

Summary of responses to HM Treasury's consultation on the implementation of MiFID

May 2006



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Summary of responses to HM Treasury’s consultation on the implementation of MiFID

The table below provides an anonymous summary of the responses to the consultation document on MiFID implementation. Where responses were judged to be potentially commercially sensitive, these have not been included in the table, and we are looking separately at the issues raised in relation to the questions about a review of the Regulated Activities Order. In total, we had 37 responses from investment firms, regulated markets, trade associations, lawyers, consultants and individuals.

Question	Responses
<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>No. We would suggest maintaining the status quo.</p> <p>We support limiting the definition of an investment firm and applying the MiFID override to the Overseas Persons Exclusion. This is consistent with MiFID. We do not believe that there will be any material competitive disadvantage for our members.</p> <p>We maintain the view that MiFID did not deliberately alter the treatment of non-EEA firms, but its text may just reflect changes in the manner in which directives are expressed for non-EEA issues compared to the approach in 1993. At the very least, the UK appears free to maintain an equivalent approach to the ISD. We are not aware of any substantive policy reason to make a change; equivalent treatment of third country firms should be axiomatic.</p> <p>We do not believe it is appropriate to define investment firms solely according to EEA residence. Non-EEA firms must not enjoy more favourable treatment. This could cause a migration of UK firms to jurisdictions with lighter regulation. As an interim measure requirements could be imposed on firms from countries without equivalent regulation who should be set out on a list maintained by the Treasury.</p> <p>We support the existing position which maintains a competitive balance. Non-EEA firms should be treated in the same way as EEA firms.</p>

	<p>The rules laid down in MiFID could potentially constitute a serious threat to the competitiveness of EU firms, and a lack of a consistent approach could lead to confusion amongst consumers and ultimately to reduced investor protection. We would therefore wish to see the retention of the current ISD approach.</p> <p>Non-EEA firms should have the same treatment as EEA firms.</p> <p>Legislation should not invite a regime in which firms undertaking similar business in the UK should be regulated differently solely on the basis that some qualify as persons under EC law whilst others do not. We would urge the Treasury to reconsider its proposals on the definition accordingly.</p> <p>On balance we would favour the proposed approach of HMT on this issue as it does reflect the provisions of MiFID.</p> <p>We do not support the proposal to only apply the requirements to investment firms authorised in an EEA country. This could give non-EEA firms a competitive advantage and we suggest that all firms transacting business within the EEA are treated consistently.</p> <p>We commented on this during the informal consultation and are still of the opinion that whether or not the new definition of “investment firm” includes non-EEA firms is primarily a political rather than a legal issue. From a purely legal point-of-view, we note that to extend the definition to cover non-EEA firms would amount to “gold-plating”.</p> <p>In the absence of a requirement in MiFID to treat non-EEA firms no more favourably than EEA firms, we agree that it would be appropriate for the exclusions in the RAO to apply more widely to non-EEA firms than to EEA firms. MiFID firms will benefit from the single market arrangements provided under the Directive and there seems to us to be some potential advantage to allowing non-EEA firms, which will not, to utilize the full range of RAO exclusions. We do not consider such differential treatment to be</p>
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	<p>undesirable nor do we consider the regulatory arbitrage issue highlighted in paragraph 3.10 to be problematic; an EEA firm which re-established itself outside the EU (eg through incorporation in one of the Channel Islands) in order to take advantage of a lighter regulatory regime would still be carrying on business in the UK. More significantly, non-EEA firms may be encouraged by a lighter regulatory regime to move their place of business to the UK.</p> <p>We support the definition of investment firms as is currently drafted in the draft Regulated Activities Amendment Order.</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>We support the concept of the creation of a new RAO activity regarding the operation of an MTF. This will help clarify the existing situation.</p> <p>The FSA should have the flexibility to distinguish between MTFs operating in wholesale markets and those that are in direct competition with exchanges. There is a possible distortion in the capital regime between pure voice-broking firms and those that operate a hybrid voice/electronic model. There should not be a new activity of operating an MTF because existing regulatory categories offer the opportunity to distinguish between different types of MTF.</p> <p>Yes, given the attached passporting rights it is vital that the activity is clearly defined and identified.</p> <p>Yes, this is transparent and low cost.</p> <p>If this is a straightforward change it is one that should be made.</p> <p>We believe this and the transparency it would bring would be beneficial for consumers and market participants alike.</p> <p>We agree with this proposal.</p> <p>As the RAO already captures the activity, we wonder whether the new definition is</p>

