European Fund and Asset Management Association

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	**EFAMA** EFAMA (European Fund and Asset Management Association) is the representative association for the European investment management industry. It represents through its 26 member associations and 57 corporate members approximately EUR 13.8 trillion in assets under management, of which EUR 7.7 trillion was managed by approximately 54,000 funds at end September 2011. Just over 36,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds.

Theme	**Question**	**Answers**
Scope	1)Are the exemptions proposed in Directive Articles 2 and 3 appropriate? 2) Are there ways in which more could be done to exempt corporate end users?	1) EFAMA agrees with the extension of certain MiFID standards in order to grant the same level of investor protection to all investors, regardless of the distribution channel they choose.

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		However, many intermediaries exempted from the MiFID scope of application at national level in accordance with Article 3 are very small firms which are not able to comply with all of MiFID's requirements, in particular with those pertaining to internal organisation and own capital of investment firms. For example, individual advisors cannot be expected to adhere to standards for management boards (under Art. 9 MiFID) or notification of shareholders/members under Art. 10. It is essential that the extension of MiFID rules be proportionate, in order to account for the limited resources of such firms, and to avoid that well run SMEs be forced out of the market. 2) We see no reason to limit the scope of exemption to pure investment advisers, hence not allowing for transmission and reception of orders without investment advice. From an investor protection point of view, it would not be logical to allow for the exemption of investment advice but not of orders placed by self-advised clients. Furthermore, the current wording would not allow exempted intermediaries to accept supplementary orders placed by the client some time after the provision of advice.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	With reference to issues related to conduct of business obligations, EFAMA strongly supports the application of MiFID proposals to all PRIPs, including insurance products. MiFID must be the blueprint for the review of the Insurance Mediation Directive, and EU legislators must ensure that the Commission's decision to use separate legislative instruments to implement the PRIPs initiative does not lead to a lack of alignment for sales rules between MiFID II and IMD II, thus jeopardising the goals of the PRIPs initiative.

		In connection with PRIPs, EFAMA greatly welcomes the inclusion of structured deposits in MiFID II (Art. 1 (3) of the Directive) and the higher level of investor protection granted by this measure.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	Yes, we see the need for additional adjustments in order to provide for non-application of appropriateness test in Article 25 para. 2 of MiFID draft. Due to safekeeping of assets being qualified as a licensable investment service, the requirements for appropriateness test in the newly drafted Article 25 para. 2 would apply to the opening of client accounts. However, in this case it makes no sense for investment firms to investigate into knowledge and experience of clients as the service of asset safekeeping should be considered appropriate regardless of the client's individual background.
	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?	EFAMA has particular concerns regarding the proposed Third Country Provisions. As asset managers EFAMA Members depend on services of third country firms to manage the assets of their clients in the best interest of these clients. Examples of such services include European asset managers contract with their own non-European subsidiaries, European asset managers placing deals with non-European brokers, European asset manager delegating investment management services to a non-European investment manager, European asset managers using a non-European investment adviser or European funds investing in non-European funds.

		EFAMA understands that the Commission proposes regarding Third Country Provisions two possible systems, one for eligible counterparties and one for retail investors, and that the proposed provisions for retail investors shall also apply to professional investors. EFAMA Members, whether they will be AIFM, UCITS Management Companies or MiFID firms, seek as much as possible to be treated as professional investors (be it because they wish to receive best execution for their clients, or because no special system for eligible counterparties exists). Given the current proposal, this would mean that EFAMA Members would fall under the same framework as retail investors which would restrict available services and increase costs for their clients. It has been suggested that the proposed Recital 74 MiFID would allow European asset managers to receive services from non-European entities at the exclusive initiative of the European asset manager without the need to comply with all requirements of MiFIR and MiFID. The proposed Article 36 para. 4 MiFIR repeats this proposal for eligible counterparties. EFAMA would appreciate clarification in a main article in the Directive that this principle shall be applicable to all investors (not only eligible counterparties). Furthermore, for solicited services, EFAMA considers that treatment of asset managers as retail investors disregards their capacity to engage in financial services and is not in the best interest of the asset managers' clients, the final investors. Both regimes (for eligible counterparties and for retail investors) are

