Amafi > Association française des marchés financiers
FINANCIAL MARKET PROFESSIONALS

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EC PROPOSALS FOR A DIRECTIVE ON THE PRUDENTIAL SUPERVISION OF INVESTMENT FIRMS AND A REGULATION ON THE PRUDENTIAL REQUIREMENTS OF INVESTMENT FIRMS

AMAFI'S AMENDMENTS

On December 20th 2017, the European Commission (EC) has published a proposal for a new prudential regime for investment firms (Investment Firms Regime, IFR), which consists of a proposal for a Directive on the prudential supervision of investment firms and a proposal for a Regulation on the prudential requirements of investment firms (the Proposal).

The Proposal which aims to put in place a more effective prudential and supervisory framework for investment firms (IF) is based on the "Opinion of the European Banking Authority in response to the European Commission's Call for Advice on Investment Firms" issued on September 29th 2017[1].

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

Given the importance of the subject for its members, AMAFI has closely followed the progression of this issue at the European Banking Authority (EBA) level during the last two years. In this respect, we attended various meetings organised by the EBA and the European Commission (EC) as well as by the French supervisor (ACPR), and provided at various stages of the consultation process our input to the EBA and to the EC[2].

AMAFI supports the global framework proposed by the EC as it intends to meet regulatory principles of proportionality and fair competition.

In particular and on prudential aspects, AMAFI fully agrees with:

- Setting up an actual EU proportional regime taking into account the size, the activities, the complexities of business models of IFs within the EU;
- Setting up an actual level playing field between EU IFs which is not the case today given the numerous national discretions allowed by the current CRD/CRR regime;
- Setting up an actual level playing field between EU and non EU systemic entities.

That being said AMAFI would like to make the following comments on the Proposal.

[1] EBA/Op/2017/11

[2] 17-09 - EBA Discussion paper on a new prudential regime for Ifs, AMAFI contribution (2 February 2017); 17-54 - EBA Investment Firms Regime, AMAFI contribution (27 July 2017)

❖ **On the level of application of requirements for investment firms only**

AMAFI **strongly disagrees** with one point of the Proposal which is of the utmost importance when considering the goal to put in place a simpler prudential regime for IFs. The point is the level of application of requirements for **investment firm-only groups**. Contrary to the CRD/CRR regime, the Proposal does not allow any possibility, except for the application of the group capital test, to have supervision on a consolidated basis only for the requirements laid down in Parts Two to Seven of the draft regulation.

Indeed, AMAFI understands that one of the main principles of the CRD/CRR and the coming IFR regime is that credit institutions and investment firms have to comply with the requirements on a solo basis. Nevertheless when there are requirements on a consolidated basis, the CRD/CRR regime authorizes National Competent Authorities to exempt firms to comply with these requirements on a solo basis when certain conditions are met.

AMAFI considers that this possibility should be introduced in the IFR framework for the following reasons.

First of all, AMAFI does not see the rationale behind the difference between groups of institutions subject to the CRD/CRR regime, where article 7.1 allows consolidated supervision if all appropriate conditions are met and upon agreement by the supervisor, and investment firms where no equivalent provision would exist. This does not favour a level playing field on the exercise of supervision by competent authorities.

Second, this situation would also create a distortion between, on the one hand, the situation of systemic (class 1) groups of investment firms which could apply for the application of article 7.1 of CRR and, on the other hand, non-systemic groups of investment firms which would be deprived of this possibility while they are not systematically important.

Third, this situation would lead to several undesirable practical consequences:

- Individual firms would have to capitalise intercompany transactions, including when they are purely technical or designed to perform transfer of scarce resources (capital, liquidity) within the group; in addition, such transactions would be double-counted, as an exposure between entity A and its subsidiary B would be capitalised both within A and B. In our views this would lead to a very substantial increase in capital requirements which would not reflect an increase in the level of risk borne by the firms considered. K-CON (concentration risk) capital requirement is of specific concern in this context.

- Pillar 2 rules (e.g. ICAAP / SREP) would have to apply at individual level, even in the case of very small subsidiaries with no consistent risks borne in their balance sheet; it has to be reminded that, considering class 2 investment firms, in most cases even the group would be a relatively limited unit both in terms of size and complexity.

- It would generate additional reporting workload with no value added in terms of capacity to provide an accurate view of risks, as in many cases a consistent view of risks would only be provided by consolidated reports.

