

Investment Association Response to HM Treasury Consultation Paper: Transposition of the Markets in Financial Instruments Directive II

Chapter 2: Third Countries

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.*

We fully support the approach of maintaining the current third country regime, as much as that is possible, given other necessary consequential changes.

Chapter 3: Data Reporting Services

2. *Do you agree that it is appropriate and proportionate to create a separate regulation for DRSs and in particular not to include them as regulated activities under the RAO?*

Our members' preference would be for Treasury to create one holistic regime under the RAO if possible. When fault lines in legislation such as this are created, over time mismatches and disconnects can occur, creating unintended consequences.

However, if the proposed separate regime is created for DRSs, we consider the current drafting would meet the requirements. It will be important for the relevant regulatory bodies to ensure that definitions and market interpretations in the different regimes remain in synch.

3. *Do you agree with the general approach to implementation of Title IV MiFID II including copying out the definitions in respect of CTPs, ARMs and APAs? If not please suggest an alternative, such as following the structure of the 'investment firm' definition.*

We agree with the general approach of copying out definitions in respect of CTPs, ARMs and APAs.

In relation to the definition of CTPs, the 100% requirement represents a challenge. We consider the definition should be amended to encompass firms' intentions. That is, those firms seeking to provide 100% coverage should require an approval. The admission of new instruments to trading, halts in trading and other market related events can impact on a firm's coverage. As outlined in the CP some DRR firms may deliberately seek to sit under a particular coverage level to avoid the new requirements.

Therefore our members consider that firms under the new regime should be required to make a notification to FCA that they are seeking to provide comprehensive (100%) coverage and as such will be caught under the new regime.

4. *Do you consider that it is reasonable and proportionate to apply something akin to section 89 FSMA and section 90 Financial Services Act 2012 to a DRSP? If you do not consider it reasonable or proportionate please specify why.*

Yes we support the application of FSMA section 89 and section 90 type provisions to the DRR.

5. *Do you agree with the transposition of the FCA powers in the DRRs? Do you consider that any further powers are necessary?*

Yes the investment Association supports the application of FCA's powers in the DRR. FCA should be given all necessary powers to monitor and enforce the new regime.

Chapter 4: Position Limits and Reporting

6. *Do you agree that the regulation adequately transposes the position limit regime established by Article 57 MiFID II?*

Yes, we support the proposed transposition.

7. *Do you agree that the amendments to the Recognition Requirement Regulations adequately transposes the position reporting and management regime established by Articles 57 and 58 MiFID II?*

We have no comments

8. *Do you agree that the position reporting and management regime established by Articles 57 and 58 MiFID II for Investment Firms and Credit Institutions operating trading venues be detailed in FCA Rules?*

We have no comments

9. *Do you agree that the powers of the FCA reflect those provided for under MiFID II? In particular, in relation to Article 69(2)(p) and 69(1)(j) MiFID II.*

We have no comments

10. *Do you have any further comments on the drafting of the secondary legislation in respect of the position limits and reporting regimes?*

We have no comments

Chapter 5: Unauthorised persons

11. *Do you agree with the transposition drafting and approach to unauthorised persons?*

This would apply Articles 17(1) – (6) to, *inter alia*, collective investment undertakings and pension funds and the depositaries and managers of such undertakings, that are

members or participants of regulated markets and MTFs. Article 17 concerns algorithmic trading.

These changes are required under MiFID II, and the proposals seem to implement them reasonably.

12. Do you agree that the powers provided to the FCA in respect of unauthorised persons are appropriate in light in particular of Article 69 MiFID?

Yes, the approach taken seems appropriate, in order to ensure that unauthorised persons are subject to FCA enforcement and administrative sanctions.

Chapter 7: Power to remove board members

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.

We consider the current FSMA powers to be sufficient, but perhaps there are examples of additional data or information that has led to this increased requirement to remove board members. That said, we understand the requirement to put in place such measures should they be required in the future (for unseen circumstances) and a clear, structured process is commended.

18 Do you agree that FSMA powers in relation to market operators have to be amended either under Option A or B?

We have no particular comments to make.

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.

As per the answer to Q17, it is not clear such amendments are required.

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.

If a standalone power is required, we suggest the following areas are considered:

- A clear definition of board is required, as many firms will use the term across many part of their business.
- Does this power extend to all board members: e.g. independent directors (i-NEDs), non-executive directors (NEDs)?
- Investment firms will still be following the Approved persons' Regime, as opposed to banks, who will be subject to the Senior Managers and Certification Regime - will any changes be applied in the same way across both areas of the industry?

Chapter 8: Organised Trading Facility

21. Do you agree that amendments to the RAO and the Recognition Requirements Regulations appropriately transpose the MiFID II investment service of operating an OTF? In particular, do you agree that it is unnecessary to require firms to apply for a separate dealing in investments as principal permission, in addition to the activity of operating an OTF, if they engage in matched principal trading as an operator?

We agree that it is overly burdensome to require firms to apply for a separate permission if they intend to engage in matched principle trading. A notification regime is sufficient.

22. Do you have any additional comments on how the government has transposed the MiFID II OTF regime?

We have no particular comments to make.

Chapter 9: Binary Options

23. Do you agree that binary options should be treated as financial instruments under the existing MiFID?

In line with the existing European Commission Q&A, we agree with the proposal to amend the RAO in order to create an extension of the MiFID II regime to incorporate binary options in the UK.

24. Do you agree with the scope of the coverage of binary options proposed in the amendment to Article 85 of the RAO? If not, what do you think the scope should be?

We agree with the Treasury's proposed scope of binary options. However for the sake of clarity it may be useful for a non-exhaustive set of examples of what is regarded as a financial instrument to be included, e.g. Binary Options where their value is tied to:

- Existing MiFID financial instruments
- Currencies
- Stock indices
- Commodity prices
- Economic statistics
- Weather indices – for example [CME Weather Products](#)

In addition Treasury should provide an exhaustive list of exclusions - including but not limited to Binary Options where their value is tied to sporting events, which are regulated by the Gambling Commission.