



MiFID II/MiFIR Refit

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AMAFI preliminary remarks on the position paper of the German Ministry of Finance

Investor Protection issues

DISCLAIMER

“AMAFI remarks” as provided in the following table aim at sharing AMAFI preliminary reactions to the German Ministry of Finance proposals as presented in their papers “*Necessary amendments and revisions to investor protection provisions in MiFID and PRIIPS*” dated 12 September 2019. It must be outlined that those proposals are sometimes quite general without sometimes necessary details nor specific solution like propositions of text amendments. Therefore, AMAFI reactions are only based on our understanding of the general point made by the German Ministry of Finance and may be further precise or amended considering next developments.

“AMAFI remarks” have been made based on AMAFI “MiFID 2/ MiFID Refit” positions from documents that are - for some of them - still under discussion. Therefore, positions thus presented could still be amended.

Time scope	Areas where amendments are needed	German Ministry of Finance proposals	AMAFI remarks
Investor protection provisions in MiFID and PRIIPS¹			
MiFID near term	Wholesale clients	<p>Currently, all information requirements on costs and charges also apply to professional clients and eligible counterparties. Fulfilling these requirements is burdensome for investment firms, while wholesale clients usually have different sources of information and the expertise to assess costs and charges without being dependent on information about every transaction. Therefore, in order to avoid unnecessary burdens to investment firms as well as to professional clients and eligible counterparties, the client information requirements of MiFID and the respective level 2 provisions should be limited by giving these clients the possibility to opt out.</p>	<p>AMAFI agrees with the burdensome of some MiFID II requirements (especially those related to costs and charges) for professional and eligible counterparties. Nevertheless, AMAFI proposes not to apply such requirements to eligible counterparties (unless the EC requests to receive the information) rather than propose the possibility to “opt out”.</p> <p>As for professional clients, AMAFI proposes a more proportionate regime (<i>i.e.</i> focusing on service costs and provided through tariff grids).</p>

¹ German Ministry of Finance, «[Necessary amendments and revisions to investor protection provisions in MiFID and PRIIPS](#)», August 2019

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MiFID near term	Distance communication	<p>Under MiFID, clients must be informed about the costs and related charges of a financial instrument in good time before the provision of investment services in a durable medium. This rule also applies to clients using a means of distance communication (e.g. telephone orders), where a timely provision of ex-ante information in many cases might possibly not be provided due to practical reasons. To ensure that these clients can use a means of distance communication effectively, and to ensure the timely conclusion of transactions, particularly in fast markets, investment firms should be allowed to provide ex-ante cost information after the client is bound by an agreement under the same conditions set out in Article 25 (6) MiFID regarding the provision of a suitability statement.</p>	AMAFI agrees with this proposal.
MiFID near term	Recording of telephone conversations	<p>The implementation of the recording requirement (Art. 16 (7) MiFID) causes high costs for investment firms, raises data privacy concerns for customers, and has the potential to impair the confidentiality of communication between investment firm and client. The German Ministry of Finance is therefore in favour of deleting the provision. At a minimum, clients should be allowed to waive the telephone recording requirement, under the condition that they are provided with information regarding the risks of not being able to use a telephone recording as proof in cases of dispute with an advisor.</p>	AMAFI does not have concern about this issue.

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MiFID near term	Product governance requirements for simple financial instruments	Simple financial instruments (e.g. plain vanilla bonds, shares) used for corporate financing do not change their structure or payment profile during their life cycle. In general, a periodic review of such instruments does not lead to additional benefits for clients and should therefore not be required. Among other things, this would facilitate corporate financing.	AMAFI agrees with this proposal but also has additional proposals regarding application of product governance requirements for simple financial instruments.
PRIIPS near term	Scope of application	Due do the Commission's current interpretation regarding the scope of PRIIPS a significant volume of plain vanilla bonds with make-whole clauses traded on German trading venues is not available to non-professional clients. Bonds should not become packaged products simply by adding a make-whole clause. Therefore, it should be specified that PRIIPS does not apply to plain vanilla corporate bonds, including bonds with a makewhole clause (e.g. bonds with the amount repayable directly linked to an interest rate index). Additionally, in our view, the trading of these products does not lead to significant investor protection issues.	AMAFI agrees with this proposal.

