ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS

FINANCIAL MARKET PROFESSIONALS

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MiFID 2/MiFIR REFIT

TAKING STOCK AFTER TWO YEARS OF IMPLEMENTATION

AMAFI Position Paper

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, the EU's main financial center, about to leave the Union, it is crucial to rethink the way the EU-27 finances its economy and the role of financial markets to that end. This reflection is directly linked to the various works previously or currently undertaken[1] in order to revive the Capital Markets Union (CMU) project which was launched in 2014 at a time where no one thought the City could become offshore.

While AMAFI will provide its contribution to the CMU project early 2020, it is keen through this note to highlight the elements it considers essential as part of the MiFID 2/MiFIR review process. Given the central role played by the legislation in the functioning of EU financial markets, AMAFI considers it is necessary to review some provisions of the legislative framework more than two years after its application.

Association française des marchés financiers (AMAFI) *is the trade organisation working at national, European and international levels to represent financial market participants in France. AMAFI has more than 150 members operating for their own account or for clients in equities, fixed-income, structured products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions. 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.*

Taking into account the necessity to relaunch the CMU project, AMAFI believes that the review of MiFID 2/MiFIR should aim at achieving two main objectives:

i) Ensure EU-27 financial markets have the capacity to contribute to the financing of the EU economy, so it does not exclusively rely on third country resources in terms of expertise, capital and liquidity. It requires to preserve and to strengthen the competitiveness of financial market actors operating in the EU-27;

ii) Introduce more proportionality to better reflect the specificities of the wholesale market for which a better integration at EU level is critical and should take place in the short term.

AMAFI played a central role in the elaboration of MiFID II/ MiFIR and even more so in the last two years where it helped its members implementing the legislation through different workstreams. AMAFI gained highly valuable expertise in working with its members towards full compliance with this heavy and complex legislation and through this work has identified certain areas it considers should be re-evaluated.

While a number of issues will be reviewed by ESMA through review reports[2] that will be transmitted to the European Commission and examined by 2020, 2021 or 2022, AMAFI considers that other issues should also be considered as a matter of priority and in particular with regards to investor protection and research financing for SMEs.

Reflecting on the issues at stake for the EU-27 to strengthen the efficiency of its markets in financing the economy, the purpose of this note is to highlight the key issues that AMAFI considers should be reviewed as a matter of priority. In the annexes, each issue is further developed and provides with proposed legislative changes. For each topic, we have allocated a colour code, dark blue for issues which should reviewed as a matter of priority and light blue for issues where subsequent work is needed.

[1] See High Level Forum from the European Commission (*link*) ; See the report from the Next CMU High-Level Group (*link*) ; See the Roadmap from Markets4Europe (*link*).
[2] See ESMA letter in January 2019 to DG FISMA (*link*).

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PRIORITY TABLE		
TOPICS AND OBJECTIVES	**ARTICLES**	**APPENDIX**
Costs and charges : • Reintroduce more proportionality according to investor categorization (in particular, reliefs for wholesale) and the typology of financial instruments • Simplify and clarify the current regime	*Recitals 103 & 104 MiFID* *Articles 24.4 & 30.1 MiFID* *Article 24.4 MiFID*	**APPENDIX 1**
Product Governance : • Reintroduce more proportionality for simple financial instruments • Clarify the Distributor concept to exclude "passive" / "broad" distribution • Exclude from the Product Governance field negotiations between eligible counterparties	*Recital 71 MiFID* *Recital 71 MiFID* *Articles 16.3 & 24.2 MiFID*	**APPENDIX 2**
Other Investor Protection key issues including: • Clarify the meaning of "holding an account" and exclude financial instruments marketed solely for hedging purposes • Clarify that if a Member State has implemented national measures equivalent to measures that ESMA has published and recognised, ESMA's measures should cease to apply in that Member State	*Article 62 DR (UE) 2017/565* *Article 40 MiFIR*	**APPENDIX 3**
Territoriality: • Exonerate EU-27 investment firms branches based in 3rd countries from the application of the EU STO/DTO • Exonerate transparency obligations for 3rd country branches of EU-27 investment firms	*Articles 14.1, 18.1, 23.1 and 28.1 MiFIR* Articles 20.2, 21.1 MiFIR	**APPENDIX 4**
Cost of market data: • Enable the enforcement of the reasonable commercial basis concept by calling for a simplification and harmonisation of tarif grids, contracts and audit procedures of trading venues	*N/A*	**APPENDIX 5**
Regime for OTC derivatives and reference data : • Make clear that the decision to be a systematic internaliser for non-TOTV instruments can be voluntary only • Clarifier que le régime d'internalisation systématique ne s'applique qu'aux instruments TOTV	*Article 4 MiFID, Article 27 MiFIR, Articles 1a & 3 DR (UE) 2017/585*	**APPENDIX 6**
SMEs research financing : • Introduce more proportionality in the inducement regime for SMEs research	*Article 24.14 MiFID*	**APPENDIX 7**

1. INVESTOR PROTECTION: INTRODUCING SIMPLER AND MORE PROPORTIONATE RULES

➢ *Simpler cost and charges disclosure requirements*

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 ones. In that context, AMAFI is advocating for a simpler and more proportionate approach to cost and charges disclosure requirements (*see Appendix 1*).

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

SHORT TERM PRIORITIES

Reintroduce more proportionality according to investor categorization (in particular, reliefs for wholesale) and the typology of financial instruments (*Recitals 103 & 104 MiFID & Articles 24.4 & 30.1 MiFID*)

Simplify and clarify the current regime (*Article 24.4 MiFID*)

AMAFI also recommends deleting from MiFID II the parts of the cost disclosure regime 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 improve information provided to retail investors. The best means to reach that objective would be to change within PRIIPs the cost indicator of the PRIIPs KID towards an addition of total costs that would be more consistent with MIFID II.

➢ *A more proportionate approach to product governance rules*

AMAFI considers it is crucial to introduce a more proportionate approach to the product governance rules both for wholesale products and for ordinary shares and bonds as several of them make little to no sense at all (*see Appendix 2*).

MEDIUM TERM PRIORITIES

Reintroducing more proportionality for simple financial instruments *(Recital 71 MiFID*)

Clarify the Distributor concept to exclude "passive" / "broad" distribution (*Recital 71 MiFID, Articles 16.3 & 24.2 MiFID*)

Exclude from the Product Governance field negotiations between eligible counterparties (*Articles 16.3 & 24.2 MiFID*)

AMAFI proposes as well to amend the definition of Distributor to clarify that they actually market a financial instrument.

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 plain vanilla corporate bonds that should not fall under the scope of the PRIIPs regulation.

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

➢ *Other investor protection issues*

MEDIUM TERM PRIORITIES (INCLUDING)

Clarify the meaning of "holding an account" and exclude financial instruments marketed solely for hedging purposes (*Article 62 DR (UE) 2017/565*)

Clarify that if a Member **State has implemented national measures equivalent to measures that ESMA has published and recognised, ESMA's measures should cease to apply in that Member State** (*Article 40 MiFIR*)

Other issues have been raised and developed notably the issue of the durable medium (*see Appendix 3)* as well as other issues like the 10% warning and ESMA intervention measures.

2. EXONERATE EU INVESTMENT FIRMS BRANCHES BASED IN 3RD COUNTRIES FROM DTO/STO AND TRANSPARENCY OBLIGATION

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 investment 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.

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.

SHORT TERM PRIORITY

Exonerate EU-27 investment firms branches based in 3rd countries from the application of the EU STO/DTO (*Articles 14.1, 18.1, 23.1 and 28.1 MiFIR*)

Exonerate transparency obligations for 3rd country branches of EU-27 investment firms (*Article 20.2 and Article 21.1 MiFIR*)

AMAFI calls for an exoneration of transparency obligations for third country branches of EU firms so they can remain competitive (*see Appendix 4*).

3. ENSURING A REASONABLE PRICING FOR MARKET DATA

SHORT TERM PRIORITY

Enable the enforcement of the *reasonable commercial basis* concept by calling for a simplification and harmonisation of tarif grids, contracts and audit procedures of trading venues

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 both in terms of supply and price 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 higher[3].

AMAFI would recommend bringing more transparency in the methodology used by trading venues to calculate the price of the data they sell (*see Appendix 5*). A possible solution going forward could be to ask ESMA to create a standardized template for the list of prices related to market data enabling market actors to compare prices more easily and for regulators to determine when the reasonable commercial basis principle is not respected.

4. ALLEVIATING THE BURDENS OF THE OTC DERIVATIVES AND REFERENCE DATA REGIME

Application of the systematic internaliser regime to instruments which are not traded on a trading venue (non-TOTV instruments) and the requirement to supply reference data for instruments traded on a trading venue (Utotv instruments) creates major burdens. Furthermore, assigning ISIN codes to Utotv instruments creates difficulties in terms of transparency, efficiency and costs for both regulators and investment firms (*See Appendix 6*).

Therefore, AMAFI believes it is essential to alleviate the obligations that restrain the efficiency of transparency provisions in order to remove investment firms requirement to supply reference data for Utotv instruments while leaving some freedom to investment firms already compliant so they do not have to proceed to expensive and heavy investments in terms of human resources.

SHORT TERM PRIORITIES

Make clear that the decision to be a systematic internaliser for non-TOTV instruments can be voluntary only *(Article 4 MiFID, Article 27 MiFIR, Articles 1a & 3 DR (EU) 2017/585)*

Eliminate the requirement for investment firms that become an SI *(Article 4 MiFID, Article 27 MiFIR, Articles 1a & 3 DR (UE) 2017/585)*

5. INTRODUCE MORE PROPORTIONALITY IN THE INDUCEMENT REGIME FOR SME RESEARCH

MiFID II/MiFIR 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.

SHORT TERM PRIORITY

Introduce more proportionality in the inducement regime for SMEs research *(Article 24.14 MiFID)*

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 diminution in the supply of research primarily impacts SMEs given the weakness of its economic model. 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 (*See Appendix 7*).

[3] Copenhagen Economics, Pricing of Market Data, 28 November 2018.

This appendix was also published independently as note AMAFI 19-109

APPENDIX 1

MiFID II/ MiFIR REFIT – Investor Protection
Costs and charges

PRIORITIES AND SUMMARY OF PROPOSED AMENDMENTS

(1) Reintroduce more proportionality according to investor categorization (in particular, reliefs for wholesale) and the typology of financial instruments
- *See amendments of Recitals 103 and 104 of the Level 1 Directive*
- *See amendments of Articles 24.4 and 30.1 of the Level 1 Directive*

(2) Simplify and clarify the current regime
- *See amendments of Article 24.4 of the Level 1 Directive*

MiFID II (and in particular Articles 24.4 of MiFID II and 50 of RD MiFID II 2017/565) ("DR MiFID II") requires investment firms to inform all investors, in a timely manner, of the costs and charges associated with the services provided and, where applicable, with the products marketed or recommended. An estimate of these expected costs must be provided to the investor prior to the transaction or service provision (*ex-ante* information), this estimate must be supplemented by information on the costs actually incurred by the client and provided, at a minimum, annually as soon as certain conditions are met (*ex-post* information).

AMAFI fully supports this obligation to inform investors, and in particular retail ones, of the costs and charges incurred. Disclosure of costs is indeed absolutely essential for investor protection purposes. However, this obligation is difficult to implement given the complexity caused by the number of parameters to be taken into account in identifying the obligation applicable to each situation. It does not take sufficient account of the principle of proportionality and the very heterogeneous degrees of knowledge between eligible counterparties, professional clients and retail investors.

This obligation, which has been complicated to implement for investment firms and which has not yet been stabilised, as evidenced by numerous ESMA question-and-answer publications, is, in AMAFI view, one of the priority topics for review MiFID II investor protection rules.

1. PROPORTIONALITY

The current costs and charges disclosure requirements are applicable to all types of clients (with a very limited flexibility for professional clients and eligible counterparties: "limited application") without differentiation according to the service provided or the underlying product.

However, in order to guarantee an effective protection for the different categories of clients without imposing requirements on investment firms with no added value, it seems appropriate to introduce greater proportionality in the implementation of these *ex-ante* and *ex-post* disclosure on costs and charges.

As regards the *ex-ante* disclosure, as practice shows, it is not relevant for eligible counterparties that have the expertise and the necessary resources to make informed and responsible investment decisions (like putting several investment firms into competition when placing an order in order to obtain the best possible price).

For professional and retail investors, it seems appropriate to introduce greater proportionality in the implementation of the obligation according to the complexity of the product and the type of customer. Indeed, information communicated transaction per transaction seems relevant when the product is complex and the investor is retail but is disproportionate when the product is very simple (the costs being essentially the same from one transaction to another) and/or when the client is professional.

In the latter situation, information provided through a tariff grid, and not on a transaction-by-transaction basis, would allow to meet this logic of proportionate transparency.

As regards the *ex-post* disclosure, such requirement is not relevant for eligible counterparties who have knowledge to estimate themselves the costs and charges charged to them by their various investment firms. Thus, the *ex-post* disclosure requirement should be limited to professional and retail clients who are in "ongoing relationship" with the firm.

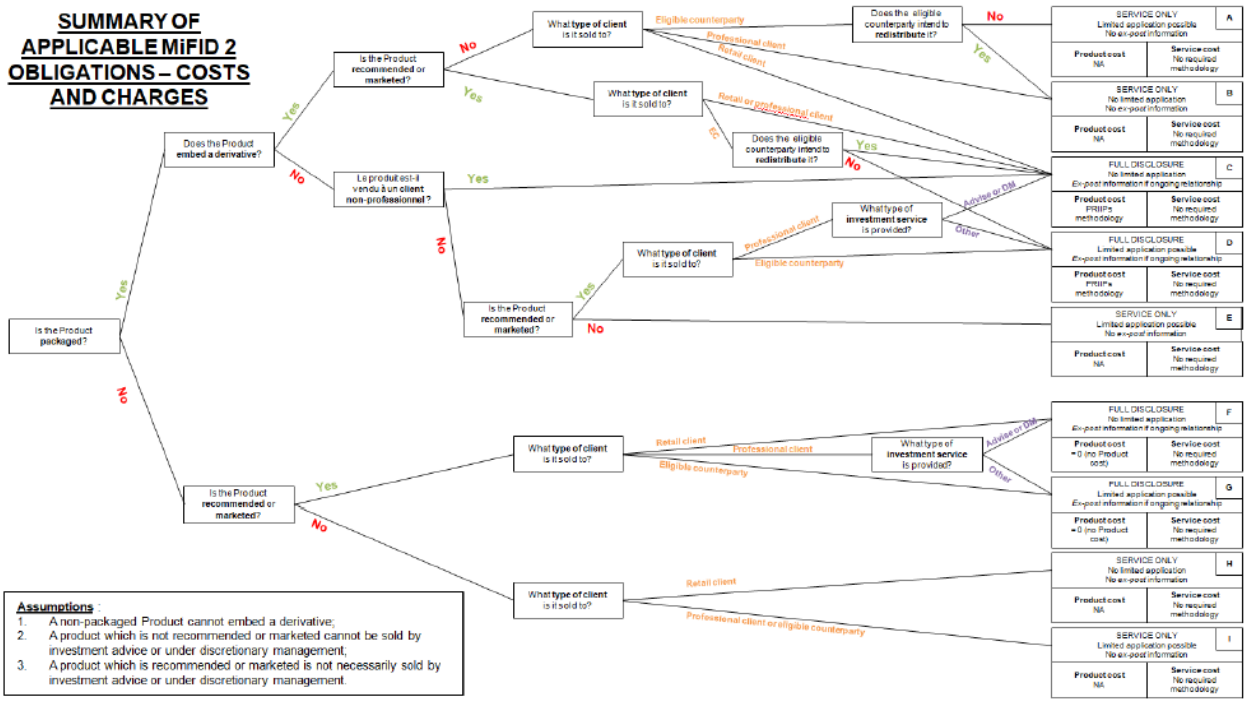
Taking into account the feedback on this topic, it also seems important to clarify the scope of the "ongoing relationship" to limit it to the provision of truly "ongoing" investment services : the safekeeping service (Section B(1) of Annex I of MiFID II), the portfolio management service (Section A(4) of Annex I of MiFID II) or a service that involves providing a periodic assessment of the suitability within the meaning of Article 24(4) of MiFID II and Article 52 of the DR.