		not suitable for asset managers and EFAMA Members strongly advocate that a third regime, for professional investors, be included into the proposal. EFAMA will make further and more detailed points on these provisions shortly.
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?	EFAMA largely agrees with the proposals to strengthen corporate governance in MiFID II, but our members are concerned that the Commission text does not sufficiently take into account either the peculiarities of investment management, or the different business models of investment firms and their sizes. EFAMA requests that the Commission should better incorporate the peculiarities of investment management into the text. For example, directorships on the Board of corporate-type funds (with a legal personality) will not be able to qualify as being held within the same group although managed by the same investment manager, and therefore will not be considered as a single directorship. EFAMA Members further wish to see proportionality and flexibility more clearly enshrined in the text. Some of the provisions are aimed at large corporate entities and will be difficult to implement for small and medium-size firms. It must be kept in mind that MiFID firms can be very small, even natural persons. EFAMA Members agree with the requirement of diversity in the management body of MiFID firms, including requirements for geographical and professional diversity. However, again, proportionality and flexibility should be included more clearly into the text. For example, geographical diversity will be less relevant for a very small only very locally

		active MiFID firm. EFAMA Members also believe that the number of mandates should not be fixed in a one-size-fits all numerical limit for all MiFID firms but again a more proportionate and flexible approach needs to be found. 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. Although independent expertise should be sufficiently available among non-executive directors or within a supervisory board, EFAMA believes that inside knowledge of a firm and professional experience closely linked to the supervised activities are also very useful to ensure adequate internal oversight. Almost all EFAMA Members therefore disagree with this general requirement.
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?	EFAMA Members welcome in principle the introduction of the Organised Trading Facility (OTF) categorisation but 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. EFAMA would 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.

		Converting OTFs into MTFs after reaching a specific threshold is neither desirable nor appropriate. Execution venues categorised as OTF are distinct in form, function and business model from MTFs. Therefore, it does not make sense to change of the status of the execution venue after a given threshold has been surpassed. Regulators should, in this case, focus on the services provided instead of the number of transactions dealt with particular execution venues.
	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?	EFAMA agrees on MIFID II proposal, even if it does not stipulate a specific definition for OTC. OTC trading is currently one of the places possible alongside regulated markets and multi-lateral trading facilities to execute orders. Liquidity and transparency of a given instrument should however be the principal regulatory focus. Therefore, exceptions should be taken into account to accommodate the specificities of the fixed income market such as in respect of pre-trade transparency and the necessary regime for delays in post-trade transparency in case of large orders.
	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 most of the investment managers are users of third-party designed

		algorithms. As such, the majority of the investment managers 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, current provisions on algorithmic trading provisions 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. Every computer program uses algorithms. Investment managers may also 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. Investment managers would therefore 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 Article 17.3 " An investment firm whose principal activity is to post quotes (market making) 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." Proposed new Article 4(30) "Algorithmic trading" means trading in financial instruments where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention. This definition does not include any system that is only used for the purpose of complying with Article 27 (best execution)." 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; and (2) algorithms may be proprietary or purchased, i.e. one may or may not have access to the computer code and the inner working 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", bearing in mind that best execution is also covered through several other means. Automated trading has been studied 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?	EFAMA has no comment so far on this point apart from stressing the point 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?	EFAMA agrees with the extension. We also strongly support harmonisation of the requirement to keep records of all trades. On top of being mainly beneficial for investor protection, record keeping of all trades including proprietary trades is important to allow competent authorities to combat market abuse and conflicts of interests. This harmonisation could be extended to the storage of data in order to produce marginal benefits for the work of regulators undertaking investigations.
	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 on an analysis to favour liquidity and transparency. Thus, it is necessary to define the concept of liquidity for each class assets which require 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 an 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 organised 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 real economy. Thus, we want to maintain the so call "exchange regulated" market segments. Moreover, adding new MTFs could result in 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) EFAMA emphasizes that the same effective investor protection regarding transparency and market abuse is necessary as it is in other markets. Otherwise the investment risk would increase in SME markets as opposed to other MTFs. The proposal achieves that 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. EFAMA believes SME markets may well help SMEs to gain easier access to more capital. But EFAMA 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?	EFAMA 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 price variations. 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.
	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?	1) Independent Advice EFAMA agrees that the new requirements on independent advice protect investors from conflicts of interest. Transparency to investors and correct enforcement are key to the provision of good quality advice.