	<p>needed.</p> <p>We do not feel strongly about whether operating a Multilateral Trading Facility should be a new investment activity in the RAO provided that the proposed changes do not materially alter the standards to apply to such operators (with consequent increase in operating costs).</p> <p>We think that adding a new regulated activity of operating a multilateral trading facility (“MTF”) to the RAO is unnecessarily complicated. Whilst there is uncertainty in many Member States as to whether the ISD and MiFID will catch the operation of a multilateral trading facility, it is clear that this activity is caught in the UK under the RAO.</p> <p>As the Consultation Document indicates, a firm operating an MTF is within the scope of articles 14, 21 or 25 of the RAO and it is thus not strictly necessary to specify in the RAO the proposed new activity of operating an MTF. In such circumstances, we do not think it desirable to do so. Adding the new activity risks creating a level of confusion and uncertainty. In particular:</p> <ul style="list-style-type: none"> • it inserts a new undefined term of ‘operating’ an MTF, implying that there is an aspect to this activity, other than dealing as principal or as agent or arranging investment transactions, which is subject to regulation; • it creates an unnecessary definition of ‘MiFID investments’; • inclusion of the proposed new activity, together with the exclusion in the proposed new article 25C for persons to whom MiFID does not apply, creates potential uncertainty as to whether the operation of an MTF by such a person is intended to constitute one or more specified activities under articles 14, 21 and 25 of the RAO; and • it is unlikely that any MTF operator will be convinced, given the width of article 25 of the RAO, that the new permission is sufficient to cover all of their regulated
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	<p>activities. Accordingly, an MTF operator is likely to seek (at least) a “top-up” article 25 permission.</p> <p>In order both to achieve a clear degree of transparency and to allow the MiFID passport to be exercised for those firms operating an MTF, we would support the inclusion of the operation of an MTF as a new specified activity under the RAO.</p>
<p>3. In the light of the emerging implementing 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>We do not support the catch-all approach. Given the RAO provides the foundation blocks for determining what is authorized business and the financial instruments therein should be clearly expressed. Firms should not have to rely on FSA perimeter guidance, which is not legally binding, to determine whether an activity is authorized. The current text over-implements MiFID. UCITS management companies are brought within the scope of MiFID only when providing the services of: portfolio management in accordance with mandates given by investors; investment advice; or safekeeping and administration in relation to units in collective investment undertakings. Article 25 sub-paragraph 2(b), Article 26 sub-paragraph 2 (b) and Article 27 sub-paragraph 3(b) should be replaced by the following:</p> <p>‘a management company provides the investment service specified in paragraph 4 or 5 of Section A of Annex 1 to MiFID to a person other than a collective investment undertaking operated or managed by it’</p> <p>The reference to paragraph 1 in Article 26 sub-paragraph 2 is incorrect since futures which are not cash settled will not be transferable securities.</p> <p>Greater clarity is required in the RAO in respect of instruments which fall within Section C7 and C10 of MiFID. Commercially driven activities should remain outside the scope of regulation.</p> <p>To assist in greater clarity the following criteria should exempt any instrument potentially falling within C7 and C10 from regulation:</p> <ul style="list-style-type: none"> - bilateral (not centrally cleared) - Bespoke OTC contracts (not standardized)