- Governance rules, such as, for example, risk and remuneration committees with only non executive directors would have to be duplicated for each individual entity comprising the group. This would both add substantial additional burden and impair the ability of the governance structure to assess and monitor the actual risk profile of the institution.

Consequently, the impossibility to apply consolidated prudential supervision would generate undesirable effects:

- Increased complexity regarding the supervision of investment firms-only groups,
- Additional capital requirements not reflecting an increase in the level of risk of the financial system.
- Decreased adequacy of data reported for capturing real risks borne by a group of investment firms.
- Decrease in governance effectiveness.

For all these reasons, AMAFI really believes that a provision equivalent to article 7.1 CRR should exist for non-systemic groups of investment firms in the future regime. It must be recalled that, in all cases, it would be submitted to approval by the national supervisor. Therefore we do not see any risk of consolidated supervision creating situations of inappropriate or "under-calibrated" supervision.

This is a major point of disapproval of the proposal in its current version. In our views, it contradicts current practice by competent authorities under the current CRR regime as well as the objective to better capture the level of risk borne by investment firms, in a proportional way and in accordance with the diversity of their business models and operational setups.

- ❖ **On Amending Regulation (EU) No 575/2013**

From a general point of view AMAFI is not opposing the proposed definition of credit institutions and investment firms so long as it does not have inappropriate or unidentified effects on the CRD/CRR regime or other banking and financial regulations. This has to be deeply analyzed before moving toward this change. At least, according to AMAFI analysis, the following potential drawback should be mitigated.

Indeed, the proposal aimed to modify the current definition of credit institutions and investment firms of Regulation (EU) No 575/2013: (Article 60. 2 (a) (1) (b), article 60. 2 (b to e) of [Regulation (EU) ---/----[IFR],

Therefore investment firms would no longer be classified as "institutions" but would fall into the "financial institution" category.

This change of classification should not end up with a modification of the calibration of the exposures required for credit institutions when dealing with investment firms subject to [Regulation (EU) ---/----[IFR].

This could create an unlevel playing between credit institutions and investments firms which would be a negative outcome of the new regime. Indeed, ceteris paribus, credit institutions would be encouraged to deal with other credit institutions at the expense of investment firms if the level of own funds required for a given transaction is higher when dealing with investment firms than with a credit institution.

Given that, AMAFI considers that the IFR regime should be deemed comparable to the CCR one in terms of robustness and proposes an amendment to article 119 (5) of Regulation (EU) No 575/2013.

In addition, AMAFI would like to make the following comments based on the draft reports released by Markus Ferber on April 11th 2018[3].

- ❖ **On prudential supervision: 2017/0358 (COB)**

AMAFI fully agrees with the amendments 1 to 13.

[3] 2017/0358 (COB) and 2017/0359 (COB).

❖ **On prudential requirements: 2017/0359 (COB)**

AMAFI fully agrees with the amendments 2 to 23, and 26.

❖ **On remuneration policies 2017/0358 (COB) and 2017/0359 (COB) – AMAFI's Proposal of amendments**

1. Scope of the rules on remuneration policies

AMAFI would like to underline that rules on compensation of employees are not only part of the prudential supervision framework. They in fact raise important issues in term of competition and level playing field between market participants.

It is therefore essential to try to minimize as much as possible differences in treatment between the various categories of actors, while taking into account the particularities of each of these categories.

As a consequence the remuneration provisions in the proposed legislation for investment firms should always apply to an investment firm:

(i) on a solo basis, and
(ii) even when the investment firm is part of a banking group in which the combined total value of the assets of all undertakings in that group exceeds EUR 30 billion.

Therefore, it should be clarified that the Investment Firm remuneration rules apply to an Investment Firm on an individual basis (i.e. the so-called "Class 2" non-systemic Investment Firm that has total assets < EUR 30 billion) and to an investment firm the total value of assets of which does not exceed EUR 30 billion and which, according to Art. 60. 2 (a) (1) (b) of [Regulation (EU) ---/----[IFR], are qualified as credit institutions, even if CRD remuneration rules apply to its parent company.

2. Diversification of the instruments for payment of the variable remuneration

Certain investment firms do not issue share and / or do not issue additional tiers 1 or tiers 2 instruments. For example, in partnership situation, the shares are not listed and held by "partners" only. Paying compensation with those shares is an issue because employees receiving those shares would not necessarily meet the criteria for joining the partnership; the proposed new rules would therefore interfere with the governance in place, which is not desirable.