		EFAMA Members are not recipients of inducements. They do, however, pay commissions and retrocessions to third party distributors. Our members fully support clarity and disclosure about the selection and assessment of products, as well as regarding remuneration of advisers. At the same time, they have a strong interest in maintaining choice of distribution channels for investors and are concerned that a ban on the acceptance of monetary inducements for advice "provided on an independent basis" will actually lead to a reduction in competition among distribution channels, and/or a reduction in the number of products offered by distributors. Several studies[1] shows that a large majority of retail clients are unwilling to pay for advice, and under a fee-based model the current subsidization of advice to small retail clients will no longer be possible. Measures aiming at banning inducements are likely to reduce access to advice for retail investors, leading to a Union where only the wealthiest would be able to afford the luxury of a full range of investment options. More than ever, EU citizens need access to sound advice for long-term investment, as both social security systems and companies are forced to cut back on pension provision, and pension fund returns suffer from the financial crisis. Further reducing access to advice is neither in the interest of retail investors, nor encourages savings accumulation and therefore a healthy growth of EU capital markets in the long term.

[1] Survey conducted for KPMG by YouGov on the Retail Distribution Review(published in September 2010), study "Describing advice services and adviser charging" carried out by IFF Research and published in June 2009 and a study in Germany published in January 2011 by Nikolaus Franke , Christian Funke, Timo Gebken and Lutz Johanning.

		In many Member States, distribution of financial products is either carried out by bank and insurance company-linked financial groups, or by unrelated financial advisers. Such financial advisers are more likely to distribute products from product providers not related to a financial group, and could fulfill the requirements for the provision of "independent" advice. However, as such independent advisers are usually small, the prohibition to accept monetary inducements would weaken their economic viability, leading to a loss of many jobs in the industry and reducing competition among distribution channels to the detriment of end investors. As a result, access to products from product providers unrelated to large financial groups would also be reduced and the progress of "open architecture" in the European Union would be undermined. **If a ban for monetary inducements is considered necessary for advice "provided on an independent basis", majority of EFAMA's members believe that the choice of providing advice on such basis or on a restricted basis should be left to the distributor/adviser.** Furthermore, the provisions in Para. 5 of Art. 24 for firms providing advice on an independent basis require the assessment of a sufficiently large number of financial instruments, and not "limited to financial instruments issued or provided by entities having close links with the investment firm". It should be ensured that the simple use of an execution platform belonging to a group is not considered equivalent to the provision of the product, as this would prohibit the use of such execution platforms, which constitute purely an auxiliary service and do not threaten the independence of the adviser.

		2) Portfolio Management EFAMA agrees that to ensure investor protection it is important that the investment firm provides portfolio manager service which is in the client's best interest. **However, EFAMA does not consider that monetary inducements in the case of portfolio management should be banned entirely. We are not aware of evidence of market failure in this area that would warrant such a measure. It is appropriate that either inducements be rebated to the client (as already done in some cases) or the client should be allowed to consent to them being kept by the portfolio manager. It must be noted that inducements kept by portfolio managers reduce the fees charged to investors. Should they be banned, fees would have to be increased as a result. The Commission proposal should be modified to allow for the rebating of monetary inducements to the client or to allow for payments to the portfolio manager, subject to client express consent.** Non-monetary benefits such as soft commissions (broker research, financial analysis or pricing information systems) provide important assistance for asset managers in the process of taking investment decisions or transmitting orders for execution and are subject to MiFID Level 2 requirement that they enhance the quality of the service. EFAMA is therefore of the opinion that soft commissions should in any case be permitted in relation to portfolio management (in particular the provision of research bundled with brokerage services), as they are valuable to the industry as a whole, they help reduce fees to clients, and assist investment managers in providing a better