2. SIMPLIFY THE REGIME AS A WHOLE

Article 50 is difficult to understand because it requires the articulation of several regimes:

- (1) *ex-ante* information: total (meaning both service and product costs) or only service costs;
- (2) *ex-post* information; and
- (3) limited application.

As illustrated in the diagram below, this means having to differentiate between 9 situations, which seems difficult to implement and disproportionate given the objectives pursued.



Therefore, it seems appropriate to drastically simplify this system for both *ex-ante* and *ex-post* information.

For ex-ante information, AMAFI proposes to distinguish only **two regimes**:

- "**Full regime**": disclosure on both product costs and service costs on a trade-by-trade basis;

- "**Proportionate regime**": disclosure only on service costs through tariff grid. This tariff grid should be declined by asset class, the amounts indicated in may be fixed amounts or, where applicable, ranges or maximum amounts (provided that the latter reflect as closely as possible the economic reality of the costs). This grid, which is sufficiently granular according to the activities of the investment firm, must be communicated at the time of entering a relationship or at the first operation. It is updated at least annually and made available all times to clients.

These regimes would be applicable according to the types of customers and products involved:

- Eligible counterparties: possibility to switch off completely the costs and charges disclosure requirement (meaning no requirement to provide information on costs and charges (neither in *ex-ante* nor in *ex-post*) unless the eligible counterparty so requests. In this latest case information would be provided under the "Proportionate regime" (through tariff grids);

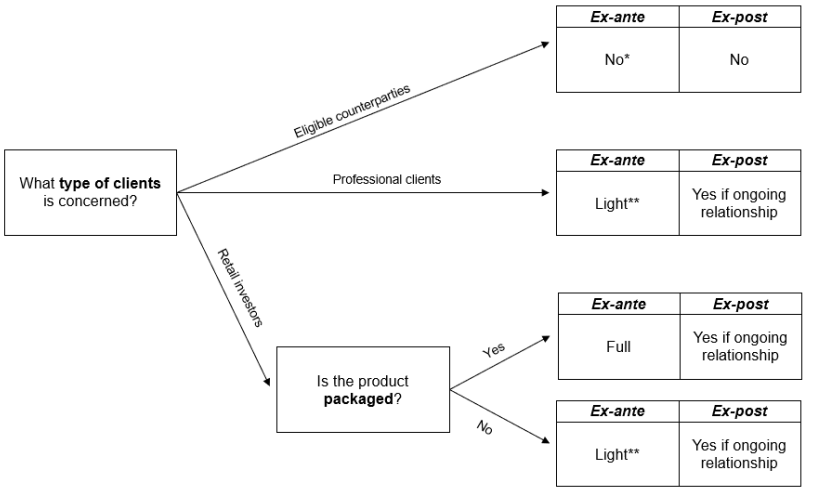
- Professional clients: application of the "Proportionate" regime; e.g. communication of costs and charges in *ex-ante* using tariff grids. When requested by the professional client, more detailed information will be communicated to this client.

- Retail clients: application of either the

    - "Full regime": when the product is a packaged product within the meaning of the PRIIPs Regulation, whatever the service provided;
    - "Proportionate regime": when the product is not a packaged product within the meaning of the PRIIPs Regulation, regardless of the service provided unless the client requested more detailed information.

Ex-post information would be provided to professional and retail clients who have been in an "ongoing relationship" with the investment firm over the past year.

This simplification proposal, which would make a distinction between 4 situations, is illustrated in the diagram below.



*Light information on demand
** More detailed information on demand

3. THE CONFUSION BROUGHT BY THE "IMPACT OF COSTS ON RETURN"

The current Article 50.2 of the DR MiFID II 2017/565 required investment firms to provide to their clients an illustration of the impact of costs on return. Practice shows that the notion of impact of costs on return is difficult for investors to understand, especially for retail investors who understand more easily costs expressed in absolute value or in percentage as required by Article 50.2.

In line with the current European-wide discussions on questioning this cumulative effect on the yield of PRIIP KIDs, **it seems appropriate to remove this MiFID II requirement**, as it provides more confusion than transparency for retail investors.

4. CALCULATING COSTS METHODOLOGY

Importing into MiFID II, for the calculation of the costs of all financial instruments, the PRIIPs calculating costs methodology seems inadequate. Indeed, while it seems consistent to allow investment firm to use the costs information contained in the PRIIPs KIDs to communicate information on product costs due under MiFID II when it is within the scope of PRIIPs (packaged product made available to retail investors), it does not seem acceptable to require investment firms to use the calculation methodology defined in PRIIPs when the transaction does not fall within the scope of this regulation. Indeed, MiFID II must not bring into the scope of PRIIPs products and/or transactions that were not initially included in it.

Additionally, in order to bring closely PRIIPs and MiFID II wherever it is relevant to do so (meaning both texts apply), and have more possible synergies, AMAFI considers that the PRIIPs methodology should be amended to change the cost indicator of KID PRIIPs towards Total Expense Ratio (TER) that is the best consistent choice with MiFID II. Indeed, services costs could easily be added to a TER.

The current methodology of the KID PRIIPs, the impact on yield (RiY method - Reduction in Yield) does not currently allow the investor to communicate figures consistent with those of the KID PRIIPs and MiFID 2 (*see AMAFI /19-54 "AMAFI Position on PRIIPs KID revision"*)

5. PROVISION OF THE INFORMATION

➢ *Communication of the information on a durable medium*

The technical constraints relating to the provision of information on a durable medium in the context of dematerialized relationships create significant logistical difficulties. In addition, while the responsiveness of the investment firm is a key element for the client, the time required to provide detailed information before being able to execute/transmit his/her order can have a negative impact on the quality of execution. These negative consequences are not adequately addressed in the texts. In addition, it appears that the obligation to obtain the client's agreement under the conditions detailed in Article 3 of DR MiFID II to provide him with the information on a durable medium other than paper does not correspond to the objectives stated by the European authorities to promote a sustainable economy and the reduction in the use of paper, and should therefore be amended to encourage the use of dematerialised durable media.

➢ *Particular case of telephone trading*

The combined reading of Articles 46.3 and 50 of RD MiFID 2 2017/565 requires investment firms to provide *ex-ante* information before the transaction and on a durable medium. However, in the context of providing an execution service by telephone, this *ex-ante* communication on a durable medium requires delaying the execution of the transaction, which is not compatible with best execution obligations.

That is why, without prejudice to the changes that AMAFI would recommend of the current regime of costs disclosure, we think that **an exception to the obligation to provide information on a durable medium prior to the transaction should be granted, in all cases, for orders placed by telephone** when the investment firm cannot communicate a tariff grid to fulfil is *ex-ante* disclosure obligation. This could consist in providing information by telephone at the time of the transaction, followed by sending the information on a durable medium to the client[4].

For AMAFI, the answer provided by ESMA in its latest Q&A 28 is **not satisfactory** because it requires to provide to the client the durable medium **simultaneously** (and not "immediately after") to the communication over the phone which is very **difficult to implement and to comply with**. Moreover, legally speaking, it seems essential to have this exemption in Level 1 or Level 2 rather than in a Q&A.

PROPOSED AMENDMENTS

LEVEL 1

Directive 2014/65/EU	Proposed amendment
Recital 103 For the purposes of this Directive eligible counterparties should be considered to be acting as clients.	*Recital 103* For the purposes of this Directive eligible counterparties should be considered to be acting as clients **except where this would be manifestly disproportionate regarding their level of sophistication and all the more if they wish to waive the protection provided for them according to this Directive**.
Recital 104 The financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments. While it should be confirmed that conduct of business rules should be enforced in respect of those investors most in need of protection, it is appropriate to better calibrate the requirements applicable to different categories of clients. To that extent, it is appropriate to extend some information and reporting requirements to the relationship with eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and funds as well as information and reporting requirements concerning more complex financial instruments and transactions. In order to better define the classification of	*Recital 104* The financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments. While it should be confirmed that conduct of business rules should be enforced in respect of those investors most in need of protection, it is appropriate to better calibrate the requirements applicable to different categories of clients. To that extent, it is appropriate to extend some information and reporting requirements to the relationship with **first professional clients and, only where relevant,** eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and funds as well as information and reporting requirements concerning more complex financial instruments and transactions.

[4] This exception has already been granted:
- for the submission of the MiFID II suitability statement when the order " is concluded using a means of distance communication which prevents the prior delivery of the suitability statement" (*MiFID II, art. 25.6*);
- for the delivery of PRIIPs KIDs when the investment service is provided by telephone and the KID cannot be communicated to the client before the service is provided (*PRIIPs, art. 13*).

municipalities and local public authorities, it is appropriate to clearly exclude them from the list of eligible counterparties and of clients who are considered to be professionals while still allowing those clients to ask for treatment as professional clients on request.	**On the other hand, this extension is not appropriate for the simplest financial instruments.** In order to better define the classification of municipalities and local public authorities, it is appropriate to clearly exclude them from the list of eligible counterparties and of clients who are considered to be professionals while still allowing those clients to ask for treatment as professional clients on request.
Article 24 **General principles and information to clients** 4. The information about all costs and charges, including costs and charges in connection with the investment service and the financial instrument, which are not caused by the occurrence of underlying market risk, shall be aggregated to allow the client to understand the overall cost as well as the cumulative effect on return of the investment, and where the client so requests an itemised breakdown shall be provided. Where applicable, such information shall be provided to the client on a regular basis, at least annually, during the life of the investment. […]	*Article 24* **General principles and information to clients** **4. Depending on the situations, t**~~T~~he information about all costs and charges, including costs and charges in connection with the investment service and**, in some cases,** the financial instrument, which are not caused by the occurrence of underlying market risk, shall be aggregated to allow the client to understand the overall cost ~~as well as the cumulative effect on return of the investment~~, and where the client so requests, **a more granular information, for example** an itemised breakdown shall be provided **to it**. Where applicable, **when an ongoing investment service is provided to the client,** such information shall be provided to the client on a regular basis, at least annually, during the life of the investment. […]
Article 30 **Transactions executed with eligible counterparties** 1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Article 24, with the exception of paragraphs 4 and 5, Article 25, with the exception of paragraph 6, Article 27 and Article 28(1) in respect of those transactions or in respect of any ancillary service directly relating to those transactions. […]	*Article 30* **Transactions executed with eligible counterparties** 1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Article 24, with the exception of paragraphs 4 **a) and b)** and 5, Article 25, with the exception of paragraph 6, Article 27 and Article 28(1) in respect of those transactions or in respect of any ancillary service directly relating to those transactions. **Investment firms shall comply with the obligations under paragraphs 4 c) and 5 of Article 24 if the eligible counterparty so request.**

LEVEL 2

Delegated Regulation 2017/565	Proposed amendment
Article 2 **Definitions** N/A	*Article 2* **Definitions** **(7) packaged financial instrument means investment, including instruments issued by special purpose vehicles as defined in point (26) of Article 13 of Directive 2009/138/EC or securitisation special purpose entities as defined in point (an) of Article 4(1) of the Directive 2011/61/EU of the European Parliament and of the Council (2), where, regardless of the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor** […]
Article 3 ***Conditions applying to the provision of information*** […] 2. Where, pursuant to Article 46, 47, 48, 49, 50 or 66(3) of this Regulation, an investment firm provides information to a client by means of a website and that information is not addressed personally to the client, investment firms shall ensure that the following conditions are satisfied: (a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on; (b) the client must specifically consent to the provision of that information in that form; (c) the client must be notified electronically of the address of the website, and the place on the website where the information may be accessed;	*Article 3* **Conditions applying to the provision of information** […] 2. Where, pursuant to Article 46, 47, 48, 49, 50 or 66(3) of this Regulation, an investment firm provides information to a client by means of a website and that information is not addressed personally to the client, investment firms shall ensure that the following conditions are satisfied: (a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on; (b) the client must specifically consent to the provision of that information in that form**, except for information to be provided pursuant to Article 50 of this Regulation after being informed of the possibility of receiving the information on paper, the customer will only receive it on paper if he formally requests it**; (c) the client must be notified electronically of the address of the website, and the place on the website where the information may be accessed;

(d) the information must be up to date; (e) the information must be accessible continuously by means of that website for such period of time as the client may reasonably need to inspect it. […]	(d) the information must be up to date; (e) the information must be accessible continuously by means of that website for such period of time as the client may reasonably need to inspect it. […]
Article 50 **Information on costs and associated charges** 1. For the purposes of providing information to clients on all costs and charges pursuant to Article 24(4) of Directive 2014/65/EU, investment firms shall comply with the detailed requirements in paragraphs 2 to 10. Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to professional clients shall have the right to agree to a limited application of the detailed requirements set out in this Article with these clients. Investment firms shall not be allowed to agree such limitations when the services of investment advice or portfolio management are provided or when, irrespective of the investment service provided, the financial instruments concerned embed a derivative. Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to eligible counterparties shall have the right to agree to a limited application of the detailed requirements set out in this Article, except when, irrespective of the investment service provided, the financial instruments concerned embed a derivative and the eligible counterparty intends to offer them to its clients.	*Article 50* **Information on costs and associated charges** 1. For the purposes of providing information to **retail and professional** clients on all costs and charges pursuant to Article 24(4) of Directive 2014/65/EU, investment firms shall comply with the detailed requirements in paragraphs 2 to 10. ~~Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to professional clients shall have the right to agree to a limited application of the detailed requirements set out in this Article with these clients. Investment firms shall not be allowed to agree such limitations when the services of investment advice or portfolio management are provided or when, irrespective of the investment service provided, the financial instruments concerned embed a derivative.~~ ~~Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to eligible counterparties shall have the right to agree to a limited application of the detailed requirements set out in this Article, except when, irrespective of the investment service provided, the financial instruments concerned embed a derivative and the eligible counterparty intends to offer them to its clients.~~ **When providing investment services to retail clients, investment firms shall comply with the requirements of paragraph 2, unless the financial instruments concerned are not packaged financial instruments. In the latter situation, investment firms shall comply with the requirements of paragraph 3 unless the retail client requests more detailed information.**