Those firms shall be authorised instead to include an ad hoc firm level solvency and financial performance payment criteria in their differed compensation scheme.

❖ **On amending Regulation (EU) No 600/2014 - MiFIR: 2017/0359 (COB)**

AMAFI does not agree with the amendment (N° 27) which aims to modify the tick size regime for systematic internalisers.

On this topic, it has to be noted that on March 26th 2018, ESMA submitted its final report to the European Commission on "Amendments to Commission Delegated Regulation (EU) 2017/587"[4] (RTS1). In its report, ESMA proposed to amend article 10 of RTS 1 in ordrer to ensure that prices published by

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[4] 26 March 2018 | ESMA70-156-354

systematic internalisers reflect the minimum price increments applicable to orders and quotes advertised on trading venues[5].

AMAFI agrees with ESMA proposal which establishes an actual level palying field between trading venues and systematic internalisers when pre-trade transparency is due and when competition occurs between all kinds of trading systems.

That being said, AMAFI considers that this amendment raises serious issues.

The industry has not been consulted on this modification contrary to the rules of the European legislation process.

Imposing systematic internalisers to follow the tick size regime when dealing in all sizes could have negative effects for investment firms which deal large transactions for their clients.

And above all, that was not the intent of the legislator to impose any kind of quoting obligation when the size of the trade is above the standard market size.

Indeed, article 14-2 of MiFIR (Obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments) states that "*This Article and Articles 15, 16 and 17 shall apply to systematic internalisers when they deal in sizes up to standard market size.* ***Systematic internalisers shall not be subject to this Article and Articles 15, 16 and 17 when they deal in sizes above standard market size***"

Given that, this modification should be taken and assessed very seriously. It would be therefore more appropriate to amend MiFIR by introducing a review clause stating that the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on this topic.

[5] The prices published by a systematic internaliser shall reflect prevailing market conditions where they are close in prices to quotes of equivalent sizes for the same financial instrument on the most relevant market in terms of liquidity as determined in accordance with Article 4 for that financial instrument **and where the price levels could be traded on a trading venue at the time of publication.'**

Proposal for a Regulation of the European Parliament and of the Council on the prudential requirements of investement firms and amending regulations (EU) No 575/2013, EU No 600/2014 and (EU) No 1093/2010.

On proposal COM(2017) 790 – 2017/0359 (COD)

AMENDMENT 1

Article 6 – paragraph 3 (new)	
Proposal for a Regulation	Amendment [by Parliament]
	3. By derogation of article 5, competent authorities may authorize investment firm groups, to comply with the requirements laid in Parts two to seven at the parent undertaking level, where all of the following apply: **(a) both investment firms and their parent undertaking are subject to authorisation and supervision by the same Member State;** **(b) the competent authorities of the Union parent investment firm or the competent authorities determined in accordance with article 42 (2) of Directive (EU) ----/--(IFD) agree to such level of application** **(c) own funds are distributed adequately between the parent undertaking and the investment firms and all of the following conditions are satisfied:** **(i) there is no current or foreseen material practical or legal impediment to the prompt transfer of capital or repayment of liabilities by the parent undertaking;** **(ii) upon prior approval by the competent authority, the parent undertaking declares that it guarantees the commitments entered into by the investment firms or that the risks in the investment firms are of negligible interest;** **(iii) the risk evaluation, measurement and control procedures of the parent undertaking include the investment firms; and** **(iv) the parent undertaking holds more than 50% of the voting rights attached to shares in the capital of the investment firms or has the right to appoint or remove a majority of the members of the**

	investment firms' management bodies. **In respect of Part Five, the parent undertaking has established centralised liquidity management functions.**

Justification

Investment firms that are part of an investment firm-only group cannot benefit from the exemption stated in article 6.1.a of the draft Regulation.

This situation would lead to several undesirable practical consequences which would be contrary to the political goal to introduce a simplified regime for investment firms:

- Individual firms would have to capitalise intercompany transactions, including when they are purely technical or designed to perform transfer of scarce resources (capital, liquidity) within the group; in addition, such transactions would be double-counted, as an exposure between entity A and its subsidiary B would be capitalised both within A and B. In our views this would lead to a very substantial increase in capital requirements which would not reflect an increase in the level of risk borne by the firms considered. K-CON (concentration risk) capital requirement is of specific concern in this context.