	<ul style="list-style-type: none"> - Not exchange traded - Not marked to market - Not performance guaranteed by an exchange or clearing house; and - Always settled and the underlying investment always delivered. <p>The RAO must clearly detail financial instruments in order that firms are able to ascertain from it whether business requires regulation.</p> <p>We are concerned by the possible suggestion that MiFID might push back the boundary between financial services and commercial activity.</p> <p>We would suggest that the UK continues to adopt, to the full extent that MiFID permits, “intent” tests for physical transactions. With regards to non-MiFID firms (i.e. RAO regulated firms who are not investment firms) the Government should explicitly state that the RAO regime that will apply to them (Articles 83 to 85 and the definition of spot transactions) will remain un-amended from the current RAO (as is suggested by the drafting).</p> <p>We have significant concerns about the approach to the provisions on Articles 83, 84 and 85. They are already complex, the revisions make them almost impenetrable, even to those members of the Committee who are very familiar with this subject. We suggest that a much simpler approach is adopted which involves either: i) identifying those MiFID instruments which are not currently caught by the RAO; or ii) completely importing the definitions of derivatives financial instruments from the Annex to MiFID into the RAO and augmenting them, where necessary, with additional UK definitions. We also think that it is extremely confusing if an instrument is defined by reference to the type of person carrying out an activity in relation to it. Again we have suggested an alternative approach.</p> <p>In order to accommodate the wider range of derivatives within the scope of MiFID, it is proposed to extend the existing descriptions in the RAO of options, futures and contracts for differences by indicating that instruments referred to in the relevant</p>
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	<p>paragraphs in section C of Annex 1 to MiFID (as elaborated on in the proposed Commission ‘Level-2’ regulation) are specified investments (for certain purposes) to the extent not already covered by the existing RAO descriptions. This approach will import into the RAO interpretational difficulties and lack of clarity inherent in the MiFID provisions. We would urge the Treasury to take on the burden of interpreting the relevant paragraphs in Section C of Annex 1 to MiFID and to craft new definitions around the existing RAO definitions in articles 83-85 rather than simply cross-referencing the MiFID language.</p> <p>We consider that HM Government and the FSA should take maximum advantage of any national discretion permitted in the Proposal to ensure that the UK implementation is as favorable as possible to the UK financial services industry and its customers. Of specific concern is the likely approach of excluding all derivatives from the definition of non-complex financial instruments. This could unnecessarily increase costs and spreads for consumers and end users of these products, whilst also depriving consumers of products that are already commonly and safely used.</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>We support the application of the override to articles 67 and 71. Applying the override to Article 72 without also narrowing the definition of an investment firm in the manner proposed in the consultation paper would create very significant difficulties. There is no fundamental difference between the ISD and MiFID in this area and the current provisions have been running successfully. Much of the business done through the Overseas Persons Exclusion is in derivatives area. Given the growth in volume, value and importance of this market as a risk management tool for corporates and banks, the UK cannot afford to put in place significant barriers to firms trading in these instruments.</p> <p>It may be that the overseas person exemption is a pragmatic fix to difficult issues of interpretation for non-UK firms, but it would be preferable for UK firms for there to be clarity as to when a passport were needed or not across the EU. Subject to the outcome of transposition meetings it may be appropriate to change the treatment of the Overseas Persons Exclusion.</p>