	When providing investment services to professional clients, investment firms shall comply with the requirements of paragraph 3, unless the professional client requests more detailed information. **Pursuant to Article 30.1 of Directive 2014/65/EU, when an eligible counterparty wishes to receive information on costs and charges, investment firms shall comply with the requirements of paragraph 3.**
2. For ex-ante and ex-post disclosure of information on costs and charges to clients, investment firms shall aggregate the following: a) all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and (b) all costs and associated charges associated with the manufacturing and managing of the financial instruments. Costs referred to in points (a) and (b) are listed in Annex II to this Regulation. For the purposes of point (a), third party payments received by investment firms in connection with the investment service provided to a client shall be itemised separately and the aggregated costs and charges shall be totalled and expressed both as a cash amount and as a percentage. Where any part of the total costs and charges is to be paid in or represents an amount of foreign currency, investment firms shall provide an indication of the currency involved and the applicable currency conversion rates and costs. Investments firms shall also inform about the arrangements for payment or other performance.	2. For ex-ante ~~and ex-post~~ disclosure of information on costs and charges to clients, investment firms shall aggregate the following: a) all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and (b) all costs and associated charges associated with the manufacturing and managing of the financial instruments. Costs referred to in points (a) and (b) are listed in Annex II to this Regulation. For the purposes of point (a), third party payments received by investment firms in connection with the investment service provided to a client shall be itemised separately and the aggregated costs and charges shall be totalled and expressed both as a cash amount and as a percentage. Where any part of the total costs and charges is to be paid in or represents an amount of foreign currency, investment firms shall provide an indication of the currency involved and the applicable currency conversion rates and costs. Investments firms shall also inform about the arrangements for payment or other performance.
3. Investment firms that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation shall inform their clients about all costs and charges relating to the investment and/or ancillary service provided.	3. **In conditions developed in paragraph 1, i**Investment firms ~~that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation~~ shall inform their clients about all costs and charges **only** relating to the investment and/or ancillary service provided. **This information may be communicated to clients, at the time of entering into the relationship or concluding the first transaction, through tariff grids by asset**

	classes, sufficiently granular according to the investment firm's activities. **These tariff grids must be updated regularly and, at least, annually. The figures in this grid correspond to the best possible cost estimates and may, in some situations, correspond to the maximum costs and charges incurred by the investor, provided that they are as close as possible to the actual costs to be incurred by the investor.**
4. In relation to the disclosure of product costs and charges that are not included in the UCITS KIID, the investment firms shall calculate and disclose these costs, for example, by liaising with UCITS management companies to obtain the relevant information.	4. In relation to the disclosure of product costs and charges that are not included in the UCITS KIID, the investment firms shall calculate and disclose these costs, for example, by liaising with UCITS management companies to obtain the relevant information.
5. The obligation to provide in good time a full ex-ante disclosure of information about the aggregated costs and charges related to the financial instrument and to the investment or ancillary service provided shall apply to investment firms in the following situations: (a) where the investment firm recommends or markets financial instruments to clients; or (b) where the investment firm providing any investment services is required to provide clients with a UCITS KIID or PRIIPs KID in relation to the relevant financial instruments, in accordance with relevant Union legislation.	~~5. The obligation to provide in good time a full ex-ante disclosure of information about the aggregated costs and charges related to the financial instrument and to the investment or ancillary service provided shall apply to investment firms in the following situations:~~ ~~(a) where the investment firm recommends or markets financial instruments to clients; or~~ ~~(b) where the investment firm providing any investment services is required to provide clients with a UCITS KIID or PRIIPs KID in relation to the relevant financial instruments, in accordance with relevant Union legislation.~~
6. Investment firms that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation shall inform their clients about all costs and charges relating to the investment and/or ancillary service provided.	6. Investment firms that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation shall inform their clients about all costs and charges relating to the investment and/or ancillary service provided.
7. Where more than one investment firm provides investment or ancillary services to the client, each investment firm shall provide information about the costs of the investment or ancillary services it provides. An investment firm that recommends or markets to its clients the services provided by another firm, shall aggregate the cost and charges of its services together with the cost and charges of the services provided by the other firm. An investment firm shall take into account the costs and charges associated to the provision of other investment or ancillary services by other firms where it has directed the client to these other firms.	7. Where more than one investment firm provides investment or ancillary services to the client, each investment firm shall provide information about the costs of the investment or ancillary services it provides. An investment firm that recommends or markets to its clients the services provided by another firm, shall aggregate the cost and charges of its services together with the cost and charges of the services provided by the other firm. An investment firm shall take into account the costs and charges associated to the provision of other investment or ancillary services by other firms where it has directed the client to these other firms.

8. Where calculating costs and charges on an ex-ante basis, investment firms shall use actually incurred costs as a proxy for the expected costs and charges. Where actual costs are not available, the investment firm shall make reasonable estimations of these costs. Investment firms shall review ex-ante assumptions based on the ex-post experience and shall make adjustment to these assumptions, where necessary.	8. Where calculating costs and charges on an ex-ante basis, investment firms shall use actually incurred costs as a proxy for the expected costs and charges. Where actual costs are not available, the investment firm shall make reasonable estimations of these costs. Investment firms shall review ex-ante assumptions based on the ex-post experience and shall make adjustment to these assumptions, where necessary.
9. Investment firms shall provide annual ex-post information about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s) where they have recommended or marketed the financial instrument(s) or where they have provided the client with the KID/KIID in relation to the financial instrument(s) and they have or have had an ongoing relationship with the client during the year. Such information shall be based on costs incurred and shall be provided on a personalised basis. Investment firms may choose to provide such aggregated information on costs and charges of the investment services and the financial instruments together with any existing periodic reporting to clients.	9. Investment firms shall provide **to retail and professional clients** annual ex-post information about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s) where ~~they have recommended or marketed the financial instrument(s) or where they have provided the client with the KID/KIID in relation to the financial instrument(s) and~~ they have or have had an ongoing relationship with the client during the year. Such information shall be based on costs incurred and shall be provided on a personalised basis. Investment firms may choose to provide such aggregated information on costs and charges of the investment services and the financial instruments together with any existing periodic reporting to clients. **An investment firm shall be considered to be in an ongoing relationship with its client when it provides the client with the safekeeping service referred to in Section B(1) of Annex I of Directive 2014/65/EU, the portfolio management service referred to in Section A(4) of Annex I of Directive 2014/65/EU or a service that involves providing a periodic assessment of the suitability within the meaning of Article 24(4) of Directive 2014/65/EU and Article 52 of this Regulation.**
10. Investment firms shall provide their clients with an illustration showing the cumulative effect of costs on return when providing investment services. Such an illustration shall be provided both on an ex-ante and ex-post basis. Investment firms shall ensure that the illustration meets the following requirements: (a) the illustration shows the effect of the overall costs and charges on the return of the investment;	~~10. Investment firms shall provide their clients with an illustration showing the cumulative effect of costs on return when providing investment services. Such an illustration shall be provided both on an ex-ante and ex-post basis. Investment firms shall ensure that the illustration meets the following requirements:~~ ~~(a) the illustration shows the effect of the overall costs and charges on the return of the investment;~~

(b) the illustration shows any anticipated spikes or fluctuations in the costs; and (c) the illustration is accompanied by a description of the illustration.	~~(b) the illustration shows any anticipated spikes or fluctuations in the costs; and~~ ~~(c) the illustration is accompanied by a description of the illustration.~~ 11. **By way of derogation from paragraph 2, and subject to Articles 3(1), 3(3)(a) and 6 of Directive 2002/65/EC, an investment firm may provide information on costs and charges to the retail investor after the provision of the service, without undue delay, where all the following conditions are met:** **(a) the retail investor chooses, on his own initiative, to contact the investment firm and conclude the transaction using a means of distance communication;** **(b) the investment firm has informed the retail investor that it is not possible to provide ex-ante information on costs and charges and has clearly stated that the retail investor may delay the provision of the service in order to receive and read this information before providing the service;** **(c) the retail investor consents to receiving ex-ante information on costs and charges without undue delay after the provision of the service rather than delaying the provision of the service to receive such information in advance.**

LEVEL 3

ESMA's Q&As on costs and charges

Q&A	Amendments to be achieved ?	Comments
1	NA	
2	To be deleted	Suppression of the requirement to communicate an illustration of the cumulative effect of costs on performance.
3	To be deleted	Suppression of the requirement to communicate an illustration of the cumulative effect of costs on performance.
4	To be kept	
5	To be kept	

6	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
7	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
8	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
9	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
10	NA	
11	To be amended	Keeping of the answer except for the part importing the PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
12	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
13	To be amended	The scope of this question should be restricted to situations for which trade-by-trade information should be communicated to the client.
14	To be kept	
15	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
16	To be kept	
17	To be deleted	No more PRIIPs costs methodology in MiFID II for products that do not fall within the PRIIPs scope.
18	To be deleted	This question-answer will no longer be relevant if the two new regimes proposed by AMAFI are retained.
19	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.
20	To be amended	The scope of this question should be restricted to situations for which trade-by-trade information should be communicated to the client.
21	To be kept	
22	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.
23	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.
24	To be kept	
25	To be kept	
26	To be kept	
27	To be kept	

28	To be deleted	This question-answer will no longer be relevant if AMAFI's proposal on orders placed by telephone is retained.
29	NA	
30	To be deleted	This question-answer will no longer be relevant if the two regimes proposed by AMAFI are retained.

ESMA'Q&A Other issues

1	To be deleted	The term "ongoing relationship" would be clarified by an exact reference to the relevant investment services so this question-answer would be no longer relevant

This appendix was also published independently as note AMAFI 19-110

APPENDIX 2

MiFID II/ MiFIR REFIT – Investor Protection
Product Governance

PRIORITIES AND SUMMARY OF PROPOSED AMENDMENTS

(1) Reintroducing more proportionality for simple financial instruments
- *See amendment of Recital 71 of the Level 1 Directive*

(2) Clarify the Distributor concept to exclude "passive" / "broad" distribution
- *See amendment of Recital 71 of the Level 1 Directive*
- *See amendment of Articles 16.3 and 24.2 of the Level 1 Directive*

(3) Exclude from the Product Governance field negotiations between eligible counterparties
- *See amendment of Recitals 103 and 104 of the Level 1 Directive*

MiFID 2 adopts new investor protections by introducing a mandatory framework for the design and distribution of financial instruments. These new provisions, which are set out in Chapter III of the MiFID 2 DD[5] under the heading "Product Governance", are one of the major advances of MiFID 2.

Implementation of these provisions by the relevant institutions is a significant challenge due to the legal, organisational and IT consequences they entail. They raise key commercial issues because Product Governance regulates the supply and distribution of ISPs' financial instruments.

The new Product Governance requirements oblige "Manufacturers" and "Distributors" of financial instruments to prevent conflicts of interest and to control the risks of inappropriate marketing of products or the creation of products without any defined interest for clients. Accordingly, these provisions contribute to improving investor protection because their aim is to better target investors compatible with each product marketed by defining "Target Markets", more fully informing clients about the nature of the product or service offered and manufacturing only products that meet the needs and objectives of clients targeted. The Product Governance provisions defines the responsibilities of each actor in the distribution chain, from the designer to the distributor, as well as the exchanges between the two. The scope of this Product Governance system, as currently defined, is very broad, and its obligations apply to all clients, regardless of how they are classified, as well as to all financial instruments[6].

This new system undoubtedly represents an advance in investor protection. However, the work carried out over the past several years on the interpretation and implementation of the obligations it imposes has shown that, due to its ambitious nature, certain criticisms are justified and should be taken into account for purposes of the MiFID 2 revision project.

These criticisms have led to the revision proposals discussed below, which focus on the two general messages put forward in the introduction:

[5] The provisions of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing MiFID 2 ("MiFID 2 DD") on Product Governance have been transposed in France in Book III, Chapter III, of the AMF General Regulation.
[6] As defined by MiFID 2 (Annex I, Section C), as well as structured deposits. However, they may be applied in a proportionate manner depending on the category of clients and the nature of the financial instruments (see MiFID 2 DD 2017/593, recital 18).

(1) **Simplifying, clarifying and making the system more comprehensible;** and

(2) **Reintroducing greater proportionality and more fully reflecting the specificities of the wholesale market.**

1. PROPOSALS TO SIMPLIFY AND CLARIFY THE SCOPE OF PRODUCT GOVERNANCE AND TO MORE EXTENSIVELY APPLY THE PRINCIPLE OF PROPORTIONALITY

The Product Governance system is, firstly, very (perhaps overly) ambitious given its extremely broad scope. While this has the advantage of covering all possible situations, it quickly became apparent from the implementation work carried out that, in a number of cases, its objectives are not particularly or not at all pertinent.

➢ *Negotiations solely between eligible counterparties outside distribution channels*

When an eligible counterparty purchases or trades a financial instrument with another ISP for its own account without any intention of reselling it to its own clients, the counterparty does not act as a Distributor for Product Governance purposes ("Distributor"). The eligible counterparty is the ISP's only "client" for that specific transaction. If an eligible counterparty places an order for its own account with another ISP, both counterparties have similar roles vis-à-vis each other: each one is both a client and a supplier, and no other "end client" can be considered to be a target. Therefore, Product Governance requirements should not apply to negotiations conducted exclusively between eligible counterparties.

At the very least, the principle of proportionality, adapted to the wholesale market, should be taken into account to a greater degree for these situations. In accordance with current practice, eligible counterparties are already informed of the characteristics of the financial instruments in which they trade (for example, by providing a term sheet). Transactions that involve only eligible counterparties, who do not subsequently redistribute the products to end clients, do not require furnishing all information intended for less sophisticated clients. Concerning the information about products that Manufacturers must provide to Distributors, since eligible counterparties are both knowledgeable and experienced with respect to the products, and the knowledge and experience of the counterparties is equivalent, why should one counterparty be required to furnish this information to the other? Concerning the information required to monitor transactions in relation to the identified target market, which of the two counterparties should submit a report to the other? With respect to the obligation to regularly review these target markets, in the case of eligible counterparties, for what purpose?

These obligations should not apply in these cases.

➢ *Issues of financing products: ordinary shares and bonds*

Product Governance obligations apply to all types of clients, all investment services and all products regardless of their complexity. However, AMAFI notes that these obligations were primarily designed for structured products, which are actually "manufactured"[7] by ISPs. On the other hand, in the case of so-called "vanilla" products[8], the application of Product Governance obligations is more difficult to understand, in particular in the primary market where the added value is, in principle, very low or non-existent.

[7] "*... ensure that the investment firms which manufacture financial instruments ensure that those products are manufactured to meet the needs of an idnetified target market of end clients ...*" (*MiFID 2, recital 71*).

[8] **"Ordinary" shares and bonds** admitted to trading on a regulated or equivalent market or MTF, which are classified as non-complex financial instruments within the meaning of Article 25(4)(a) of MiFID 2, and equity-linked products, such as bonds that are convertible and/or exchangeable into shares that are admitted to trading on a regulated or equivalent market

a) An ISP that advises an issuer should not be considered the Manufacturer of a vanilla product

A Manufacturer is an ISP that manufactures financial instruments, which encompasses the *"creation, development, issuance and/or design of financial instruments"*[9]. However, in the case of issues of vanilla products, if the issuer is not subject to MiFID 2 (for example, a corporate issuer), it does not itself meet the prerequisites of the definition of Manufacturer. A commonly accepted interpretation of recital 15[10] of the MiFID 2 DD considers that the issuer's ISP adviser in connection with an issue of vanilla products is the "Manufacturer" of such products for Product Governance purposes.

