

18 June 2015

HM Treasury
MiFID 2 Consultation
Securities and Markets
Financial Services Group
1 Horse Guards Road
London SW1A 2HQ
Email: mifid2consultation@hmtreasury.gsi.gov.uk

AFME response to the HM Treasury Consultation on the Transposition of the Markets in Financial Instruments Directive II

Dear Sir, dear Madam

Please find attached the AFME response to this consultation which represents the views of members of the Association for Financial Markets in Europe (AFME) and has been based on the feedback from relevant AFME working groups.

Please do not hesitate to contact me if you would like to discuss the issues covered in this submission or would like us to provide further information about any of the matters which our members have raised. We would be happy to continue to engage with HM Treasury in ongoing dialogue on this and, in due course, may raise with you any further issues on the subject that AFME Members bring to our attention.

Yours faithfully

Angela Teke
Managing Director, Compliance
Angela.teke@afme.eu
Tel: 0207 743 9369

Consultation response

18 June 2015

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the **HM Treasury Consultation on the Transposition of the Markets in Financial Instruments Directive II**. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Please find below our response to the consultation, which is based on Member feedback and addresses the chapters of specific interest to Members.

Questions

Chapter 2 on Third countries

Questions on the Third Country regime

1 Do you agree the UK should maintain its current third country regime and not implement Article 39 MiFID II? Please explain your reasons why and supply any evidence you have to support your answer.

If you do not agree, please provide your views on:

- a) what would be the likely or expected economic and non-economic consequences of implementing the MiFID II third country regime?
- b) what impact would the implementation of Article 39 MiFID II have in relation to retail cross-border business currently conducted under applicable exclusions?

Please supply any evidence you have to support your answers.

AFME response:

- The third country regime is an issue of great importance to AFME Members and it is therefore essential that the UK approach to transposition strikes the right balance between protecting investors whilst maintaining open and accessible EU markets. Generally Members believe that the UK overseas person exclusion delivers these tasks extremely well. Additionally, the current regime is well understood and has proven to work well in practice. We are therefore fully supportive of the government's proposed approach to maintain the UK's existing third country regime and opt out of Article 39 of MiFID II.

AFME Members have also considered that if the UK does not formally opt into Article 39 of the MiFID II regime (and therefore removes the possibility of passporting wholesale business through Article 47(3) MiFIR), passporting could still be pursued through Article 46 MiFIR. This would reflect the policy intention of Article 46 MiFIR and the fact that legally there is no distinction between a branch of a third country and head office. AFME members are therefore encouraging HMT to explore all its legal options in this respect.

Irrespective of the foregoing, AFME Members would urge HMT to ensure that, should its thinking on the interpretation of the Level 1 text evolve, it does not impose any additional or parallel regime or take any other action which might put the operation and/or scope of the current overseas persons exclusion at risk.

Whilst we recognise that the application of Article 46/47 MiFIR will not become relevant for some time (following a positive equivalence determination and the three-year transition period), our Members strongly believe that at this stage the UK should not formally implement Article 39. However, at the same time we would suggest that HMT should remain mindful of the UK's overall competitive position, also in the context of the transposition approaches of other Member States. As Member States' and firms' understanding of the impact of the MiFID/MiFIR third country regime develops, HMT should keep its position on Article 39 MiFID II under careful review.

Chapter 4: Position limits and reporting

AFME response:

- AFME would like to support the response of the Global Financial Markets Association (GFMA) which has been submitted under separate cover.

Chapter 6: Structured deposits

Questions in relation to power to Structured Deposits

Q13: Do you consider the regulated activities that have been "switched on" for structured deposits appropriate to cover the Article 1(4) MiFID II concepts of "selling or advising"? In particular is it appropriate in to treat Article 25(2) RAO and Article 37 RAO as within the meaning of "selling"?

Q14: Is the definition of structured deposits provided at Article 3 RAO clear?

Q15: Do the amendments to the FPO ensure consistency between it and the amended RAO activities in relation to structured deposits?

Q16: Do you have any further comment on the draft secondary legislation in relation to structured deposits?

AFME response to questions 13 – 16:

- AFME members believe that any changes to the inclusion of structured deposits within the regulatory perimeter should go no further than what is required by MiFID II.

- Any changes which go beyond the requirements of MiFID II should be accompanied by a full cost benefit analysis and clear rationale for any such extension of remit.
- Whilst we agree that Art 25(2) RAO is appropriate to cover the Article 1(4) MiFID II concept of selling or advising, we do not agree that Article 37 RAO is appropriate/relevant to include, as “selling/advising” is already covered within Art 25(2).
- We agree that the definition of structured deposits at Article 3 RAO is clear.
- However, we do not agree that the proposed FPO amendments are consistent with the amended RAO activities for the following reason: whilst the concepts of “dealing” and “arranging” are covered (at paragraphs 3(1) and paragraph 4 of Schedule 1 FPO respectively), there seems to have been an oversight where the concept of “advising” is concerned. Consequently, there should be an amendment to paragraph 7 of Schedule 1 FPO.

Chapter 7: Power to Remove Board Members

Questions in relation to power to remove member of the board:

17. Do you consider that existing FSMA powers are sufficient for the purposes of Article 69(2)(u) MiFID? If yes, please explain how these powers do not suffer from the limitations mentioned above.
18. Do you agree that FSMA powers in relation to market operators have to be amended either under Option A or B?
19. Do you consider that Option B is appropriate to transpose Article 69(2)(u) MiFID? If not, please specify what your preferred alternative option is and how this meets Article 69(2)(u) of MiFID.
20. What factors do you think should be taken into account in relation to the drafting of the standalone power suggested at Option B? Please provide answers both in relation to the proposal for investment firms and market operators.

AFME Response to questions 17-20:

- MiFID II introduces a new provision in Article 69(2)(u), which requires that a competent authority has at least the power to “require the removal of a natural person from the management board of an investment firm or market operator”.
- The proposed “Option A” is to rely on the existing FSMA powers and the proposed “Option B” is to introduce new powers.
- Our Members’ preference is always for less and less complex regulation, unless there is a clearly identified and evidenced gap in the existing regulatory regime. The Strengthening Personal Accountability regime has been introduced with enormous complexity and created, alongside the Approved Persons regime which will continue to exist for smaller firms and investment management firms, a hugely complex personal regulatory environment.
- Our Members’ preference is Option A. The government acknowledges at page 34 of the Consultation Paper that existing powers “could be regarded as adequately transposing Article 69(2)(u)” – subject to the need to extend the scope to certain persons currently not covered by

the existing regime. Given that the existing regime (subject to some amendment) is sufficient, Members do not consider that a case has been made for the need to introduce a brand new set of powers which would fulfil a similar objective; nor is it clear where the real benefit of any such introduction of new powers would lie. Members also note the absence of a full cost benefit analysis supporting Option B.

- We do however see as necessary (i) the need to bring RIEs into the ambit of the approved persons regime and (ii) the need for the regulators to have the power to remove non-executive directors of firms falling within the Strengthening Personal Accountability regime (because only non-executive directors chairing committees or representing shareholders will be Senior Managers). Once that is done, the regulators will have ample powers and will certainly be compliant with article 69(2)(u).

Please do not hesitate to contact me if you would like to discuss the issues covered in this submission or would like us to provide further information about any of the matters which our members have raised. We would be happy to continue to engage with HM Treasury in ongoing dialogue on this and, in due course, may raise with you any further issues on the subject that AFME Members bring to our attention.

AFME contacts

Angela Teke

angela.teke@afme.eu

+44 (0)207 743 9369