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<p>MiFID medium-term</p>	<p>Introduction of semi-professional clients</p>	<p>MiFID does not differentiate between inexperienced retail clients, who need all of the information and protection provided for in MiFID, and experienced retail clients, who are very active in financial markets and therefore might not have the same need for information. It should be examined how such a semiprofessional client could be defined properly and how information requirements could be limited in such a way that they apply only to inexperienced retail clients. In any case, it should be assessed whether the information requirements that apply to experienced retail 3 clients can be limited to certain types of information (e.g. standardised ex-ante cost information).</p>	<p>AMAFI tends to consider that the point is well made. It is true that among the category of retail clients there might be some significant differences of experience and sophistication. It is also true to say that generally speaking opt/in-out system is not an efficient solution to this issue.</p> <p>However, the proposal to create a whole new formal category is too disruptive and would require costly implementation changes in current process.</p> <p>An alternative solution could be to allow firms to distinguish among their retail clients those who have the necessary experience to receive less information and to trade some financial instruments that are as today not available to retail (such as some FIA, private equity,...) and without prejudice to any intervention measure decided by ESMA or national NCAs that would still apply.</p>

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MiFID medium-term	Product governance	<p>Responses from market participants point out several application issues regarding the product governance requirements (e.g. extent of product governance obligations for initial public offerings (IPOs); lack of clarification at level 1 and level 2 regarding market makers and execution-only cases). Some market participants even expressed doubt that these requirements are needed at all. A thorough analysis should be conducted to identify the extent to which the product governance provisions are achieving investor protection objectives and whether these provisions can be simplified or revoked, since adequate protection could possibly be achieved through other provisions, in particular the suitability test. In any case, further clarification regarding the application of these provisions is needed.</p>	<p>AMAFI proposes not to qualify the ISP which lead the IPO as a “Manufacturer” regarding Product governance requirements.</p> <p>AMAFI also proposes to add more proportionality for the application of product governance requirements considering the investment service provided (especially when the ISP only provided execution services) and the nature of financial instruments (see comment above on simple financial instruments i.e. ordinary bonds and shares).</p>
MiFID medium-term	Extra-territorial scope of MiFID	<p>The extent to which MiFID requirements apply if a MiFID investment firm does business outside the EU appears to be rather unclear (e.g. do MiFID product governance provisions or information requirements apply if a MiFID firm deals with non-EU clients abroad?). Further clarification on the scope of MiFID in such cases at level 1 should be considered.</p>	<p>Even though this point has not particularly been raised during our workshop on MiFID 2 refit, we might consider that such clarification could be indeed useful.</p>

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MiFID medium-term	Portfolio management (reporting of losses)	The additional reporting obligations in Article 62 Regulation (EU) 2017/565 regarding portfolio management may lead to the frequent, abrupt and unnecessary restructuring of portfolios, together with subsequent losses for clients. These potential effects should be thoroughly analysed, and amendments should be made to avoid unintended consequences.	Regarding reporting of losses from an ISP point of view (Article 62.2 rather than 62.1) AMAFI proposes to apply this obligation only when the service of safekeeping is provided and when the financial instrument is not used only for hedging purpose.
PRIIPS medium-term	Harmonisation of MiFID and PRIIPS information requirements	The MiFID and PRIIPS provisions on the information that must be provided to clients, particularly as regards costs should be harmonised to avoid a misleading duplication of information. Under the current provisions, the cost information for the same product may differ depending on whether MiFID or the PRIIPS KID is applied, due to different calculation methods.	AMAFI totally agrees with this proposal. We propose to replace the actual “PRIIPs RiY” by a “TER” which can be used for MiFID II disclosure.
PRIIPS medium-term	Review and adaptation of methodology for performance scenarios	For some products, the current provisions lead to misleading presentations of performance scenarios. PRIIPs manufacturers are forced to add written comments that the presentation should be disregarded. This situation is contrary to the Regulation's objective of ensuring that retail clients are properly informed about packaged investment products and its potential future performance.	AMAFI agrees with this proposal and proposes to remove the historical drift in the current methodology in addition with a premium risk defined by asset class.