However, it bears noting that the advice provided by the ISP in this context does not concern the product as such or its functioning but, rather, the characteristics of the issue (terms and conditions, timetable, etc.). Moreover, in practice, it has proved very complicated to harmonise the identification of Target Markets, for Product Governance purposes, with the types of investors targeted for a given issue in accordance with the Prospectus Regulation. In particular, a number of Product Governance provisions seem inapposite for these financial instruments, especially the obligations that apply over time, given the fungible nature of these instruments[11].

For the foregoing reasons, these ISPs should not be classified as "Manufacturers" of vanilla products because practice has shown that this provides no added value apart from a purely formal exercise to identify a Target Market that, by its nature, is very broad and identical for the same type of financial instrument[12].

b) Introduce additional proportionality in the application of Product Governance provisions to vanilla products

Even in the absence of a MiFID 2 Manufacturer, vanilla products that are both distributed on the primary market and traded on the secondary market are subject to the Product Governance provisions.

In this case as well, given the inherent nature of these products, which by their nature must be accessible to as many people as possible, the current system fails to sufficiently apply the principle of proportionality, in particular with regard to the following factors:

a) **Identification of the positive target market:** it should be possible to define a "single" target market. For example, such market could include, on the one hand, all shares and, on the other hand, all bonds with similar characteristics.

b) **Identification of the negative target market:** in light of the nature of these products, the need to identify a negative target market should be acknowledged to be rare[13] or non-existent.

c) **Costs:** by nature, vanilla products do not incur a product "manufacturing" cost. Therefore, the obligations to verify the compatibility of these costs and charges should be deemed to have been met.

d) **Regular review of the product:** given the nature of these products, AMAFI considers that it is disproportionate, unnecessary and perhaps impossible (particularly on the primary market) to conduct regular reviews.

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or MTF, even if they are not classified as non-complex financial instruments within the meaning of the article referenced above.

[9] MiFID II DD, Article 9(1).

[10] *"Investment firms that ... advise issuers on the launch of new financial instruments should be considered as manufacturers ..."*.

[11] See AMAFI Guide No. 18-60, "MiFID 2 Product Governance", Annex 4, 7 Nov. 2018.

[12] Ibid.

[13] On this point, the example ESMA gives in its Guidelines of a negative target market for a share encompassing clients looking for full capital protection, who are fully risk averse and want a fully guaranteed income (*ESMA Guidelines (English version), Annex V, Case study 4*) is particularly regrettable and harmful and should be deleted.

e) **Scenarios:** similarly, the obligation to undertake analyses of various scenarios seems to be apposite for structured products, but not particularly pertinent for shares and bonds.

f) **Reports of sales outside the target market:** given the very broad target markets for these products, a limited number of sales outside the target market is generally to be expected. Moreover, given the limited scope of its obligations, the "Manufacturer" will not perform a regular review of the Product (or its target market) and, therefore, these reports on sales outside the target market would be pointless in any event.

➢ *"Broad distribution" in the absence of a link with the Manufacturer*

"Broad distribution" concerns, in particular, ISPs that provide an RTO or order execution service enabling their clients to process financial instruments available on the secondary market via trading venues or OTC transactions. Should an ISP that provides such a service be considered a Distributor in all cases? In particular, if it receives an order "passively" (i.e. if receipt is not preceded by any of the following actions: a marketing campaign, providing recommendations or advice to clients on the product in question, sending promotional communications about the product to its clients, providing advice to clients, etc.) for a product to which it has no ties (it does not know the "Manufacturer" and receives no remuneration therefrom to market the Product), and the only service provided to the client is to transmit this order for execution or to execute the order, should the ISP be considered to "market" the Product and therefore that it is the Distributor of the financial instrument?

ESMA[14] answered this question affirmatively and considers that an ISP is also a Distributor if it decides on the products offered to clients acting at their own initiative, even if such ISP does not actively market these products.

Precisely because these "distributors" have only limited information, a legitimate question arises as to the benefit of considering that they are Distributors. Moreover, these arrangements are most often specific to "vanilla" products (*see Section (2) above*) such as shares or bonds. Pursuant to the principle of proportionality it should be fairly simple to identify the target markets for products that are, by their nature, suitable for "mass" retail clients. However, the question this raises is what benefit would accrue by identifying such a "target" market, which by definition would be very broad. It is also important to note that Product Governance requirements are not limited to the identification of the Target Market and that Distributors are subject to other obligations, such as regularly reviewing the products distributed and providing information on sales. In these cases as well, these provisions appear to be of limited utility, whereas they have a significant regulatory cost for these firms that provide execution services only, but no investment advisory or discretionary management services.

Lastly, the feedback from professionals shows that it is extremely complicated from a practical point of view for Distributors to have the exchanges of information required by the Product Governance system with a multitude of Manufacturers with whom they do not have an established relationship.

Requiring Distributors to identify in advance all products on which their clients could potentially place orders seems disproportionate. The number of financial instruments concerned is enormous. Moreover, commercially speaking, the Distributor cannot refuse to accept an order from a client for a product that it has not identified in advance, especially if the order is placed by telephone.

The system should therefore focus on the Distributor's distribution policy, i.e. through what channel and with what service it provides or does not provide access to certain markets to certain of its clients because, in this context, a product-by-product approach is not pertinent. If an ISP provides only an RTO or simple execution service, its role from a Product Governance standpoint is limited solely to determining to what market(s) or venue(s) it will provide access to its clients because it does not receive from the Manufacturer of each financial instrument referenced by the market or venue detailed information on the Target Market for each financial

[14] *" ... Distributors should also decide which products will be made available to (existing or prospective) clients at their own initiative through execution services without active marketing, considering that in such situations the level of client information available may be very limited."* (*Guidelines on MiFID II product governance requirements* (ESMA35-43-620) issued on 2 June 2017 *"ESMA Guidelines", § 31*).

instrument, if in fact any exists. Product Governance obligations should therefore be applied proportionately to the service provided and not on a product-by-product basis, as European regulated markets should generally be considered to be accessible to all investors.

This observation is evident for firms that deal with retail clients. It applies all the more so to firms that have only professional clients.

These are the rationale for AMAFI's proposals to amend the definition of the distributor concept at both Level 1 and Level 2 in order to target entities that "market or recommend" financial instruments but not those which merely "offer" or "propose" the said financial instruments.

2. SIMPLIFYING AND MAKING MORE COMPREHENSIBLE REPORTS OF SALES OUTSIDE THE TARGET MARKET

Distributors are required to provide Manufacturers with information on sales made outside the Target Market, and the Manufacturer must ensure that the product is in fact distributed to the target market[15].

An ambiguity remains about the Distributor's responsibility for this report. It would be helpful to clarify, for example in the Level 2, that the Distributor is solely responsible for this obligation. Therefore, Manufacturers that have used their best endeavours to actually obtain this information but have nevertheless not received any reports should be able to validly assume that no sales have been made outside their target market or that such sales are not sufficiently relevant to report.

Moreover, the nature of the sales to be reported is complex.

ESMA has specified the scope of the sales to be reported. As a welcome exception, sales made outside the target market for diversification or hedging purposes need not be reported[16], provided such sales are compatible with the client's total portfolio or the risk being hedged (however, this exception cannot apply to deviations from the first two criteria[17] of the target market). However, sales into the negative target market must always be reported[18] even if they are made for diversification or hedging purposes.

Ultimately, the scope of sales to be reported is based on a complex combination of statements and exceptions that should undoubtedly be simplified. In fact, under the principle of proportionality, should it not be above all the sales made into the negative target market that should be identified?

Therefore, on the basis of the same concern for proportionality, it should be made clear that the reporting requirement is not systematic and that only a certain volume of sales outside the target market triggers the obligation to report them. If a Distributor identifies a few sales outside the target market to be reported, but such sales are very small or marginal in relation to the total volume of sales made (including sales made within the target market), is it worthwhile to require the Distributor to report them anyway? Furthermore, if this departure from the target market is perfectly justified in a particular case, for example because the client has requested to invest in a product at its own initiative, is it really necessary to report it to the Manufacturer? It would seem both more consistent with the original objective of this report (i.e. to confirm the pertinence of the defined target market) and the principle of proportionality, which should be re-emphasised, to give the Distributor certain discretion to determine if it is necessary to report sales outside the target market.

[15] MiFID II DD, Article 9(14): "Investment firms shall consider if the financial instrument remains consistent with the needs, characteristics and objectives of the target market and if it is being distributed to the target market, or is reaching clients for whose needs, characteristics and objectives the financial instrument is not compatible."
[16] ESMA Guidelines, § 54.
[17] Therefore, sales made outside the positive target market because they do not meet the "Type of client" and/or "Knowledge and experience" criteria cannot be justified for diversification or hedging reasons. Accordingly, they must be reported in all cases.
[18] ESMA Guidelines, § 55.

For these reasons, AMAFI proposes to simplify the reporting of sales outside the target market by focusing on sales made into the negative target market and giving Distributors certain discretion to determine the need to report such sales to the Manufacturer.

Moreover, feedback received tends to show that Manufacturers generally receive few reports from Distributors on this subject. On average, AMAFI Manufacturers report a reporting rate of around **only 30%** from all their Distributors, a significant share of which is attributable solely to French distributors. From a qualitative point of view, the majority of Manufacturers agree that in a number of cases the information does not really enable drawing reliable conclusions as to whether or not the definition of the target market needs to be revised. Many Distributors also point to operational obstacles – chief among them, information systems and IT tools – that make the task as currently required by the laws in force extremely complex, difficult and burdensome.

Finally, and to echo the issue raised in Section *(3)* concerning scope ("broad distribution"), the complexity of this reporting is further increased if there is no contractual relationship between the Distributor and the Manufacturer.

3. THE PRINCIPLE OF PROPORTIONALITY SHOULD BE RE-EMPHASISED WITH RESPECT TO THE REQUIREMENT TO MONITOR PRODUCTS THROUGHOUT THEIR LIVES

Article 9.15 of the Delegated Directive requires Manufacturers to identify *"crucial events that would affect the potential risk or return expectations"* of the product, such as:

(a) The crossing of a threshold that will affect the return profile of the product; or
(b) The solvency of certain issuers.

Feedback obtained on the implementation of this obligation shows that it cannot be applied consistently due to the variety of situations concerned. For example, depending on the level of granularity the Manufacturer decides for the purposes of applying it, this obligation may become quite onerous even if not justified by the category of end clients targeted. Although this review is particularly beneficial if the end client is a retail investor, it seems much less useful in the case of sophisticated clients.

Furthermore, the factors chosen to identify such reviews and their frequency vary considerably depending on the type of financial instrument. By their nature, these reviews will not be carried out based on whether the product is a structured product such as an EMTN sold to retail clients or an OTC derivative traded with a professional client who frequently trades in these financial instruments. Moreover, such review will be meaningless for vanilla products[19].

Therefore, it is essential to provide legal certainty to Manufacturers by explicitly stipulating that this obligation is to be applied in a manner appropriate and proportionate to the nature of the relevant financial instrument and the category of the final client, i.e. to the nature of the Target Market identified.

[19] See, above, "Introduce additional proportionality in the application of Product Governance provisions to vanilla products".

PROPOSED AMENDMENTS

LEVEL 1

Directive 2014/65/EU	Proposed amendment
Recital 71 Member States should ensure that investment firms act in accordance with the best interests of their clients and are able to comply with their obligations under this Directive. Investment firms should accordingly understand the features of the financial instruments offered or recommended and establish and review effective policies and arrangements to identify the category of clients to whom products and services are to be provided. Member States should ensure that the investment firms which manufacture financial instruments ensure that those products are manufactured to meet the needs of an identified target market of end clients within the relevant category of clients, take reasonable steps to ensure that the financial instruments are distributed to the identified target market and periodically review the identification of the target market of and the performance of the products they offer.	*Recital 71* Member States should ensure that investment firms act in accordance with the best interests of their clients and are able to comply with their obligations under this Directive. Investment firms should accordingly understand the features of the financial instruments ~~offered~~ **marketed** or recommended and establish and review effective policies and arrangements to identify the category of clients to whom products and services are to be provided. Member States should ensure that the investment firms which manufacture financial instruments ensure that those products are manufactured to meet the needs of an identified target market of end clients within the relevant category of clients, take reasonable steps to ensure that the financial instruments are distributed to the identified target market and periodically review the identification of the target market of and the performance of the products they offer. **It should also be understood that investment firms advising issuers on the launch of new financial instruments should not be considered as manufacturer of those financial instruments.**
Investment firms that offer or recommend to clients financial instruments not manufactured by them should also have appropriate arrangements in place to obtain and understand the relevant information concerning the product approval process, including the identified target market and the characteristics of the product they offer or recommend. That obligation should apply without prejudice to any assessment of appropriateness or suitability to be subsequently carried out by the investment firm in the provision of investment services to each client, on the basis of their personal needs, characteristics and objectives.	Investment firms that **market** ~~offer~~ or recommend to clients financial instruments not manufactured by them should also have appropriate arrangements in place to obtain and understand the relevant information concerning the product approval process, including the identified target market and the characteristics of the product they **market** ~~offer~~ or recommend. That obligation should apply without prejudice to any assessment of appropriateness or suitability to be subsequently carried out by the investment firm in the provision of investment services to each client, on the basis of their personal needs, characteristics and objectives.
In order to ensure that financial instruments will be offered or recommended only when in the interest of the client, investment firms offering or	In order to ensure that financial instruments will be ~~offered~~ **marketed** or recommended only when in the interest of the client, investment firms ~~offering~~

recommending the product manufactured by firms which are not subject to the product governance requirements set out in this Directive or manufactured by third-country firms should also have appropriate arrangements to obtain sufficient information about the financial instruments.	**marketing** or recommending the product manufactured by firms which are not subject to the product governance requirements set out in this Directive or manufactured by third-country firms should also have appropriate arrangements to obtain sufficient information about the financial instruments.
Recital 103 For the purposes of this Directive eligible counterparties should be considered to be acting as clients.	*Recital 103* For the purposes of this Directive eligible counterparties should be considered to be acting as clients **except where this would be manifestly disproportionate regarding their level of sophistication and all the more if they wish to waive the protection provided for them according to this Directive**.
Recital 104 The financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments. While it should be confirmed that conduct of business rules should be enforced in respect of those investors most in need of protection, it is appropriate to better calibrate the requirements applicable to different categories of clients. To that extent, it is appropriate to extend some information and reporting requirements to the relationship with eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and funds as well as information and reporting requirements concerning more complex financial instruments and transactions. In order to better define the classification of municipalities and local public authorities, it is appropriate to clearly exclude them from the list of eligible counterparties and of clients who are considered to be professionals while still allowing those clients to ask for treatment as professional clients on request.	*Recital 104* The financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments. While it should be confirmed that conduct of business rules should be enforced in respect of those investors most in need of protection, it is appropriate to better calibrate the requirements applicable to different categories of clients. To that extent, it is appropriate to extend some information and reporting requirements to the relationship with **first professional clients and, only where relevant,** eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and funds as well as information and reporting requirements concerning more complex financial instruments and transactions. **On the other hand, this extension is not appropriate for the simplest financial instruments.** In order to better define the classification of municipalities and local public authorities, it is appropriate to clearly exclude them from the list of eligible counterparties and of clients who are considered to be professionals while still allowing those clients to ask for treatment as professional clients on request.

