

FEEDBACK STATEMENT ON HM TREASURY'S CONSULTATION ON THE IMPLEMENTATION OF MiFID

Consultation paper questions	Summary of responses	Treasury response
<p>1. Do you believe it is appropriate to define investment firms, for the purposes of UK implementation, as only including firms who are authorized in an EEA country? If not, what do you believe would be the adverse practical consequences of such an approach?</p>	<p>A majority of those who responded to this question argued that the definition of an investment firm, for the purposes of the Regulated Activities Order (RAO), should include UK branches of non-EEA firms as well as EEA firms to ensure parity of treatment.</p>	<p>In the light of the responses to the consultation paper, and a Commission non-paper on related issues, we have included branches of non-EEA firms who are authorised in the UK in the definition of investment firms for the purposes of implementing the directive. This applies both to the definition in the RAO and the Financial Services and Markets Act. The effect is that UK branches of firms based outside the EEA are treated no more favourably than UK branches of EEA firms.</p>
<p>2. Do you believe that there should be a new RAO activity of operating an MTF? If not, please could you provide details of any practical difficulties you believe this change would give rise to?</p>	<p>Most of those who responded to this question favoured creating a new activity of operating an MTF to create transparency. One respondent argued it would create confusion and uncertainty given the activity is already covered by the RAO.</p>	<p>We have created a new activity of operating an MTF. The trade associations representing many of the firms who operate MTFs thought that it would be helpful to identify this activity in the RAO. It is also consistent with the fact that the Commission included the activity in the directive to give clarity that the activity was regulated.</p>
<p>3. In the light of the emerging implementing</p>	<p>Many respondents were concerned that the draft amendments to articles</p>	<p>In articles 83 to 85 of the RAO we have moved away from the "catch-all" provisions that were included in the consultation</p>

<p>measures on the definition of financial instruments which fall within sections C7 and C10 of Part C of Annex 1 of MiFID, how can greater clarity about the scope of investments covered be achieved on the face of the RAO?</p>	<p>83 to 85 of the RAO, which expanded the scope of their coverage by reference to the need to accommodate the full scope of the directive, created uncertainty about the scope of financial instruments caught by UK regulation.</p> <p>Some respondents queried how the changes affected the coverage of foreign exchange forwards.</p>	<p>paper. An effort has been made to indicate the expansion of scope of investments covered in each of the articles for firms providing services and performing activities under the directive.</p> <p>We do not believe that the implementation of MiFID changes the boundaries of UK regulation as it effects foreign exchange forwards.</p>
<p>4. Do you believe it is appropriate to apply the MiFID override to the exclusions in articles 67, 71 and 72? If not, why do you believe these exclusions are compatible with MiFID?</p>	<p>A significant number of responses were opposed to applying the override to article 72, the overseas persons exclusion. It was argued that this would make the UK's financial markets less open than they would otherwise be for no benefit. Some also queried the application of the override to the exclusions in articles 67 (activities in connection with a profession or non-investment business) and 71 (activities in connection with employee pension schemes). They argued these were consistent with exemptions in article 2 of MiFID.</p>	<p>In the light of the consultation responses we decided not to apply the override to articles 71 and 72 of the RAO. We have applied the override to article 67 because we believe that its requirements differ from those in a similar exemption in MiFID. The exemption in MiFID requires that the service provided is governed by regulatory or legal provisions or a code of ethics. This may not apply to services supplied by all non-investment businesses currently relying on the exemption in article 67.</p>
<p>5. Do you believe the UK is right to exercise the optional exemption in</p>	<p>There was unanimous support in the responses for the UK exercising the optional exemption under article 3 of</p>	<p>We will exercise the optional exemption. The consultation proposals for, in some cases, non-discretionary withdrawal of the exemption for firms have been changed. The revised</p>

<p>article 3? If so, do you believe the treatment proposed for firms who violate the terms of the exclusion is proportionate and would be effective?</p>	<p>MiFID. Some respondents argued that the penalties for violating the terms of the exemption were cumbersome and that discretion should be given to the FSA to determine how to deal with violations.</p>	<p>proposals leave it up to the FSA's discretion to take action for violation of the terms of the exemption. The Commission confirmed at a transposition workshop that member states have discretion about the specific arrangements they put in place for dealing with firms who violate the terms of the exemption.</p>
<p>6. Are the proposed transitional provisions sufficient to ensure as smooth as possible a transition to the MiFID regime. If not, in what specific ways do they need to be changed to facilitate such a transition?</p>	<p>The transitional provisions were widely welcomed by respondents.</p>	<p>We have revised the drafting of the transitionals to bring them more into line with the Part 4 (of FSMA) permission regime wording.</p>
<p>7. Do you believe that the current restriction on FSA rule-making powers in respect of financial promotions in s145(3) of FSMA should be lifted for just MiFID firms, or for all firms? If the latter, can you explain what difficulties lifting the restriction for just MiFID firms would cause?</p>	<p>Most respondents said that the benefits of a single set of financial promotion rules were such that the restriction on the FSA's rule-making power in s145(3) of FSMA should be lifted for all firms.</p>	<p>We considered changing the proposals in the consultation document to lift the restriction on the FSA's rule-making powers in respect of financial promotions for all firms and not just those inside the scope of MiFID. However, we decided that it was not appropriate to use powers under the European Communities Act to make such a broad change to the powers of the FSA in FSMA.</p>