- Pillar 2 rules (e.g. ICAAP / SREP) would have to apply at individual level, even in the case of very small subsidiaries with no consistent risks borne in their balance sheet; it has to be reminded that, considering class 2 investment firms, in most cases even the group would be a relatively limited unit both in terms of size and complexity.

- It would generate additional reporting workload with no value added in terms of capacity to provide an accurate view of risks, as in many cases a consistent view of risks would only be provided by consolidated reports.

- Governance rules, such as, for example, risk and remuneration committees with only non executive directors would have to be duplicated for each individual entity comprising the group. This would both add substantial additional burden and impair the ability of the governance structure to assess and monitor the actual risk profile of the institution.

For all these reasons, a provision equivalent to article 7.1 CRR should exist for non-systemic groups of investment firms in the future regime. It must be recalled that, in all cases, it would be submitted to approval by the national supervisor, therefore we do not see any risk of consolidated supervision creating situations of inappropriate or "under-calibrated" supervision.

Proposal for a Regulation of the European Parliament and of the Council on the prudential requirements of investement firms and amending regulations (EU) No 575/2013, EU No 600/2014 and (EU) No 1093/2010.

On proposal COM(2017) 790 – 2017/0359 (COD)

AMENDMENT 2

Article 51 – paragraph 2 (new)	
Proposal for a Regulation	Amendment [by Parliament]
	Those provisions apply to investment firms the total value of assets of which does not exceed EUR 30 billion and which, according to Art. 60. 2 (a) (1) (b) of [Regulation (EU) ---/----[IFR], are qualified as credit institutions.

Justification

Rules on compensation of employees raise important issues of level playing field between market participants. It is therefore essential to try to minimize as much as possible differences in treatment between the various categories of actors, while taking into account the particularities of each of these categories.

As a consequence the remuneration provisions in the proposed legislation for investment firms should always apply to an investment firm the total value of assets of which does not exceed EUR 30 billion and which, according to Art. 60. 2 (a) (1) (b) of [Regulation (EU) ---/----[IFR], are qualified as credit institutions.

Proposal for a Regulation of the European Parliament and of the Council on the prudential requirements of investement firms and amending regulations (EU) No 575/2013, EU No 600/2014 and (EU) No 1093/2010.

On proposal COM(2017) 790 – 2017/0359 (COD)

AMENDMENT 3

Article 60 – paragraph 11 bis (new)	
Proposal for a Regulation	Amendment [by Parliament]
	In Article 119(5) the following sentence is added: "For the propose of this paragraph, the prudential requirements defined in Regulation (EU) ---/---[IFR] are deemed comparable to those applied to institutions in terms of robustness.

Justification

The Proposal aimed to modify the current definition of credit institutions and investment firms of Regulation (EU) No 575/2013: (Article 60. 2 (a) (1) (b), article 60. 2 (b to e) of [Regulation (EU) ---/---- [IFR],

Therefore investment firms would no longer be classified as "institutions" but would fall into the "financial institution" category.

This change of classification should not end up with a modification of the calibration of the exposures required for credit institutions when dealing with investment firms subject to [Regulation (EU) ---/----[IFR].

This could create an unlevel playing between credit institutions and investments firms which would be a negative outcome of the new regime. Indeed, ceteris paribus, credit institutions would be encouraged to deal with other credit institutions at the expense of investment firms if the level of own funds required for a given transaction is higher when dealing with investment firms than with a credit institution.

For the calibration of prudential exposures, the IFR regime should be deemed comparable to the CCR one in terms of robustness.

Proposal for a Directive of the European Parliament and of the Council on the prudential supervision of investement firms and amending Directives 2013/36/EU and 2014/65/EU

On proposal COM(2017) 791 – 2017/0358 (COD)

AMENDMENT 1

Article 30 – paragraph 1(j) – final part	
Proposal for a Directive	Amendment [by Parliament]
	Non listed investment firms which may not be in a situation to pay any part of variable compensation in instruments as prescribed above may instead include an ad hoc firm level solvency and financial performance payment criteria in their differed compensation scheme.

Justification

Certain investment firms do not issue share and / or do not issue additional tiers 1 or tiers 2 instruments. For example, in partnership situation, the shares are not listed and held by “partners” only. Paying compensation with those shares is an issue because employees receiving those shares would not necessarily meet the criteria for joining the partnership; the proposed new rules would therefore interfere with the governance in place, which is not desirable.