Justification

Those amendments in Level 1 recitals aim at:

- Clarify that “passive distribution” should be excluded from the scope of the product governance requirements;
- Legitimize the reliefs requested for eligible counterparties;

- Affirm the principle of proportionality in the application of the product governance requirements;
- Prevent the maintenance of Recital 15 of the Level 2 Directive, which wrongly qualifies the advising investment firm of an issuer as the Manufacturer of the issued instrument.

Directive 2014/65/EU	Proposed amendment
Article 16 **Organisational requirements**	*Article 16* **Organisational requirements**
[…]	[…]
3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 23 from adversely affecting the interests of its clients.	3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 23 from adversely affecting the interests of its clients.
An investment firm which manufactures financial instruments for sale to clients shall maintain, operate and review a process for the approval of each financial instrument and significant adaptations of existing financial instruments before it is marketed or distributed to clients.	An investment firm which manufactures financial instruments for sale to clients shall maintain, operate and review a process for the approval of each financial instrument and significant adaptations of existing financial instruments before it is marketed or distributed to clients.
The product approval process shall specify an identified target market of end clients within the relevant category of clients for each financial instrument and shall ensure that all relevant risks to such identified target market are assessed and that the intended distribution strategy is consistent with the identified target market.	The product approval process shall specify an identified target market of end clients within the relevant category of clients for each financial instrument and shall ensure that all relevant risks to such identified target market are assessed and that the intended distribution strategy is consistent with the identified target market.
An investment firm shall also regularly review financial instruments it offers or markets, taking into account any event that could materially affect the potential risk to the identified target market, to assess at least whether the financial instrument remains consistent with the needs of the identified target market and whether the intended distribution strategy remains appropriate.	An investment firm shall also regularly review financial instruments it offers or markets, taking into account any event that could materially affect the potential risk to the identified target market, to assess at least whether the financial instrument remains consistent with the needs of the identified target market and whether the intended distribution strategy remains appropriate.
An investment firm which manufactures financial instruments shall make available to any distributor all appropriate information on the financial instrument and the product approval process, including the identified target market of the financial instrument.	An investment firm which manufactures financial instruments shall make available to any distributor all appropriate information on the financial instrument and the product approval process, including the identified target market of the financial instrument.
Where an investment firm offers or recommends financial instruments which it does not manufacture, it shall have in place adequate arrangements to obtain the information referred to	Where an investment firm ~~offers~~ **markets** or recommends financial instruments which it does not manufacture, it shall have in place adequate arrangements to obtain the information referred to

in the fifth subparagraph and to understand the characteristics and identified target market of each financial instrument. The policies, processes and arrangements referred to in this paragraph shall be without prejudice to all other requirements under this Directive and Regulation (EU) No 600/2014, including those relating to disclosure, suitability or appropriateness, identification and management of conflicts of interests, and inducements. […]	in the fifth subparagraph and to understand the characteristics and identified target market of each financial instrument. The policies, processes and arrangements referred to in this paragraph shall be without prejudice to all other requirements under this Directive and Regulation (EU) No 600/2014, including those relating to disclosure, suitability or appropriateness, identification and management of conflicts of interests, and inducements. […]
Article 24 **General principles and information to clients** […] 2. Investment firms which manufacture financial instruments for sale to clients shall ensure that those financial instruments are designed to meet the needs of an identified target market of end clients within the relevant category of clients, the strategy for distribution of the financial instruments is compatible with the identified target market, and the investment firm takes reasonable steps to ensure that the financial instrument is distributed to the identified target market. An investment firm shall understand the financial instruments they offer or recommend, assess the compatibility of the financial instruments with the needs of the clients to whom it provides investment services, also taking account of the identified target market of end clients as referred to in Article 16(3), and ensure that financial instruments are offered or recommended only when this is in the interest of the client. […]	*Article 24* **General principles and information to clients** […] 2. Investment firms which manufacture financial instruments for sale to clients shall ensure that those financial instruments are designed to meet the needs of an identified target market of end clients within the relevant category of clients, the strategy for distribution of the financial instruments is compatible with the identified target market, and the investment firm takes reasonable steps to ensure that the financial instrument is distributed to the identified target market. An investment firm shall understand the financial instruments they ~~offer~~ **market** or recommend, assess the compatibility of the financial instruments with the needs of the clients to whom it provides investment services, also taking account of the identified target market of end clients as referred to in Article 16(3), and ensure that financial instruments are ~~offered~~ **marketed** or recommended only when this is in the interest of the client. […]

Justification

The substitution of the word "*offer*" by "*market*" in accordance with Articles 16.3 and 24.2 of the Level 1 Directive aim at clarifying that “passive distribution” should be excluded from the scope of Product governance requirements.

Directive 2014/65/EU	Proposed amendment
Article 30 **Transactions executed with eligible counterparties**	*Article 30* **Transactions executed with eligible counterparties**
1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Article 24, with the exception of paragraphs 4 and 5, Article 25, with the exception of paragraph 6, Article 27 and Article 28(1) in respect of those transactions or in respect of any ancillary service directly relating to those transactions.	1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under **Article 16(3), with the exception of paragraph 1**, Article 24, with the exception of paragraphs 4 and 5, Article 25, with the exception of paragraph 6, Article 27 and Article 28(1) in respect of those transactions or in respect of any ancillary service directly relating to those transactions.
Member States shall ensure that, in their relationship with eligible counterparties, investment firms act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business.	Member States shall ensure that, in their relationship with eligible counterparties, investment firms act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business.

Justification

The Product Governance provisions are set out in both Article 16(3), paragraphs 2 to 6, and Article 24(2). Article 30, which is the basis for the principle that investor protection provisions do not apply to transactions between eligible counterparties, already excludes Article 24(2). Therefore, the exclusion of Article 16(3) should be added to make fully clear that investor protection provisions do not apply to transactions between eligible counterparties.

LEVEL 2

Delegated Directive 2017/593/EU	Proposed amendment
Recital 15	*Recital 15*
In order to avoid and reduce from an early stage potential risks of failure to comply with investor protection rules, investment firms manufacturing and distributing financial instruments should comply with product governance requirements. For	In order to avoid and reduce from an early stage potential risks of failure to comply with investor protection rules, investment firms manufacturing and distributing financial instruments should comply with product governance requirements. For

the purpose of product governance requirements, investment firms that create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments, should be considered as manufacturers while investment firms that offer or sell financial instrument and services to clients should be considered distributors.	the purpose of product governance requirements, investment firms that create, develop, issue and/or design financial instruments, ~~**including when advising corporate issuers on the launch of new financial instruments**~~, should be considered as manufacturers while investment firms that ~~**offer or sell**~~ **recommend or market** financial instrument and services to clients should be considered distributors.
Recital 18 (18) In light of the requirements set out in Directive 2014/65/EU and in the interest of investor protection, product governance rules should apply to all products sold on primary and secondary markets, irrespective of the type of product or service provided and of the requirements applicable at point of sale. However, those rules may be applied in a proportionate manner, depending on the complexity of the product and the degree to which publicly available information can be obtained, taking into account the nature of the instrument, the investment service and the target market. Proportionality means that these rules could be relatively simple for certain simple, products distributed on an execution-only basis where such products would be compatible with the needs and characteristics of the mass retail market.	*Recital 18* (18) In light of the requirements set out in Directive 2014/65/EU and in the interest of investor protection, product governance rules should apply to all products sold on primary and secondary markets, irrespective of the type of product or service provided and of the requirements applicable at point of sale. However, those rules may be applied in a proportionate manner, depending on the complexity of the product and the degree to which publicly available information can be obtained, taking into account the nature of the instrument, the investment service and the target market. Proportionality means that these rules could be relatively simple for certain simple, products distributed on an execution-only basis where such products would be compatible with the needs and characteristics of the mass retail market. **It also means that some of these rules are not proportionate for simple products, such as shares and bonds.**

Justification

These proposals meet the need to introduce additional proportionality in the application of Product Governance provisions to vanilla products.

In Recital 15, the replacement of the terms "*offer or sell"* by *"recommend or market"* is intended to make the definition of Distributor in Article 10 of the same Directive consistent and meets the need to make clear that passive distribution should be excluded from the scope of the Product Governance provisions.

Delegated Directive 2017/593/EU	**Proposed amendment**
Article 10 **Product governance obligations for distributors** 1. Member States shall require investment firms, when deciding the range of financial instruments issued by themselves or other firms and services they intend to offer or recommend to clients, to	*Article 10* **Product governance obligations for distributors** 1. Member States shall require investment firms, when deciding the range of financial instruments issued by themselves or other firms ~~**and services**~~ they intend to ~~offer or~~ recommend to clients, to

comply, in a way that is appropriate and proportionate, with the relevant requirements laid down in paragraphs 2 to 10, taking into account the nature of the financial instrument, the investment service and the target market for the product.	comply, in a way that is appropriate and proportionate, with the relevant requirements laid down in paragraphs 2 to 10, taking into account the nature of the financial instrument, the investment service and the target market for the product. **Investment firms that do not decide to include any financial instrument in their range and they do not recommend that financial instrument may agree to execute a client order on that financial instrument without complying with the requirements set out in paragraphs 2 to 10.**
Member States shall ensure that investment firms also comply with the requirements of Directive 2014/65/EU when offering or recommending financial instruments manufactured by entities that are not subject to Directive 2014/65/EU. As part of this process, such investment firms shall have in place effective arrangements to ensure that they obtain sufficient information about these financial instruments from these manufacturers.	Member States shall ensure that investment firms also comply with the requirements of Directive 2014/65/EU when ~~**offering or**~~ recommending financial instruments manufactured by entities that are not subject to Directive 2014/65/EU. As part of this process, such investment firms shall have in place effective arrangements to ensure that they obtain sufficient information about these financial instruments from these manufacturers.

Justification

These proposals meet the need to clarify that “broad” distribution should be excluded from the scope of the Product Governance provisions, in accordance with amendments proposed in Level 1.

Delegated Directive 2017/593/EU	**Proposed amendment**
Article 9 **Product governance obligations for manufacturers** 15. Member States shall require investment firms to review financial instruments prior to any further issue or re-launch, if they are aware of any event that could materially affect the potential risk to investors and at regular intervals to assess whether the financial instruments function as intended. Investment firms shall determine how regularly to review their financial instruments based on relevant factors, including factors linked to the complexity or the innovative nature of the investment strategies pursued. Firms shall also identify crucial events that would affect the potential risk or return expectations of the financial instrument, such as:	*Article 9* **Product governance obligations for manufacturers** 15. Member States shall require investment firms to review financial instruments prior to any further issue or re-launch, if they are aware of any event that could materially affect the potential risk to investors and at regular intervals to assess whether the financial instruments function as intended. Investment firms shall determine how regularly to review their financial instruments based on relevant factors, including factors linked to the complexity or the innovative nature of the investment strategies pursued. Firms shall also identify, **in a manner appropriate and proportionate to the nature of the financial instrument and the target market for the financial instrument**, crucial events that would affect the potential risk or return expectations of the financial instrument, such as:

(a) the crossing of a threshold that will affect the return profile of the financial instrument; or (b) the solvency of certain issuers whose securities or guarantees may impact the performance of the financial instrument.	(a) the crossing of a threshold that will affect the return profile of the financial instrument; or (b) the solvency of certain issuers whose securities or guarantees may impact the performance of the financial instrument.

Justification

This addition makes clear that the monitoring obligation during the life of the products laid down in Article 9 should be applied in a manner appropriate and proportionate to the nature of the product and the category of targeted end clients.

LEVEL 3

ESMA Guidelines on MiFID II product governance requirements

ESMA Guidelines on MiFID II product governance requirements	Proposed amendment
54. The distributor is not required to report sales outside of the positive target market to the manufacturer, if these sales are for diversification and hedging purposes and if these sales are still suitable given the client's total portfolio or the risk being hedged.	54. The distributor is not required to report sales outside of the positive target market to the manufacturer, **provided they are not made into the negative target market**. ~~if these sales are for diversification and hedging purposes and if these sales are still suitable given the client's total portfolio or the risk being hedged.~~
55. Sales of products into the negative target market should always be reported to the manufacturer and disclosed to the client, even if those sales are for diversification or hedging purposes. Moreover, even if for diversification purposes, sales into the negative target market should be a rare occurrence (see also paragraphs 67-74).	55. Sales of products into the negative target market should always be reported to the manufacturer and disclosed to the client, even if those sales are for diversification or hedging purposes. Moreover, even if for diversification purposes, sales into the negative target market should be a rare occurrence (see also paragraphs 67-74).
59. In relation to the reporting of information on sales outside the manufacturer's target market, distributors should be able to report any decisions they have taken to sell outside the target market or to broaden the distribution strategy recommended by the manufacturer and information on sales made outside the target market (including sales within the negative target market), taking into account the exceptions as noted in paragraph 54.	59. In relation to the reporting of information on sales outside the manufacturer's target market, distributors should be able to report any ~~decisions they have taken to sell outside the target market or to broaden the distribution strategy recommended by the manufacturer and information on sales made outside the target market (including~~ sales within the negative target market~~), taking into account the exceptions as noted in paragraph 54~~.
74. Deviations from the target market (outside the positive or within the negative) which may be relevant for the product governance process of the manufacturer (especially **those that** are recurrent) should be reported to the manufacturer taking into account the exceptions as noted in paragraph 54.	74. Deviations from the target market (~~outside the positive or~~ within the negative) which may be relevant **in the distributor's opinion** for the product governance process of the manufacturer (especially **if they** ~~**those that**~~ are recurrent) should be reported to the manufacturer ~~taking into account the exceptions as noted in paragraph 54~~.

	Manufacturers that have used their best endeavours to obtain this information from their distributors, but despite such endeavours have not received any reports in this respect, may validly assume that no sales have been made outside or that such sales are not sufficiently relevant to report.

Justification

These proposals meet the need to simplify the reporting of sales outside the target market and take into account the principle of proportionality to a greater degree.

Application of the target market requirements to firms dealing in wholesale markets (i.e. with professional clients and eligible counterparties)

ESMA Guidelines on MiFID II product governance requirements	Proposed amendment
75. The requirements set out in Article 16(3) MiFID II apply irrespective of the nature of the client (retail, professional or eligible counterparty). […]	75. The requirements set out in Article 16(3) MiFID II **do not** apply ~~irrespective of the nature of the client (retail, professional or~~ **to** eligible counterpart**ies**~~y~~). […]

Justification

The rest of its paragraphs will have to be revised to reflect the addition of Article 16(3) to the exclusions set out in Article 30 of the Level 1.

