of structural changes to financial markets before introducing any new regulation, and also And weigh the possible costs to the final investor.</p> <p>ALFI agrees that trade transparency is clearly key for price formation. However the needs of retail and institutional investors are different. There are also 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.</p> <p>ALFI therefore opposes the extension of pre-trade transparency beyond equities. If transparency is deemed necessary for retail clients for some instruments, specific rules could be introduced, tailored to that segment and appropriately calibrated.</p>
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	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?	Please see above comment (20).
	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?	Please see above comment (20).
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	ALFI is of the opinion that the existing rules are sufficient to achieve transparency.
	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	

	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	There should be a clear mandate and ESMA to have decisive powers when supervising markets, market activities and products. Notably, bans or suspensions of trading should in all cases be agreed / supported by ESMA, not by Member States (please refer to answer of question 19)
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	Consistency should be ensured with UCITS, PRIPS, and AIFMD. A harmonized approach of corporate governance should be adopted across various initiatives; in particular the Green Paper on Corporate Governance for financial Institutions, and the specificities of the investment management business should be taken into account in this context.

	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	It must be underlined that sanctions are also being covered in UCITS V.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	
Detailed comments on specific articles of the draft Directive		
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