<p>8. Following the implementation of MiFID do you believe that it is appropriate for the UK to continue to restrict the promotion of unregulated collective investment schemes in the UK? If not, what benefits can you see flowing from the lifting of this restriction, and are there any risks for investor protection?</p>	<p>Respondents argued both for and against the retention of the existing restrictions on the promotion of unregulated collective investment schemes (UCIS).</p>	<p>The Commission has presented a non-paper on marketing and selling restrictions on UCIS. Debate about the paper is ongoing. We are, for the time being, retaining our legislative restrictions on the promotion of UCIS.</p>
<p>9. Do respondents consider that treating tied agents as a subset of the general class of appointed representatives under s39 of FSMA provides sufficient legal certainty? In particular, have HMT anticipated and avoided issues that arise from the various business models and types of activity that may be performed by Appointed Representatives and Tied Agents?</p>	<p>Respondents agreed that the approach adopted was the right one.</p>	<p>We have revised the provisions dealing with tied agents since the consultation paper draft. The changes made do not change the substantive approach of treating tied agents as a subset of appointed representatives. They were designed to clarify the registration requirements and other aspects of the operation of these provisions.</p>

<p>10. Are there any specific provisions in UK legislation which you believe contravene the prohibition on imposing additional regulatory requirements on passporting firms?</p>	<p>No one identified any such provisions.</p>	
<p>11. Do the transitional and saving provisions for passporting work? Is it appropriate to include passporting provisions in respect of EEA firms?</p>	<p>The transitional and saving provisions were widely welcomed.</p>	<p>We decided that it was not appropriate to have transitional provisions for firms passporting into the UK from other EEA states. It seemed more sensible for the legislation in other member states to deal with transitional issues related to the passports of such firms. UK legislation should not cut across this. The only transitional for EEA firms we have retained relates to passporting notifications being dealt with when MiFID takes effect.</p>
<p>12. Are the suggested amendments to provide access to clearing and settlement infrastructure appropriate? In particular, have we correctly identified the recognition requirements and uncertificated securities regulations as the most appropriate pieces of legislation to amend to ensure non-</p>	<p>Respondents said we had identified the correct provisions.</p>	

discriminatory access to clearing and settlement infrastructure?		
13. Do respondents believe that transposing Article 5(2) of MiFID in the recognition requirements for recognized investment exchanges provides sufficient certainty about the regulatory regime for MTFs run by exchanges and sufficient flexibility?	Respondents said that transposing Article 5(2) of MiFID in the recognition requirements was the best way to implement this provision.	We have also added a requirement in the recognition requirements to ensure that a recognised exchange operating an MTF also operates at least one regulated market. This is to ensure that, in line with MiFID, MTFs are only run by market operators (which are defined as persons operating a regulated market), investment firms and credit institutions.
14. Is the proposed implementation of Article 37 of MiFID appropriate?	The approach taken to the implementation of article 37 was welcomed.	We have not made any significant changes to the proposals in the consultation document dealing with the implementation of article 37.
15. Is it appropriate to implement Article 38 (3) of MiFID through a simplified version of the controllers regime for authorized persons, and are the thresholds triggering notices of control appropriate?	The general approach was welcomed but some questions were raised about the thresholds for notification of control.	We have not made any significant changes to the proposals in the consultation document.
16. Do the proposals for	Most respondents thought we had	

<p>the implementation of title 3 of the directive maintain the existing competitive balance between exchanges and firm-operated MTFs?</p>	<p>struck an appropriate balance.</p>	
<p>17. Do you have any views on our implementation of MiFID enforcement powers as regards firms?</p>	<p>Our proposals were generally welcomed.</p>	<p>We have made a series of technical changes to the proposals in the consultation document to ensure proper transposition.</p>
<p>18. Do you have any views as regards our implementation of MiFID enforcement powers as regards RIEs?</p>	<p>Our proposals were generally welcomed.</p>	<p>We have made a series of technical changes to the proposals in the consultation document to ensure proper transposition.</p>

<p>Other comments</p>	<p>It is super-equivalent to apply the regulated market admission to trading standards to RIE-operated MTFs.</p> <p>The requirement that an issuer be notified when an MTF run by an RIE admits one of the issuer's securities which trade on a regulated market should be dropped as it goes beyond what the directive requires.</p> <p>MiFID implementation should not make direct-offer business more difficult to conduct. This should be achieved by:</p> <ul style="list-style-type: none"> - Defining direct-offer business as currently transacted as "execution only" - To exempt all direct-offer business from the appropriateness test. - To exempt direct offer of products which cannot be sold cross-border from the appropriateness test - To exempt direct offer of stakeholder products from the appropriateness test. - To extend the article 3 	<p>We have reduced the admission to trading requirements for MTFs run by recognized investment exchanges.</p> <p>We have omitted this proposal from the final legislation.</p> <p>Under MiFID we are not permitted to take any of the suggested approaches to direct-offer business. The FSA proposed some guidance on this issue in 11.5.3 of its new conduct of business rules contained in its consultation paper CP 06/19.</p>
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	<p>exemption to firms making direct-offer promotions who hold clients' funds.</p> <ul style="list-style-type: none">- To extend the article 3 exemption as above but only to those making direct-offers in connection with products which cannot be sold on a cross-border basis. <p>Several questions:</p> <ul style="list-style-type: none">- Can the scope of the directive in respect of commodity derivative firms be clarified?- When will the scope of the level 2 measures be clarified in respect of financial instruments?- Can we have clarity on the likelihood of existing exemptions being retained beyond 2008?- Can firms dealing with eligible counterparties only continue to be exempt from the ombudsman scheme?	<p>Draft guidance on the scope of MiFID was provided in Annex 5 of the FSA's consultation paper CP06/9.</p> <p>The final version of the implementing measures is at: http://ec.europa.eu/internal_market/securities/isd/mifid2_en.htm</p> <p>No. The Commission will approach the review of the exemptions with an open mind.</p> <p>MiFID does not require the extension of the ombudsman scheme.</p>
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