This appendix was also published independently as note AMAFI 19-111

APPENDIX 3

MiFID II/ MiFIR REFIT – Investor Protection Other issues

PRIORITY AND SUMMARY OF PROPOSED AMENDMENTS

(1) Clarify the meaning of "holding an account" and exclude financial instruments marketed solely for hedging purposes.
- *See amendments of paragraph 2 Article 62 in Delegated Regulation 2017/565*

(2) Clarify that if a Member State has implemented national measures equivalent to measures that ESMA has published and recognised, ESMA's measures should cease to apply in that Member State
- *See amendments of Article 40 in MiFIR*

(3) Meeting new economical and environmental demands while still providing appropriate information to clients
- *See amendments of Article 3 in Delegated Regulation 2017/565*

(4) Delete General Guideline 7 in ESMA Guidelines on Suitability as issues of product knowledge applicable to ISPs that market such products are now governed by the Product Governance system and hence should not be included in the Suitability system.
- *See amendments of General Guideline 7*

(5) ESMA should recommend, as a best practice, that investment firms inform investors when, to their knowledge, investors' credit risk may be deemed overly concentrated
- *See amendments of Paragraph 81 in ESMA Guidelines on Suitability*

(6) Delete additional obligations as to the manner in which ISPs are to provide in the suitability report *"the reasons why the benefits of the recommended switch are greater than its costs"*
- *See amendments of Paragraph 91 in ESMA Guidelines on Suitability*

1. ARTICLE 62.2: 10% WARNING

Article 62(2) of MiFID 2 Delegated Regulation 2017/565 requires ISPs that *"hold a retail client account that includes positions in leveraged financial instruments"* to warn the client when the value of any of these instruments decreases by 10% compared to its initial value (and for each multiple of 10%). Three cumulative conditions must be met for this obligation to apply:

(1) having a retail client;
(2) holding an account for that client;
(3) such account includes a "leveraged" financial instrument.

The drafting of condition (1) does not require any comment.

In contrast, the scope of conditions (2) and (3) raises several questions:

- What does "*holding a retail client account*" refer to?

- Under what circumstances should a financial instrument be considered to be *"leveraged"* within the meaning of Article 62(2) of MiFID 2 Delegated Regulation? In particular, should a financial instrument marketed for hedging purposes only be considered to be leveraged?

AMAFI therefore proposes to take advantage of the MiFID 2 revision project to clarify these issues.

Firstly, AMAFI proposes to clarify the meaning of "*holding an account*" by expressly referring to the ancillary service of safekeeping defined in Annex I of MiFID 2.

Secondly, AMAFI proposes to exclude financial instruments marketed solely for hedging purposes from the scope of this obligation. The very function of a financial instrument used for hedging purposes is to reduce or eliminate an underlying risk, in particular in relation to the business activities of retail investors. Therefore, a financial instrument marketed to a client solely for hedging purposes does not increase that client's exposure to the underlying risk but, instead, reduces or eliminates that risk. Furthermore, in this situation, warning clients could lead them to take an investment decision that is contrary to their original objective. Although the "value" of the financial instrument may fluctuate over time, this does not impact the amount of the hedge as defined at the time the investment is made. So long as the hedged risk continues to be hedged it does not seem productive to warn retail investors of changes in the value of their hedge. If an investor were to reduce his position after receiving a warning, he would put himself at risk with regards to his original hedging objective, which, in principle, would not be in his interest.

PROPOSED AMENDMENT

Delegated Regulation 2017/565	Proposed amendment
Article 62 **Additional reporting obligations for portfolio management or contingent liability transactions** […] 2. Investment firms that hold a retail client account that includes positions in leveraged financial instruments or contingent liability transactions shall inform the client, where the initial value of each instrument depreciates by 10% and thereafter at multiples of 10%. Reporting under this paragraph should be on an instrument-by-instrument basis, unless otherwise agreed with the client, and shall take place no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.	*Article 62* **Additional reporting obligations for portfolio management or contingent liability transactions** […] 2. Investment firms that **provide a safekeeping service as referred to in Section B(1) of Annex I of Directive 2014/65/EU to** ~~hold~~ a retail client ~~account~~ that includes positions in leveraged financial instruments or contingent liability transactions, **unless such instruments have been marketed or such transactions have been carried out solely for hedging purposes**, shall inform the client, where the initial value of each instrument depreciates by 10% and thereafter at multiples of 10%. Reporting under this paragraph should be on an instrument-by-instrument basis, unless otherwise agreed with the client, and shall take place no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.

2. INTERVENTION MEASURES

Pursuant to Article 40 of MiFIR, ESMA may take temporary intervention measures to prohibit or restrict the marketing of certain financial instruments. As the name suggests, these restrictions are meant to be "temporary" and may be imposed for a maximum period of three months (*MiFIR, Article 40(6)*). However, these measures are renewable and no limit is set on the number of possible renewals (ESMA's website states: *"There is no limit to the number of times ESMA could renew product intervention measures"*).

In parallel, competent authorities also have the possibility to take intervention measures to prohibit or restrict the marketing of certain financial instruments (*MiFIR, Article 42*).

Therefore, an investment firm may be subject to two similar but not totally identical measures: a measure adopted by ESMA and a measure adopted by the regulator of the Member State in which it markets its products.

AMAFI acknowledges that the principle of adopting intervention measures is legitimate and beneficial in order to properly protect retail investors, especially in light of the very aggressive marketing practices that have developed in recent years with respect to certain particularly risky products. Nevertheless, it also considers that the fact that different intervention measures may potentially coexist indefinitely is not justified and creates legal uncertainty for financial operators.

Accordingly, AMAFI proposes that if a Member State has implemented national measures equivalent to measures that ESMA has published and recognised, ESMA's measures should cease to apply in that Member State, thereby avoiding the coexistence of divergent measures[20].

Moreover, given the temporary and exceptional nature of this power of intervention granted to ESMA, it seems necessary that ESMA consults the various stakeholders affected by its intervention measures before implementing them or deciding to renew them.

PROPOSED AMENDMENT

Regulation (EU) 600/2014	Proposed amendment
Article 40 **ESMA temporary intervention powers**	*Article 40* **ESMA temporary intervention powers**
[…]	[…]
3. When taking action under this Article, ESMA shall ensure that the action:	3. When taking action under this Article, ESMA shall ensure that the action:
a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action;	a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action;
b) does not create a risk of regulatory arbitrage; and	b) does not create a risk of regulatory arbitrage; and

[20] MiFIR Article 40.7 only resolves the situation where a competent authority has implemented national measures prior to those adopted by ESMA.

c) has been taken after consulting the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, where the measure relates to agricultural commodities derivatives.	c) has been taken after consulting the **different stakeholders who would be affected by this decision, in particular competent authorities, investors and investment firms** ~~public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, where the measure relates to agricultural commodities derivatives~~.
Where a competent authority or competent authorities have taken a measure under Article 42, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 43.	Where a competent authority or competent authorities have taken a measure under Article 42, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 43.
[…]	[…]
6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three-month period it shall expire.	6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three-month period it shall expire.
[…]	**Before any renewal, the stakeholder consultation laid down in paragraph 3(c) shall also be carried out.** **Prohibitions or restrictions imposed pursuant to paragraph 1 and any extensions thereof shall cease to apply to Member States that have implemented similar national provisions approved by ESMA.** […]

3. PROVISION OF INFORMATION - MEETING NEW ECONOMICAL AND ENVIRONMENTAL DEMANDS WHILE STILL PROVIDING APPROPRIATE INFORMATION TO CLIENTS

MiFID II did not revamp the investment firms' duty to provide of information to their clients.

As a matter of fact, Article 3 of Delegated Regulation (EU) 2017/565[21] supplementing MiFID II is nothing more than Article 3 of Directive 2006/73/EC[22] implementing MiFID I. It sets in stone the supremacy of paper unless the client, amongst other conditions, formally decides otherwise.

This requirement, which dates back to the inception of MiFID, in the early 2000's, is no longer suited to the reality of the relationships between investment firms and clients and goes counter to the Union's sustainable growth objectives, without providing better information to the said clients.

[21] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.
[22] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

For those reasons, an amendment to afore mentioned Article 3 is proposed.

➢ *Meeting dematerialisation and digitalisation demands*

Digitalisation, driven by ever-changing technologies and increasingly demanding clients, has been a reality for many years, including in the financial sector.

For investment firms, innovating towards dematerialisation and constantly improving responsiveness is a matter of survival.

The regulatory framework governing the services provided by these actors must evolve in parallel so as not to penalise them in their change process.

The choice of paper as the default option for the provision of information to clients is no longer appropriate: it is inconsistent with investment firms' economical requirements of digitalisation and constitutes a major obstacle to the responsiveness sought by their clients.

➢ *Meeting environmental challenges: sustainable finance*

Sustainable growth constitutes one of the EU's priorities. The Commission supports transition towards a sustainable financial system and adopted in March 2018 its action plan from which followed regulatory initiatives currently under review. More broadly, in its reflexional document "A sustainable Europe by 2030", it noted in January 2019: "Sustainable development is development that meets the needs of current generations without compromising the ability of future generations to meet theirs" and insisted on the crucial importance of rational consumption.

Any massive use of paper is irreconcilable with these objectives.

➢ *Promoting clients' proper information*

There is no evidence that the provision of paper-based information has any bearings on the quality of information delivered to the client. As a matter of fact, sending paper documents can actually prove to be ineffective in that regard: incorrect recipient or department, obsolete address, difficulties in updating clients' contact details, loss of documentation (…) with a strong risk that clients do not consider or process the said documentation. Investment firms have further noticed, in relation to paper-based information, a low feedback rate even where a response is actually required.

In addition to its benefits in terms of real access to clients, a digital document addresses two key concerns: storage and ease of retrieval allowing a swift access to items which the client may wish to refer to.

Furthermore, and in any case, building a framework around the use of digital mediums guarantees a level of protection at least equivalent to that of paper. It is incidentally the position that the French authorities adopted in the context of dematerialisation of contractual relationships in the financial sector[23].

[23] Ordonnance n°2017-1433 of 4 October 2017 regarding dematerialisation of contractual relationships in the financial sector

PROPOSED AMENDMENT

Delegated Regulation 2017/565	Proposed amendment
Article 3 **Conditions applying to the provision of information**	*Article 3* **Conditions applying to the provision of information**
1. Where, for the purposes of this Regulation, information is required to be provided in a durable medium as defined in Article 4(1) point 62 of Directive 2014/65/EU investment firms shall have the right to provide that information in a durable medium other than on paper only if :	1. Where, for the purposes of this Regulation, information is required to be provided in a durable medium as defined in Article 4(1) point 62 of Directive 2014/65/EU investment firms shall have the right to provide that information in a durable medium other than on paper only if :
(a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on; and	(a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on; and
(b) the person to whom the information is to be provided, when offered the choice between information on paper or in that other durable medium, specifically chooses the provision of the information in that other medium.	(b) the person to whom the information is to be provided, when offered the choice between information on paper or in that other durable medium, ~~specifically chooses the provision of the information in that other medium~~ **has not specifically chosen the provision of information on paper**.
2. Where, pursuant to Article 46, 47, 48, 49, 50 or 66(3) of this Regulation, an investment firm provides information to a client by means of a website and that information is not addressed personally to the client, investment firms shall ensure that the following conditions are satisfied:	2. Where, pursuant to Article 46, 47, 48, 49, 50 or 66(3) of this Regulation, an investment firm provides information to a client by means of a website ~~and that information is not addressed personally to the client~~, investment firms shall ensure that the following conditions are satisfied:
(a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on;	(a) the provision of that information in that medium is appropriate to the context in which the business between the firm and the client is, or is to be, carried on;
(b) the client must specifically consent to the provision of that information in that form;	(b) the client ~~must specifically consent to the provision of that information in that form;~~ **when offered the opportunity to have this information personally addressed, did not specifically choose the provision of information in that manner;**
(c) the client must be notified electronically of the address of the website, and the place on the website where the information may be accessed;	(c) the client must be notified electronically of the address of the website, and the place on the website where the information may be accessed;
(d) the information must be up to date;	(d) the information must be up to date;

(e) the information must be accessible continuously by means of that website for such period of time as the client may reasonably need to inspect it. 3. For the purposes of this Article, the provision of information by means of electronic communications shall be treated as appropriate to the context in which the business between the firm and the client is, or is to be, carried on where there is evidence that the client has regular access to the internet. The provision by the client of an e-mail address for the purposes of the carrying on of that business shall be treated as such evidence.	(e) the information must be accessible continuously by means of that website for such period of time as the client may reasonably need to inspect it. 3. For the purposes of this Article, the provision of information by means of electronic communications shall be treated as appropriate to the context in which the business between the firm and the client is, or is to be, carried on where there is evidence that the client has regular access to the internet. The provision by the client of an e-mail address for the purposes of the carrying on of that business shall be treated as such evidence.

4. SUITABILITY ASSESSMENT

➢ *Guidelines on product knowledge*

As it made known when the Guidelines were being drafted, AMAFI strongly objects to Guideline 7 "Arrangements necessary to understand investment products" of ESMA's Guidelines on Suitability[24]. Since MiFID 2 entered into force, and contrary to MiFID 1, issues of product knowledge applicable to the ISP that markets such products are now governed by the Product Governance system and, therefore, should no longer be included in the Suitability system.

This Guideline is particularly detrimental because the obligations it sets out are, at best, redundant and, at worst, in contradiction with Product Governance obligations: for example, paragraph 72 requires that an investment firm that provides advice (a "distributor" for Product Governance purposes) obtain information on financial instruments from several data providers; however, the Product Governance provisions stipulate that the information to be considered is the information provided by the Manufacturer (i.e. a single data source).

PROPOSED AMENDMENT

ESMA Guidelines on Suitability - General Guideline 7

AMAFI proposes that General Guideline 7 be deleted.

➢ *Consideration of concentration risk*

Paragraph 81 of ESMA's Guidelines on Suitability requires ISPs to take into account credit risks and, in particular, to verify that the client's portfolio does not have products issued by a single issuer or too few issuers ("concentration risk"). However, firstly, investment firms are not aware of all financial instruments their clients hold with other institutions, so this review of credit/concentration risk will only concern a portion of the client's assets and will be an incomplete review. Secondly, pursuant to the obligations on investor information and the drafting of sales documentation, investors are already fully informed that if they invest in product X they will be exposed to credit risk on issuer Y.

[24] ESMA guidelines on certain aspects of the MiFID II suitability requirements, French version dated 6 November 2018 (*ESMA35-43-1163*).

Therefore, AMAFI suggests that ESMA should recommend, as a best practice, that investment firms inform investors when, to their knowledge, investors' credit risk may be deemed overly concentrated. However, firms cannot be required to closely and systematically monitor this risk or to apply methodologies that include threshold mechanisms.

