

AMAFI POSITION PAPER

MiFID II REFIT: GENERAL APPROACH

Negotiated in the aftermath of the 2007-2008 financial crisis, with the objective to implement some of the recommendations from the G20 Pittsburgh Summit, MiFID II/MiFIR has become the cornerstone of EU financial markets legislation. **Its objectives are threefold (i) increase transparency, (ii) enhance investor protection and (iii) improve financial market supervision.**

With the UK about to leave the EU, it is crucial to rethink the way EU financial markets operate in financing EU-27 economies. In that context, the French Association for financial market (AMAFI) has initiated reflexions around the future of the Capital Markets Union (CMU) project for EU financial markets to finance EU-27 economies in a more effective and autonomous way (*AMAFI / 19-46*). As part of this reflexion, the revision of some aspects of MiFID II/MiFIR appear critical as the legislation was originally designed with the City as the EU main financial center.

AMAFI is arguing in favour of a refit approach rather than a full reopening of the texts. The purpose of this approach should be **(i) to improve the competitiveness of the EU financial sector, (ii) to ensure together with the CMU reform that EU markets are able to finance the EU economy, (iii) to introduce more proportionality and to better reflect the specificities of the wholesale market.** AMAFI is therefore supportive of the MiFID II/MiFIR review reports calendar ¹ but also considers that **additional issues should be added especially with regards to investor protection as well as territoriality and 3rd country regime.**

This note aims to provide with an overview of the issues that AMAFI considers should be central in the review of MiFID II/MiFIR. As part of its works, separate notes have been drafted on some of these issues providing further details on AMAFI's reflexion and proposed solutions.

For more than five years during the elaboration of MiFID II/MiFIR, AMAFI has contributed to the numerous discussions that took place at national and European levels and played a central role in helping its members implementing the texts. **AMAFI is keen to contribute once again to the reflexions of EU co-legislators and ESMA and look forward to engage in a constructive dialogue on the topics below.**

1. Investor protection

➤ **Cost and charges (*Art. 50 Delegated Regulation 2017/565*)**

The cost and charges disclosure regime provided under MiFID II is highly complex and generates flows of information which are of limited use by clients, especially for wholesale. In that context, **AMAFI is advocating for a simpler and more proportionate approach to cost and charges disclosure requirements.**

As a possible way forward, **AMAFI considers that the rules should be calibrated depending on the type of client and of financial instrument** (packaged product or not). Disclosure of costs and charges should not generally apply to Eligible counterparties and adapted for professional clients to notably include the possibility of using a tariff grid for ex-ante costs. **AMAFI also believes proportionality should be added in accordance with the type of financial instrument for retail clients.** The execution of orders on ordinary shares should not require the same way of disclosure of costs than selling a complex structured product.

¹ ESMA writes to European Commission on MiFID II/MiFIR review reports:
<https://www.esma.europa.eu/file/50884/download?token=6w7tRNUV>

AMAFI also recommends deleting from MiFID II the parts of the cost disclosures that have led to most confusion for investors which include the illustration of costs on return. Lastly, it seems that a closer alignment between the cost disclosure in PRIIPs and MiFID II is needed in order to enable retail investors to make informed investment decisions. The best means to reach that objective would be to change within PRIIPs the cost indicator of KID PRIIPs towards an addition of total costs that would be more consistent with MIFID II.

➤ **Product governance (Art. 9 & 10 Delegated Directive 2014/65)**

AMAFI supports a more proportionate approach to the product governance rules in MiFID II that would be based on the utility of the information on target market for wholesale investors. **AMAFI also considers that more proportionality should be introduced in the way products governance requirements apply to ordinary shares and bonds** as several of them make little to no sense at all.

The legal uncertainty related to the application of product governance rules for shares and bonds on the primary market should also be tackled. An investment firm which has advised issuers on the primary market should not be considered as a manufacturer.

Another important concern for AMAFI is linked to the effects the PRIIPS regulation has had on the retail bond market in the EU. Plain vanilla corporate bonds are not “packaged” instruments and hence should not fall under the scope of the PRIIPs regulation. **Therefore, AMAFI agrees with the interpretation made by the ESAs in July 2018 and is in favour of a review of the PRIIPs regulation.**

Finally, AMAFI believes it is necessary to clarify and **simplify the requirements to notify sales outside of the target market.**

2. Territoriality and third country regime (see AMAFI / 19-86)

➤ **The territorial application of MiFID II/MiFIR**

Overall, issues at stake for EU-27 investment firms revolve around competitiveness and costs. EU-27 investment firms should not have to apply obligations stemming from both EU and 3rd countries regulations especially because in practice the most constraining obligation applies.

a. Application of the share trading obligation (Art. 23 MiFIR) and derivative trading obligation (Art. 28 MiFIR)

In a post-Brexit regulatory environment, **one can expect the UK STO and DTO to differ from those foreseen in MiFIR and that trading venues are expected not to be recognized by both EU and UK authorities creating a conflict of law.**

AMAFI considers that in such a context, the EU STO and DTO should not apply third country branches of EU-27 firms. The application of these rules would not contribute to the protection of investors or the integrity of EU markets, **it is hence better to apply local rules only.**

b. Reporting (Art. 26 MiFIR)

Generally speaking, AMAFI considers that from a supervisory/regulatory perspective, it is difficult to envisage a situation where from a transaction reporting standpoint, EU 3rd country branches would only be subject to 3rd country legislations. This is especially true for the specific case of the UK, given the high probability of a hard Brexit and the likely difficulty to conclude a MoU under which **ESMA could rely on transaction reporting information transmitted by the FCA.**