Those firms shall be authorised instead to include an ad hoc firm level solvency and financial performance payment criteria in their differed compensation scheme.

Proposal for a Directive of the European Parliament and of the Council on the prudential supervision of investement firms and amending Directives 2013/36/EU and 2014/65/EU

On proposal COM(2017) 791 – 2017/0358 (COD)

AMENDMENT 2

Article 32(a) (new)	
Proposal for a Directive	Amendment [by Parliament]
	Articles 28, 29, 30 and 32 apply to investment firms the total value of assets of which does not exceed EUR 30 billion and which, according to Art. 60. 2 (a) (1) (b) of [Regulation (EU)---/----[IFR], are qualified as credit institutions.

Justification

Rules on compensation of employees raise important issues of level playing field between market participants. It is therefore essential to try to minimize as much as possible differences in treatment between the various categories of actors, while taking into account the particularities of each of these categories.

As a consequence the remuneration provisions in the proposed legislation for investment firms should always apply to an investment firm the total value of assets of which does not exceed EUR 30 billion and which, according to Art. 60. 2 (a) (1) (b) of [Regulation (EU) ---/----[IFR], are qualified as credit institutions.

Draft report on the proposal for a regulation of the European Parliament and of the Council on the prudential requirements of investement firms and amending regulations (EU) No 575/2013, EU No 600/2014 and (EU) No 1093/2010.

On proposal (COM(2017)0790 – C8-0453/2017-2017/0359(COD))

Committee on Economic and Monetary Affairs
Rapporteur: Markus Ferber

AMENDMENT 1

Article 61 – paragraph 1(1) (new) Regulation (EU) N° 600/2014 Article 17(a) (new)	
Text proposed by the Rapporteur	Amendment [by Parliament]
(-1) The following new Article 17a is inserted: “Article 17a Tick sizes Systematic internalisers’ quotes, and price improvements on those quotes, shall comply with tick sizes set in accordance with Article 49 of Directive 2014/65/EU;”	**deleted**

Justification

On March 26th 2018, ESMA submitted its final report to the European Commission on “Amendments to Commission Delegated Regulation (EU) 2017/587” (RTS1). In its report, ESMA proposed to amend article 10 of RTS 1 in orderer to ensure that prices published by systematic internalisers reflect the minimum price increments applicable to orders and quotes advertised on trading venues.

This proposal, which establishes an actual level playing field between trading venues and systematic internalisers when pre-trade transparency is due and when competition occurs between all kinds of trading systems, is very welcome.

That being said, the Rapporteur proposal raises serious issues.

The industry has not been consulted on this modification contrary to the rules of the European legislation process.

Imposing systematic internalisers to follow the tick size regime when dealing in all sizes could have negative effects for investment firms which deal large transactions for their clients.

And above all, that was not the intent of the legislator to impose any kind of quoting obligation when the size of the trade is above the standard market size.

Indeed, article 14(2) of MiFIR (Obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments) states that “*This Article and Articles 15, 16 and 17 shall apply to systematic internalisers when they deal in sizes up to standard market size.* ***Systematic internalisers shall not be subject to this Article and Articles 15, 16 and 17 when they deal in sizes above standard market size****”.*

Given that, this modification should be taken and assessed very seriously. It would be therefore more appropriate to amend MiFIR by introducing a review clause stating that the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on this topic.

Draft report on the proposal for a regulation of the European Parliament and of the Council on the prudential requirements of investement firms and amending regulations (EU) No 575/2013, EU No 600/2014 and (EU) No 1093/2010.

On proposal (COM(2017)0790 – C8-0453/2017-2017/0359(COD))

Committee on Economic and Monetary Affairs
Rapporteur: Markus Ferber

AMENDMENT 2

Article 61 – paragraph 1(1) (new) Regulation (EU) N° 600/2014 Article 52 11 a (new)	
Text proposed by the Rapporteur	Amendment [by Parliament]
	By 3 July 2020, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on whether Systematic internalisers' quotes, and price improvements on those quotes, shall comply with tick sizes set in accordance with Article 49 of Directive 2014/65/EU.

Justification

On March 26th 2018, ESMA submitted its final report to the European Commission on "Amendments to Commission Delegated Regulation (EU) 2017/587" (RTS1). In its report, ESMA proposed to amend article 10 of RTS 1 in ordrer to ensure that prices published by systematic internalisers reflect the minimum price increments applicable to orders and quotes advertised on trading venues.

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