PROPOSED AMENDMENT

ESMA Guidelines on Suitability	Proposed amendment
Paragraph 81 *When a firm conducts a suitability assessment based on the consideration of the client's portfolio as a whole, it should ensure an appropriate degree of diversification within the client's portfolio, taking into account the client's portfolio exposure to the different financial risks. (geographical exposure, currency exposure, asset class exposure, etc.). In cases where, for example, from the firm's perspective, the size of a client's portfolio is too small to allow for an effective diversification in terms of credit risk, the firm could consider directing those clients towards types of investments that are "secured" or per se diversified (such as, for example, a diversified investment fund).*	*Paragraph 81* *When a firm conducts a suitability assessment based on the consideration of the client's portfolio as a whole, it should ensure an appropriate degree of diversification within the client's portfolio, taking into account the client's portfolio exposure to the different financial risks.* ***If it deems that credit risk is overly concentrated on too few issuers, it shall inform the client.*** ~~*(geographical exposure, currency exposure, asset class exposure, etc.).* In cases where, for example, from the firm's perspective, the size of a client's portfolio is too small to allow for an effective diversification in terms of credit risk, the firm could consider directing those clients towards types of investments that are "secured" or per se diversified (such as, for example, a diversified investment fund).~~
Firms should be especially prudent regarding credit risk: exposure of the client's portfolio to one single issuer or to issuers part of the same group should be particularly considered. This is because, if a client's portfolio is concentrated in products issued by one single entity (or entities of the same group), in case of default of that entity, the client may lose up to his entire investment. When operating through so called self-placement models, firms are reminded of ESMA's 2016 Statement on BRRD24 according to which "they should avoid an excessive concentration of investments in financial instruments subject to the resolution regime issued by the firm itself or by entities of the same group". Therefore, in addition to the methodologies to be implemented for the assessment of products credit risk (see guideline 7), firms should also adopt ad hoc measures and procedures to ensure that concentration with regard to credit risk is effectively identified, controlled and mitigated (for example, the identification of ex ante thresholds could be encompassed).	~~*Firms should be especially prudent regarding credit risk: exposure of the client's portfolio to one single issuer or to issuers part of the same group should be particularly considered. This is because, if a client's portfolio is concentrated in products issued by one single entity (or entities of the same group), in case of default of that entity, the client may lose up to his entire investment. When operating through so called self-placement models, firms are reminded of ESMA's 2016 Statement on BRRD24 according to which "they should avoid an excessive concentration of investments in financial instruments subject to the resolution regime issued by the firm itself or by entities of the same group". Therefore, in addition to the methodologies to be implemented for the assessment of products credit risk (see guideline 7), firms should also adopt ad hoc measures and procedures to ensure that concentration with regard to credit risk is effectively identified, controlled and mitigated (for example, the identification of ex ante thresholds could be encompassed).*~~

➢ *Switching investments*

Paragraph 91 of ESMA's Guidelines on Suitability requires ISPs to include in the suitability report *"the reasons why the benefits of the recommended switch are greater than its costs".* However, Levels 1 and 2 of MiFID 2 do not impose any formal requirements as to the manner in which ISPs are to provide this information to retail clients. As Level 3 cannot create additional obligations, AMAFI proposes that this paragraph requiring that such information be included in the suitability report be deleted.

PROPOSED AMENDMENT

ESMA Guidelines on Suitability	Proposed amendment
Paragraph 91 When providing investment advice, a clear explanation of the reasons why the benefits of the recommended switch are greater than its costs should be provided included in the suitability report the firm has to provide to the retail client before the transaction is made.	*Paragraph 91* When providing investment advice, a clear explanation of the reasons why the benefits of the recommended switch are greater than its costs should be provided ~~included in the suitability report the firm has to provide to the retail client before the transaction is made~~.

APPENDIX 4

MiFID II/ MiFIR REFIT – Territorial application DTO/STO & Transparency obligations

PRIORITY AND SUMMARY OF PROPOSED AMENDMENTS

(1) Exclude from the scope of the European STO/DTO transactions of EU-27 investment firms based in third countries

- *See amendments to Article 14.1, Article 18.1, Article 23.1 and Article 28.1 of Regulation (EU) 600/2014*

(2) Exempting third-country branches of EU-27 investment firms from transparency obligations

- *See amendments to Article 20.2 and Article 21.1 of Regulation (EU) 600/2014*

At a time when there is a widespread consensus that financial markets and investment firms are to be given a greater role in the financing of the EU's economy, it is crucial to ensure that regulations do not needlessly affect the competitiveness of EU investment firms. From this standpoint, the question of the territoriality of EU regulations, and superficially the costs and benefits stemming from their application to branches of EU firms in third countries, should be thoroughly considered. For EU investment firms, issues at stake revolve around competitiveness and costs. EU investment firms should not have to apply obligations stemming from both EU and 3rd countries regulations, as in practice such situations lead to the application of the most constraining obligation, and the creation of an unlevel playing field to the detriment of EU investment firms.

In the opinion of AMAFI, the STO[25] and derivatives trading obligation (DTO)[26] should not apply to transactions undertaken by EU investment firms' branches based in 3rd countries. We consider that applying EU trading obligations to the transactions involving branches of EU firms would not contribute to the protection of EU investors or to the integrity of EU markets and therefore it is better to apply local rules only.

AMAFI also calls for an exoneration of transparency obligations for 3rd country branches of EU firms so they can remain competitive. The transparency rules in MiFIR[27] have a direct impact on EU investment firms' competitiveness which have a branch located outside the EU, mainly in the US and in Asia. EU branches face a competitive disadvantage given the significant differences between the EU transparency regime and the local ones. For instance, they are obliged to display pre-trade quotes and post-trade transparency while their competitors do not have to comply with such requirements.

[25] Article 23 MiFIR
[26] Article 28 MiFIR
[27] Articles 14, 18, 20 and 21 MiFIR

PROPOSED AMENDMENTS

Regulation (EU) N° 600/2014	AMAFI amendment
Article 23 **Trading obligation for investment firms** 1. An investment firm shall ensure the trades it undertakes in shares admitted to trading on a regulated market or traded on a trading venue shall take place on a regulated market, MTF or systematic internaliser, or a third-country trading venue assessed as equivalent in accordance with Article 25(4)(a) of Directive 2014/65/EU, as appropriate, unless their characteristics include that they: **(a)** are non-systematic, ad-hoc, irregular and infrequent; or **(b)** are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process	*Article 23* **Trading obligation for investment firms** 1. An investment firm shall ensure the trades it undertakes in shares admitted to trading on a regulated market or traded on a trading venue shall take place on a regulated market, MTF or systematic internaliser, or a third-country trading venue assessed as equivalent in accordance with Article 25(4)(a) of Directive 2014/65/EU, as appropriate, unless their characteristics include that they: **(a)** are non-systematic, ad-hoc, irregular and infrequent; or **(b)** are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process. **This does not apply to transactions undertaken by EU investment firms' branches based in 3rd countries.**
Article 28 **Obligation to trade on regulated markets, MTFs or OTFs** 1. Financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 and non-financial counterparties that meet the conditions referred to in Article 10(1)(b) thereof shall conclude transactions which are neither intragroup transactions as defined in Article 3 of that Regulation nor transactions covered by the transitional provisions in Article 89 of that Regulation with other such financial counterparties or other such non-financial counterparties that meet the conditions referred to in Article 10(1)(b) of Regulation (EU) No 648/2012 in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 32 and listed in the register referred to in Article 34 only on: **(a)** regulated markets; **(b)** MTFs;	*Article 28* **Obligation to trade on regulated markets, MTFs or OTFs** 1. Financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 and non-financial counterparties that meet the conditions referred to in Article 10(1)(b) thereof shall conclude transactions which are neither intragroup transactions as defined in Article 3 of that Regulation nor transactions covered by the transitional provisions in Article 89 of that Regulation with other such financial counterparties or other such non-financial counterparties that meet the conditions referred to in Article 10(1)(b) of Regulation (EU) No 648/2012 in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 32 and listed in the register referred to in Article 34 only on: **(a)** regulated markets; **(b)** MTFs;

(c) OTFs; or **(d)** third-country trading venues, provided that the Commission has adopted a decision in accordance with paragraph 4 and provided that the third country provides for an effective equivalent system for the recognition of trading venues authorised under Directive 2014/65/EU to admit to trading or trade derivatives declared subject to a trading obligation in that third country on a non-exclusive basis. contribute to the price discovery process	**(c)** OTFs; or **(d)** third-country trading venues, provided that the Commission has adopted a decision in accordance with paragraph 4 and provided that the third country provides for an effective equivalent system for the recognition of trading venues authorised under Directive 2014/65/EU to admit to trading or trade derivatives declared subject to a trading obligation in that third country on a non-exclusive basis. contribute to the price discovery process **The trading obligation does not apply to transactions undertaken by EU investment firms' branches based in 3rd countries.**
Article 14 **Obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments** 1. Investment firms shall make public firm quotes in respect of those shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue for which they are systematic internalisers and for which there is a liquid market. Where there is not a liquid market for the financial instruments referred to in the first subparagraph, systematic internalisers shall disclose quotes to their clients upon request.	*Article 14* **Obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments** 1. Investment firms shall make public firm quotes in respect of those shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue for which they are systematic internalisers and for which there is a liquid market. Where there is not a liquid market for the financial instruments referred to in the first subparagraph, systematic internalisers shall disclose quotes to their clients upon request. **This does not apply to transactions undertaken by EU investment firms' branches based in 3rd countries.**
Article 18 **Obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives** 1. Investment firms shall make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives traded on a trading venue for which they are systematic internalisers and for which there is a liquid market when the following conditions are fulfilled:	*Article 18* **Obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives** 1. Investment firms shall make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives traded on a trading venue for which they are systematic internalisers and for which there is a liquid market when the following conditions are fulfilled:

(a) they are prompted for a quote by a client of the systematic internaliser; (b) they agree to provide a quote.	(a) they are prompted for a quote by a client of the systematic internaliser; (b) they agree to provide a quote. **<u>This does not apply to transactions undertaken by EU investment firms' branches based in 3rd countries.</u>**
Article 20 **Post-trade disclosure by investment firms, including systematic internalisers, in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments** 1. Investment firms which, either on own account or on behalf of clients, conclude transactions in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, shall make public the volume and price of those transactions and the time at which they were concluded. That information shall be made public through an APA. 2. The information which is made public in accordance with paragraph 1 of this Article and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 6, including the regulatory technical standards adopted in accordance with Article 7(2)(a). Where the measures adopted pursuant to Article 7 provide for deferred publication for certain categories of transaction in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, that possibility shall also apply to those transactions when undertaken outside trading venues.	*Article 20* **Post-trade disclosure by investment firms, including systematic internalisers, in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments** 1. Investment firms which, either on own account or on behalf of clients, conclude transactions in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, shall make public the volume and price of those transactions and the time at which they were concluded. That information shall be made public through an APA. 2. The information which is made public in accordance with paragraph 1 of this Article and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 6, including the regulatory technical standards adopted in accordance with Article 7(2)(a). Where the measures adopted pursuant to Article 7 provide for deferred publication for certain categories of transaction in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, that possibility shall also apply to those transactions when undertaken outside trading venues. **<u>This does not apply to transactions undertaken by EU investment firms' branches based in 3rd countries.</u>**
Article 21 **Post-trade disclosure by investment firms, including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives** 1. Investment firms which, either on own account or on behalf of clients, conclude transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue shall make public the volume and price of those transactions and the time at which they were	*Article 21* **Post-trade disclosure by investment firms, including systematic internalisers, in respect of bonds, structured finance products, emission allowances and derivatives** 1. Investment firms which, either on own account or on behalf of clients, conclude transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue shall make public the volume and price of those transactions and the time at which they were

concluded. That information shall be made public through an APA.	concluded. That information shall be made public through an APA. **This does not apply to transactions undertaken by EU investment firms' branches based in 3rd countries.**

This appendix was also published independently as note AMAFI 19-87

APPENDIX 5

MiFID II/ MiFIR REFIT
Cost of market data and consolidated tape

PRIORITY

Operationalize the concept of reasonable commercial basis by advocating the simplification and harmonisation of tariff schedules, contracts and audit procedures for trading platforms

1. BACKGROUND

As part of its work on MiFID II Refit (*see AMAFI / 19-85*), the French Association for financial market (AMAFI) decided to focus on specific workstreams which it considers central. Among them is the issue of the cost of market data (pre-and post-trade data) which is a key concern for AMAFI members. Cost of market data together with the implementation of a consolidated tape (CT) for equity are one of the topics for which the European Commission, after consulting ESMA must present a report on to the European Parliament and the Council.

On 12 July 2019, ESMA issued a consultation Paper on these questions. This document constitutes AMAFI general position that was expressed in its response to the consultation paper (*AMAFI / 19-84*).

2. COST OF PRE-AND POST-TRADE DATA

➢ *Analysis of MiFID II/MiFIR provisions for markets data*

MiFID II contains provisions aiming at improving the quality and availability of market data and **reducing** the costs for market participants. In order to reduce costs MiFID II requires trading venues to make pre-trade and post-trade data available separately and to make them available on a reasonable commercial basis (RCB). In addition, 15 minutes after publication, market data must be freely available.

Market participants believe that so far **MiFID II has not yet delivered on its objective** to lower the prices of market data. The main reasons are listed below:

- Unit prices of market data have not decreased and in some cases have continued to rise in a small proportion.
- Trading venues have added several items to their pricing list in order to provide data separately and have transformed existing licences. For instance, many trading venues have introduced new market data fees to cover usage of their data by Systematic Internalisers or other Trading Venues.
- Market data agreements proposed by trading venues are becoming more and more complex and difficult to understand and to comply with. This translated into a significant increase in resources required to monitor the use of market data.
- Audit procedures imposed are also more and more costly.
- Trading venues are not encouraged to lower their prices because each trading venue, notably each Regulated Market, provides indispensable datasets that cannot be replaced.

Therefore, market participants face increased costs in the acquisition and management of data and the compliance to complex auditing procedures.

Most Trading Venues acknowledge that the revenue they make from market data services is at least stable or has just increased by low single digit percent every year. This paradoxical effect can be explained by the fact that most investment firms have implemented significant optimisation programs with a view to reduce their overall costs of market data. Those programs have led to a huge decrease of the number of front office users having access to real time market data from trading venues.

All in all, it appears that, in order to maintain the same level of revenues, trading venues tend to compensate the decrease in the number of users by increasing the costs for each client, which constitutes a **vicious circle for all market participants**.

The table below gives some examples of public information related to market data revenues of the main trading venues in the EU together with the number of users.

- According to Deutsche Borse Group Q4 and FY/2018 Preliminary Results, data subscriptions (number of users) went down 18% between Q4/17 and Q4/18 when related revenue remained stable over the same period.
- According to BME financial reports, BME revenue on Market Data & VAS increased from 59 M€ in 2016 to 66.7 M€ in 2018 i.e +13.1% over a period of 2 years.
- According to LSEG Financial reports, London Stock Exchange Group (including Borsa Italia) real time market data revenue increased +14% in a period of 3 years between 2015 (82.2 M£) and 2018 (94 M£) whereas number of accesses decreased by -16% over the same period of time (from 207k to 174k).

It must also be noted that ESMA's regulatory power only applies to regulated entities. Yet, the market structure and value chain in which market data is produced and consumed are complex and do not only relies on trading venues but also on **data vendors** which are not regulated for this type of activities. Across the market data value chain, trading venues are frequently not "the last mile" of data distribution since a considerable proportion of users obtain data through data redistributors. As an illustration, Euronext is not in control of fees billed to end-users in respect of the consumption of 74% of their market data as these are billed directly by data redistributors. Changes in prices faced by end-users are therefore not only due to trading venues, since data redistributors charge mark-ups and/or additional fees on trading venue market data charged by.