AMAFI therefore considers that reporting rules should continue to apply to branches of EU investment firms given their role in terms of market supervision and investor protection. However, AMAFI considers that (i) ESMA should seek to conclude MoUs with local supervisors for the sharing of information so branches of EU entities could be exempted from reporting obligations, and (ii) the reporting regime for 3rd country

branches could be amended to better reflect specific local situations where for instance Legal Entity Identifiers (LEI) have still not been made mandatory.

c. Pre-trade for Systemic Internalisers and post-trade transparency for investment firms (Art. 14, 18, 20, 21 MiFIR)

EU branches face a competitive disadvantage with their competitors especially in the US and Asia as the EU transparency regime is more stringent. When it comes to the **UK**, with a Brexit perspective, and even before considering the risk of a divergence in rules that would have a detrimental impact on the competitiveness of UK branches of EU firms, imposing a double transparency obligation to them would **impair the quality of the data consolidation** performed by data vendors. .

AMAFI calls for an exoneration of transparency obligations for third country branches of EU firms so they can remain competitive.

➤ **MiFIR 3rd country regime**

AMAFI is very much in favour of the 3rd country regime framework adopted under IFR which has tightened the equivalence rules for 3rd country investment firms to ensure EU-27 investment firms and 3rd country branches operate in a fair competitive environment. Moreover, AMAFI is very supportive of the additional assessment powers granted to ESMA for 3rd country investment firms whose activities might be of systemic importance.

AMAFI believes that at this stage there is no need to add new provisions on the 3rd country regime under MiFIR and that **priority should be given to a harmonized implementation across the EU-27.**

3. Costs of market data (see AMAFI / 19-87)

Market data play a central role in the investment decision making process of financial market actors.

As things currently stand, trading venues have a monopoly on the market data coming from their trading platform which is even more of a problem given market data are unique for each trading venue and therefore cannot be substituted.

While MiFID II requires that market data should be made available on a “reasonable commercial basis”, there is no concrete mechanism that ensures a reasonable pricing for market data. Consequently, the cost borne by firms for market data has continuously increased in Europe over the past decade. Compared to the US the price of market data in Europe is five time higher².

AMAFI would recommend bringing more transparency in the methodology used by trading venues to calculate the price of the data they sell. A possible solution going forward could be to require trading venues to systematically publish the calculus methodology they use to set the price of data by using a homogenised template. This would make the comparison easier for buyers, and the determination of potential excess in pricing easier for supervisory authorities.

4. SME research financing

While research was never mentioned during the level 1 negotiations of MiFID II/MiFIR, **a consultation paper published by ESMA in 2014 expressed a clear preference for a full unbundling of research.** While this approach was neither supported by sell-side/sell-side entities nor by some national regulators and MEPs, the impact of such a reform was never assessed or discussed. In the end, ESMA only made some minor tweaks to its proposed approach.

² Copenhagen Economics, Pricing of Market Data, 28 November 2018.

As a result, Article 13 of the Commission Delegated Directive (EU) 2017/593 has deeply modified the economic model of financial analysis for equity markets by de facto prohibiting the former and largely used “bundled model”. Henceforth, research has to be paid by asset management companies independent of the transactions they carried out with their brokers, at least when acting on behalf of client portfolios.

There is a large consensus among issuers, asset management companies and research providers that, given the new rules, the total amount paid for research has dramatically diminished and will likely continue to fall in the coming years. So will the supply of research. This particularly impacts the supply of research for SMEs because research providers are no longer able to finance research on SMEs in a context where cross-subsidization is not possible.

As there is no evidence that a new economic model will emerge, MiFID II provisions already result in a severe reduction in the availability of research on SMEs.

The risk to see research coverage on SMEs continue to decrease is all the more serious as, as shown by a study from AMAFI³ on the evolution of the coverage of French corporate companies, the ecosystem of SME research presents a certain number of weaknesses:

- Even before the implementation of MiFID II, an important proportion of listed microcaps (50%) and small caps (20%) were not benefiting from any sell-side research coverage;
- Research on SMEs relies on a limited number of local firms. Consequently, the availability of research for SMEs depends on performance/investment decisions taken by a limited number of local firms;
- Between 2005 and 2017, the evolution of coverage on SMEs was largely linked to the disappearance of some providers and the emergence of new players. The new economic model for research is so unfavourable that it makes the emergence of new profitable players almost impossible.

Two main consequences result from the growing shortage of sell-side research on EU SMEs:

- It leads to more asymmetry of information in the market, thus a less effective price discovery process for SMEs stocks, which results in a lack of confidence from a majority of investors;
- For SMEs, it leads to higher financing costs, since there is a direct link between the availability of financial research and the cost of their access to capital⁴.

In light of the above, **AMAFI considers that MiFID II provisions should be reviewed as a matter of urgency and that more proportionality should at least be introduced in the inducement regime for SMEs research.**



About AMAFI

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions. AMAFI has been extremely active on MiFID II issues. We are involved in all regulatory matters that concern commercialization of financial instruments. As far as financial products are concerned, we mostly represent all issuers/manufacturers of products (CIBs) but, through our private bank members, distributors as well.

³ AMAFI, « Analyse Financière – Etude sur la couverture des valeurs françaises par les bureaux de recherche de 2005 à 2017 » ;

⁴ <http://observatoire-financement-entreprises.com/role-des-analystes-sur-l-attractivite-et-la-liquidite-des-pme-eti>;