		service to their clients. Paragraph 6 rules out only fees, commissions or monetary payments, but Recital 55 could be interpreted as restricting the type of non-monetary benefits a portfolio manager may receive (it refers to "limited non-monetary benefits as training on the features of the products"). **It should be clarified that non-monetary benefits may continue to be received as long as they do not impair the ability of investment firms to pursue the best interest of their clients, as further clarified in Art. 26 of Directive 2006/73/EC.**
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	The Commission proposal excludes structured UCITS from non-complex financial instruments eligible for execution-only services. EFAMA does not consider it appropriate, as UCITS are conceived as retail products, are very strictly regulated and provide a high degree of investor protection. UCITS are also very liquid (redemptions possible usually daily, but at least twice a month), do not involve any liability exceeding the acquisition cost, provide a very high level of disclosure to retail investors (which has been further improved with the introduction of the Key Investor Information Document under UCITS IV), are subject to stringent risk management rules and, above all, are designed to be well diversified. UCITS are also by far the most transparent financial instruments, and the recent introduction of the Key Investor Information Document (KIID) makes them even easier for retail investors readily to understand them. They therefore can easily fulfill all the requirements of

		Art. 38 of the current Level 2 Directive to fall within the definition of non-complex instrument. Furthermore, the very successful UCITS brand could suffer damage in the eyes of non-EU regulators and investors if some UCITS were no longer considered automatically non-complex, as they may be seen as unsuitable for retail investors. European investors' confidence in UCITS might also be affected. Most importantly, complexity is not equal to risk. On the contrary, many of the UCITS features (including special strategies and techniques, also used in structured UCITS) reduce risks for investors which are high in "plain vanilla" financial instruments such as stocks and bonds. What is relevant for retail investors is their understanding of the product´s payoff and of the guarantee (if any) as disclosed in the UCITS KIID, not necessarily of the underlying management techniques or structures. The KIID for structured UCITS already requires performance scenarios to provide further transparency. We also note that UCITS are subject to pre-approval by regulators, giving regulators the ability to challenge and seek further information from fund promoters if they think the overriding requirements relating to ease of understanding in Article 38 of the current level 2 directive and the provisions of the UCITS Directive, particularly those related to KIID disclosures, have not been met. **Nonetheless, even if structured UCITS are no longer defined as automatically non-complex for execution-only purposes, they (together with other financial instruments subject to carve-out in Letter a of Para. 3, such as non-UCITS fund shares) should remain subject to the test in Art. 38 Level 2**

		Directive. EFAMA is concerned by the lack of clarity of the new wording in Art. 25 (6), which might be interpreted as excluding completely the possibility for the carved-out instruments to be considered as non-complex (eliminating the need for Art. 38 at Level 2). **The test in Art. 38 Level 2 remains appropriate and Level 1 text must be modified clearly to allow for its application to structured UCITS.** ESMA Guidelines "for the assessment of financial instruments incorporating a structure which makes it difficult for the client to understand the risk involved" as required by Para. 7 of Art. 25 can be useful, but should rather be included in Level 2 text as an addition to Art. 38, as they clearly refer to the fourth criterion of the article, and should replicate the current Art. 38 of the Level 2 Directive . Non-UCITS funds in general (including shares in non-UCITS admitted to trading on a regulated market) should also continue to be subject to the test in Art. 38 of Level 2 MiFID, and not be considered automatically 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?	EFAMA has no comment so far on this point.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	Please see above comment (4).

	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?	EFAMA Members welcome a clarification and harmonization of supervisory powers across the Union. However, they 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 role" in Article 33 seems inadequate. EFAMA acknowledges that, in general, competent authorities are in a better position to evaluate specific concerns 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 if it is believed that a product or service presents a danger to investors or systemic risk, first that belief should be thoroughly scrutinized and, second, any supervisory measures thought necessary and appropriate should be taken in coordination with other regulators concerned as well as with ESMA, rather than undertaken solely at national level. EFAMA also recommends an equal focus on product governance for all retail products under the PRIPs initiative. This is particularly important given the difference between the UCITS regime (which requires regulatory pre-approval) and other PRIPS where this is not necessarily the case. 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. **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.**
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?	EFAMA Members agree with the Commission proposals to extend the MiFID transparency regime. However, it must be ensured that such extension applies only to true Exchange-Traded Funds (ETFs), not to all other open-ended funds (mostly UCITS) that – depending on national trading models – may be admitted to trading or are listed on a market for various reasons. It is therefore very important that the definition of ETF be correct. The definition of Exchange-Traded Funds (ETFs) as currently included in MiFIR is too broad and would catch too many funds besides ETFs. As the purpose of MiFID is very different (the definition is only required for the extension of trade transparency) and in order not to set legal precedents which may jeopardize ESMA's work, EFAMA recommends deleting the reference to "exchange-traded funds in the MiFIR definitions (Art. 2 (1) (11)), and