In assessing developments in fees for pre- and post-trade transparency data in light of the review of the RCB provisions, it is important that appropriate consideration be given to the share and relative weight of market data costs between those arising from trading venues and those coming from the rest of the market data value chain.

One initiative that would assist the market greatly in understanding the composition of the cost of data could be the imposition of a transparency obligation on data redistributors and in respect of their own fee schemes.

➢ *AMAFI's Proposals*

AMAFI considers that the RCB concept has proved so far hard to monitor for the industry and for the authorities alike. Still, at that stage, AMAFI is not in favour of the adoption of intrusive approaches such as Long Run Incremental Cost + model or a revenue cap.

We believe that the objective should be to make the transparency requirements more efficient, so that transparency can be used to enforce the RCB obligation. It requires that:

- The pricing lists published by trading venues become easily comparable. It supposes that the fee schedules provided by the trading venues are harmonised and simplified.
- Market data agreements are drastically simplified and are valid for a sufficient period of time (at least one year) in order for data users to avoid deploying unnecessary resources.
- Audit procedures are simplified and harmonised.
- High level definitions (information/market data, derived data/other original created work/etcetera, display use, non-display use…) are harmonised.

AMAFI believes that it first belongs to trading venues, in relation with market participants, to put in place a set of best practices to achieve the objectives mentioned above.

Would it not be the case within a reasonable time period, AMAFI considers that ESMA should impose measures ensuring actual comparability and harmonisation of practices.

3. CONSOLIDATED TAPE FOR EQUITY

In the equity space, AMAFI considers that the main issue in terms of the effectiveness of market transparency is the decrease of market data costs. There is no clear rationale and use case for a post trade CT given that data vendors cover around 90%-95% of EU equities trading.

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APPENDIX 6

MiFID II/ MiFIR REFIT
Systematic internaliser regime
for OTC derivatives & reference data

PRIORITIES AND SUMMARY OF PROPOSED AMENDMENTS

(1) Clarify that the decision to be a systematic internaliser for non-TOTV instruments can only be decided on a voluntary basis

- *See amendments to Article 27.1 of Regulation (EU) 600/2014 and to Article 1 of Delegated Regulation (EU) 2017/585*

(2) Clarify that the systematic internalisation regime applies only to TOTV instruments

- *See amendments to Article 4.20 of Directive 2014/65/EU and to Article 3 of Delegated Regulation (EU) 2017/585*

1. BACKGROUND

Article 15 of Delegated Regulation (EU) 2017/565 provides that an investment firm will be considered to be a systematic internaliser for derivatives belonging to a class of derivatives if it internalises to such an extent that certain pre-established limits for a frequent and systematic basis and for a substantial basis are both exceeded. Regardless of whether these thresholds are exceeded, investment firms may also choose to opt for the systematic internaliser regime for these same derivatives.

The classes of derivatives covered by Delegated Regulation (EU) 2017/565 are defined in Annex 3 of Delegated Regulation (EU) 2017/583.

The calculations to determine the transparency obligations and thresholds of the mandatory regime are set out in Article 13 of Delegated Regulation (EU) 2017/583. The data ESMA makes available to establish the reference basis for these calculations includes only data relating to TOTV instruments because ESMA bases its calculations on data supplied by trading venues, APAs and CTPs[28]. Moreover, ESMA states in its Q&A on transparency[29] that it only publishes information on TOTV instruments in order to determine whether an investment firm meets the thresholds required to be considered a systematic internaliser[30].

The information provided in ESMA's Q&A referred to above is consistent with the fact that (i) the transparency rules only apply to TOTV instruments and (ii) only data relating to such TOTV instruments is taken into account for threshold calculations. Therefore, this information seems to justify the conclusion that non-TOTV instruments are not to be included in these threshold calculations.

[28] According to MiFIR Article 22
[29] ESMA70-872942901-35
[30] ESMA70-872942901-35 Section 7, Q11

Instruments classified as "uTOTVs" are defined in Article 26(2)(b) and (c) of Regulation (EU) 600/2014. They may or may not be traded on a trading venue. In either case, the underlying is a TOTV and, therefore, this category includes:

- Financial instruments whose underlying is a financial instrument admitted to trading or traded on a trading venue;

- Financial instruments whose underlying is an index or basket composed of financial instruments admitted to trading or traded on a trading venue.

Under current law, a firm that is a systematic internaliser is required to supply the competent authority with reference data relating to uTOTV instruments traded on its system.[31] In addition, Delegated Regulation (EU) 2017/585 on reference data provides that an investment firm that is a systematic internaliser for an asset class and trades in a non-TOTV instrument, but whose underlying is a TOTV, must assign an ISIN code to that uTOTV instrument.

2. THE SYSTEMATIC INTERNALISER REGIME AND NON-TOTV AND UTOTV INSTRUMENTS

Application of the systematic internaliser regime to non-TOTV instruments and the requirement to supply reference data for uTOTV instruments impose major burdens. Furthermore, assigning ISIN codes to uTOTV instruments creates difficulties in terms of transparency, efficiency and costs for both regulators and investment firms.

- If a uTOTV instrument is traded on a trading venue

If a uTOTV instrument is traded on a trading venue it becomes a TOTV and the trading venue is required by Article 3 of Delegated Regulation (EU) 2017/585 to assign it an ISIN. Therefore, an investment firm that is an SI for this instrument should not be required to do so.

- If a uTOTV instrument is not traded on a trading venue

Under current law, Article 27 of MiFIR and Article 3 of Delegated Regulation (EU) 2017/585 require that reference data be supplied and an ISIN code be assigned to any financial instrument that is traded by an SI. In this particular case, the cost-benefit analysis of the burdens imposed by these information obligations with respect to uTOTV instruments is negative.

Firstly, the obligation to supply reference data significantly increases the volume of such data and the number of ISIN codes to be assigned by institutions, which imposes significant operating costs on them. The volume of reference data and the number of ISIN codes created are increasing exponentially, making it considerably more difficult to populate the FIRDS database, at the expense of the quality of transparency data. In fact, because uTOTV instruments are not subject to transparency obligations, the creation of ISINs for these products increases the volume of ISINs assigned without making transparency data more efficient or improving effective use of the FIRDS database. For example, in April 2018, according to ANNA DSB[32], 8.2 million OTC ISINs were created, 16% of which are in the FIRDS Reference Data database (1.3 million) and only 140,000 are in the FIRDS Transparency Data database. In other words, 6.9 million ISIN codes have been created in ANNA DSB but have not been reported to FIRDS.

It seems clear that this reference data makes no positive contribution to market transparency because the transparency rules apply only to TOTV instruments.

[31] Pursuant to MiFIR Article 27.
[32] https://www.anna-dsb.com/2018/05/04/firds-data-analysis-for-april-2018/

Moreover, with respect to the reports to be submitted to regulators, it should be pointed out that Delegated Regulation (EU) 2017/590 requires that fields 42 to 56 of Table 2 be completed for instruments for which an ISIN code is not assigned. It would seem that the information provided pursuant to this requirement is more relevant than simply assigning an ISIN code, as it is more detailed and focuses on the uTOTV instrument itself. Therefore, it provides the competent authorities with sufficiently granular and complete information about the type of the instrument in which a transaction has been made.

Lastly, in the specific case of systematic internalisers, providing reference data for and assigning ISIN codes to transactions which, by their nature, are carried out with only one investor is likely to provide irrelevant information to other investors.

For these reasons, AMAFI proposes that MiFIR and Delegated Regulation (EU) 2017/585 be amended to delete the obligation imposed on investment firms to supply reference data for uTOTV instruments, yet leave room for discretion for institutions that have adopted this practice. In fact, despite the burdens imposed by this obligation, certain institutions have already implemented this system. In such case, those institutions may not wish to modify their information systems accordingly and should retain a certain amount of discretion in this respect.

By amending the laws in this way, the obligations that would apply to an investment firm that is a systematic internaliser would in practice be limited to TOTV instruments only. Therefore, the definition of systematic internaliser should be amended and ESMA's Q&A on "transparency topics" should be clarified accordingly to make it clear that only investment firms that have opted to follow the systematic internaliser regime for non-TOTV instruments will be required to supply reference data.

These suggestions to amend the level 1 MiFIR laws could be adopted in connection with the MiFID refit, whereas the suggested clarification of the Q&A could be done within a shorter period of time.

SOLUTIONS AND PROPOSED CHANGES TO THE LAWS

Based on the points discussed above, it is imperative to eliminate the burdens and practices that hinder the effectiveness of the transparency provisions by amending the aforementioned laws.

Accordingly, the objectives of the amendments proposed below are to:

- **(i)** Make clear that the decision to be a systematic internaliser for non-TOTV instruments can be voluntary only;
- **(ii)** Eliminate the requirement for investment firms that become an SI for an asset class or an instrument only[33] to supply reference data and assign an ISIN code to uTOTV instruments. However, investment firms that may wish to adopt this system would still be entitled to do so.

The Association suggests adopting the amendments below and changing in consequence thereof the points in ESMA's Q&A that are inconsistent with these amendments[34]:

[33] The optional regime allows for finer granularity with respect to the instruments for which an investment firm chooses to be an IS. See ESMA70-872942901-35 Section 7, Q11a

[34] The points that should be changed are found in Q11 of the "Systematic internaliser regime" section of ESMA70-872942901-35 Q&A on the transparency regime

Directive 2014/65/EU	AMAFI amendment
Article 4 **Definitions** 20) "systematic internaliser" means an investment firm which, on an organised, frequent systematic and substantial basis, deals on own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system. The frequent and systematic basis shall be measured by the number of OTC trades in the financial instrument carried out by the investment firm on own account when executing client orders. The substantial basis shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a specific financial instrument or by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument. The definition of a systematic internaliser shall apply only where the pre-set limits for a frequent and systematic basis and for a substantial basis are both crossed or where an investment firm chooses to opt-in under the systematic internaliser regime;	*Article 4* **Definitions** 20) "systematic internaliser" means an investment firm which, on an organised, frequent systematic and substantial basis, deals on own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system. The frequent and systematic basis shall be measured by the number of OTC trades in ~~**the**~~ **a** financial instrument**, traded on a trading venue**, carried out by the investment firm on own account when executing client orders. The substantial basis shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a ~~**specific**~~ financial instrument **traded on a trading venue** or by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument. The definition of a systematic internaliser shall apply only where the pre-set limits for a frequent and systematic basis and for a substantial basis are both crossed or where an investment firm chooses to opt-in under the systematic internaliser regime;[35]

Regulation (EU) 600/2014	AMAFI amendment
Article 27 **Obligation to supply financial instrument reference data** 1. With regard to financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs, trading venues shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 26. With regard to other financial instruments covered by Article 26(2) traded on its system, each systematic	*Article 27* **Obligation to supply financial instrument reference data** 1. With regard to financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs, trading venues shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 26. With regard to other financial instruments covered by Article 26(2) traded on its system, each systematic internaliser **that opts into the systematic**

[35] Consideration should be given to whether the amended definition of systematic internaliser requires the provisions on transparency calculations (in particular in Articles 12-16 of Delegated Regulation (EU) 2017/565) to be amended accordingly.

internaliser shall provide its competent authority with reference data relating to those financial instruments. Identifying reference data shall be made ready for submission to the competent authority in an electronic and standardised format before trading commences in the financial instrument that it refers to. The financial instrument reference data shall be updated whenever there are changes to the data with respect to a financial instrument. Those notifications are to be transmitted by competent authorities without delay to ESMA, which shall publish them immediately on its website. ESMA shall give competent authorities access to those reference data.	**internaliser regime for those financial instruments** shall provide its competent authority with reference data relating to those financial instruments. Identifying reference data shall be made ready for submission to the competent authority in an electronic and standardised format before trading commences in the financial instrument that it refers to. The financial instrument reference data shall be updated whenever there are changes to the data with respect to a financial instrument. Those notifications are to be transmitted by competent authorities without delay to ESMA, which shall publish them immediately on its website. ESMA shall give competent authorities access to those reference data.

Delegated Regulation (EU) 2017/585	**AMAFI amendment**
N/A	*Article 1a* **Definitions** **For the purposes of this Delegated Regulation, "systematic internaliser" means an investment firm that has opted into the systematic internaliser regime for the financial instruments referred to in Article 26(2)(b) and (c) of Regulation (EU) No 600/2014.**
Article 3 **Identification of financial instruments and legal entities** 1. Prior to the commencement of trading in a financial instrument in a trading venue or systematic internaliser, the trading venue or systematic internaliser concerned shall obtain the ISO 6166 International Securities Identifying Number ('ISIN') code for the financial instrument.	*Article 3* **Identification of financial instruments and legal entities** 1. Prior to the commencement of trading in a financial instrument in a trading venue or systematic internaliser, the trading venue or systematic internaliser concerned shall obtain the ISO 6166 International Securities Identifying Number ('ISIN') code for the financial instrument. **1 *bis*. The obligation specified in paragraph 1 shall not apply to the instruments referred to in Article 26(2)(b) and (c) of Regulation (EU) 600/2014**.

The proposed amendments do not affect the transparency objectives because:

- uTOTV instruments traded on a trading venue will, in effect, become TOTVs and, therefore, will be assigned an ISIN code by the trading venue and will be thus subject to the transparency requirements;
- uTOTV instruments not admitted to trading on a trading platform are not subject to the transparency rules;

- Delegated Regulation (EU) 2017/590 already applies to information about non-TOTV instruments (i.e. instruments without ISIN codes).[36]

However, AMAFI notes that under current law nothing prevents institutions that already assign ISIN codes to uTOTV instruments (non-TOTVs) from continuing to do so.

[36] See Delegated Regulation (EU) 2017/590 Table 2, fields 42 to 56

APPENDIX 7

MiFID II/ MiFIR REFIT
SMEs research financing

PRIORITY AND SUMMARY OF PROPOSED AMENDMENT

Introduce more proportionality into the incentive scheme

- *See amendment of Article 24.14 of Directive 2014/65/EU*

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.

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 AMAFI on the evolution of the coverage of French corporate companies[37], 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:

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

- 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 capital[38].

Given that, 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. Proportionality should be granted either for research dedicated to SMEs, SMEs being in this context companies with a market capitalization below one billion euros, and/or local firms specialized in SMEs research.

PROPOSED AMENDMENT

Directive 2014/65/EU	AMAFI amendment
Article 24-14 The delegated acts referred to in paragraph 13 shall take into account: **(a)** the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions; **(b)** the nature and range of products being offered or considered including different types of financial instruments; **(c)** the retail or professional nature of the client or potential clients or, in the case of paragraphs 4 and 5, their classification as eligible counterparties.	*Article 24-14* The delegated acts referred to in paragraph 13 shall take into account: **(a)** the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions; **(b)** the nature and range of products being offered or considered including different types of financial instruments; **(c)** the retail or professional nature of the client or potential clients or, in the case of paragraphs 4 and 5, their classification as eligible counterparties; **(d)** concerning investment research, the proportionality of the regime for SMEs.

[38] http://observatoire-financement-entreprises.com/role-des-analystes-sur-l-attractivite-et-la-liquidite-des-pme-eti