		simply referring to "units of open-ended collective investment schemes", for example "units of open-ended collective investment schemes which are actively traded on at least one European Regulated Market, with at least one market maker". 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. In some Member States some UCITS are traded on secondary markets (with low volumes) without the permission of the fund management company. It would be excessively burdensome to impose an obligation on the fund management company resulting from the action of unrelated parties acting without its consent.
	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	MiFID introduced greater competition into European markets, which fostered choice and growth, and is welcomed by institutional investors. 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.

	transparency requirements and why?	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. However, EFAMA Members do not consider the impact of trading venue innovation and transparency provision as equally negative: existing market structures are overall well-functioning, and improvements are already being promoted by the G20 and Dodd-Frank, particularly regarding OTC markets. EFAMA supports fair competition and protection of final investors. EFAMA also stresses that it is crucial to assess the impact structural changes to financial markets could have before introducing potentially highly disruptive regulation: markets must continue to serve the interests of the users (issuers and investors), thereby providing capitals for the real economy and long-term saving opportunities for EU citizens. 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. Overall, EFAMA supports in extension of post-trade transparency to non-equity markets (with an appropriate calibration regime at Level 2), but opposes the extension of pre-trade transparency beyond equities (Articles 7-8 MiFIR). EFAMA 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, EFAMA 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	Changes in transparency requirements should always take into account asset and market characteristics, and carefully weigh

	products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	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, EFAMA supports in extension of post-trade transparency to non-equity markets (with an appropriate calibration regime at Level 2), but opposes the extension of pre-trade transparency beyond equities (Articles 7-8 MiFIR).
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	EFAMA is in favour of transparency and trusts that the existing 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 be legislators' top priority.
	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)?	EFAMA supports the proposals to require a functioning consolidated tape for post-trade data through the use of APAs and CTPs, as well as harmonised data standards. We also support commercial solutions for CTPs in principle, but fear that

		commercial drivers towards comprehensive CTPs will be insufficient. We therefore consider that the European Commission should be equipped to mandate a single consolidated tape. Some members believe this will need to be created as MiFID II is implemented; others that it should be a reserved power if the introduction of CTPs does not deliver the desired solutions. EFAMA strongly supports 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?	The post-trade transparency proposals for fixed income and OTC derivative are welcomed by our members. 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). Appropriate calibration in publication delays is necessary in post-trade transparency (to be detailed at Level 2). Calibration of post-trade transparency delays should also be done for each asset classes, for the global interest of the market mechanism and to optimize liquidity. Illiquid securities or large trade should have an appropriate time delay and should not be penalised by the post-trade transparency regime.
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?	Please see above comment (19).
	27) Are any changes needed to the proposal to ensure that	Please see above comment (19).

	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?	From the viewpoint of the asset management industry, there are also important interactions with provisions of AIFMD and UCITS Directive relating to delegation of tasks to third country providers. The recently adopted AIFMD regime allows for delegation of portfolio management to third country entities subject to the condition that the delegate is authorised or registered for the purpose of asset management, or approved by the AIFM competent authority and cooperation between the competent authorities in and outside the EU is ensured. Similar principles apply to the delegation of portfolio management under the UCITS Directive. It must be noted, however, that provision of portfolio management even on delegated basis is considered a MiFID service in accordance with Annex I Section A No. 4 MiFID. In view of the Commission's proposal for third country firms, this flexible approach adopted by the EU investment fund Directives is under the threat of being undermined by the very strict MiFID/MiFIR rules on access to EU markets. Therefore, a separate, more liberal regime governing the relationship of third country firms with professional clients is indispensable in order to maintain competitiveness of the EU financial sector (for details, see our reply to question 4 above).
	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?	Yes it is.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	EFAMA believes there is an appropriate balance between Level 1 and Level 2.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article ... :	
Article ... :	
Article ... :	
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