	<p>We believe that the MiFID override should not be applied to article 71 of the RAO. Our members currently take comfort from the fact that the administrators of their employee share schemes are subject to regulation.</p> <p>We do not believe it is appropriate to apply the MiFID override to the Overseas Persons exclusion. It would impinge on the openness and flexibility of UK financial markets and introduce more complexity in regard to passporting rights.</p> <p>In principle we believe it is right to apply the MiFID override to Article 71 of the RAO., but we would like clarification on the role of the Trustee for employer-participation schemes. The scope of the exemption in Article 2(1)(e) of MiFID is not clear.</p> <p>Many companies outsource the administration of their employee share schemes. Their position under MiFID is unclear. There should be an even-handed and light-touch approach to implementing this part of MiFID.</p> <p>We support applying the override to articles 67 and 71.</p> <p>We support applying the override to Article 71 of the RAO subject to clarification about whether the activities of trustee and administrator (particularly that of trustee) of employee pension schemes fall outside the scope of the directive.</p> <p>We would welcome further clarity on exemptions 2(1)(i) and 2(1)(k) of the directive. We believe there is no need to override articles 42 and 49 of the exemption order.</p> <p>We believe that MiFID does not require the override to be applied to articles 42 and 49 of the exemption order.</p> <p>We agree the override should be applied to articles 67 and 71. We do not agree it should be applied to article 72 unless we have better information about how other EU countries will deal with this issue.</p>
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	<p>We believe strongly that the current arrangements work well and should not be changed. Firms affected by the proposed changes may not understand the implications and so fail to appreciate that it may be necessary to obtain authorisation. Moreover, it is possible that because of Article 38(1) of the CRD (which says that non-EEA banks cannot be treated more favourably than EEA banks) that the effect of applying the override could be to deprive non-EEA banks from benefiting from the exclusion.</p> <p>In respect of article 71 (employee share schemes), we would suggest that the substance of the article should be modified to clarify its scope consistent with MiFID. We would suggest that the MiFID “override” should not be applied to article 72 (overseas persons) at all, or at least not in relation to non-EEA investment firms. We believe such a change is not required under the terms of MiFID, nor justified, given that to our knowledge the overseas person exclusion has not given rise to regulatory concerns to date. We also believe the removal of the overseas person exclusion would overcomplicate the position in respect of passporting rights and would act to the detriment of London as a financial centre.</p> <p>We agree that it is appropriate to apply the MiFID override to the exclusion in Article 67, because the provision is wider than the exemption in article 2(1)(c). However, there may be little real difference because it applies to investment services provided in the course of professional activity. Those providing such services are regulated by legal or regulatory provisions or a code of ethics which does not exclude the provision of such services.</p> <p>We note the Treasury’s point in paragraph 3.3 of the Consultation that the Commission’s intention is that MiFID is to be implemented on a much more consistent basis than the ISD. However, whilst this may be the stated aim of the Commission, we simply do not agree that in practice this will be wholly achieved. We do not think the UK should change a provision which has been extremely beneficial to London as a financial centre without concrete evidence of consistent practices, we take no comfort from statements which on past experience are more optimistic than realistic. Any “anti-</p>
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	<p>avoidance” concerns that the Treasury may have in relation to UK firms operating outside the UK could be addressed more simply by amending the definition of an “overseas person” in the RAO, such that it excludes any entity that is incorporated or registered in the UK. We do not agree that the MiFID override ought to be applied to Article 67 to the extent that Article 67 refers to the carrying on of a profession given that, in our view, it is inherent in the meaning of profession that professional activities are regulated by a code of ethics of some sort (and Treasury could issue guidance to this effect) and, therefore, this is consistent with MiFID. The case is less clear in relation to other businesses carrying on incidental business and there may be a case for bifurcating this exemption and applying the MiFID override to businesses carrying on incidental investment business. Such firms would however, by definition, be unlikely to be providing core investment services on a professional basis and the practical effects of applying the MiFID override to the business section of the exemption would be very limited indeed. We do not consider that Article 71 is incompatible with MiFID. Article 2(e) of MiFID clearly provides a general exemption for “persons which provide investment services consisting exclusively in the administration of employee-participation schemes”. This seems to address the Treasury’s concern that the MiFID exemption may be limited to the intra-group provision of such investment services (which is only part of the additional broader exemption referred to in Article 2(f)).</p> <p>We do not have any concerns in relation to the MiFID override being applied to the exclusion in article 67 of the RAO, although we note that the exemption in article 2(1)(c) of MiFID relating to investment services provided in the course of professional activity is expressed in the same terms as the equivalent exemption in article 2(2)(c) of the ISD and we are therefore unclear as to why it is considered to be necessary to apply the MiFID override to article 67 when the ISD override was not. Similarly, we are unclear as to why it is necessary to apply the MiFID override to article 71 of the RAO. We are firmly of the view that the overseas persons exemption should continue to apply to non-UK EEA firms and consider that removing this option would be undesirable and constitute gold-plated implementation.</p> <p>While we support the drive towards reducing ambiguity and uncertainty between the</p>
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	<p>regimes applicable in EEA Member States, we would not support the application of the MiFID override to article 72. The aim of MiFID would seem to be to create a level playing field for businesses wishing to do business from one member state to another. This aim would not be compromised by allowing certain UK exclusions to continue. The exclusions such as article 72 would not allow those incoming third country firms to do business into other member states from the UK, and so the effect of MiFID would not be diluted in this respect. As EEA firms would be able to passport into the UK on the basis of their own home state authorisations, they would not be subject to any disadvantage by comparison with the firm using article 72. It is inappropriate for administration services in relation to employee share schemes to be subject to the detailed regulatory requirements imposed by MiFID. MiFID cannot have been intended to capture services which by their very nature are an offer, relating to specific shares, to a restricted, distinct, and limited number of individuals, and which cannot be seen as an offer to the general public. We do not, therefore, believe it is appropriate to apply the MiFID override to the exclusion in article 71.</p>
<p>5. Do you believe the UK is right to exercise the optional exemption in 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>We support the use of the optional exemption and believe the proposals as outlined give the FSA sufficient powers to be effective against any firms who are in breach of the exclusion.</p> <p>We support the use of the optional exemption provided the FSA applies MiFID conduct of business rules to these firms. The Treasury should also monitor developments in other member states in this area.</p> <p>The approach to sanctions for those who breach the conditions for the exemption are appropriate and proportionate.</p> <p>We support the use of the optional exemption, and believe the treatment for the breach of the conditions for the exemption is reasonable.</p> <p>We support the principle of giving smaller firms more flexibility. But the provisions for breach of the qualifying conditions are somewhat cumbersome. Perhaps the time limits in relation to breaches should work by reference to the time at which the firm</p>

	<p>becomes aware of the breach. It is awkward that a firm could lose its exemption for an inadvertent breach of which it remained unaware.</p> <p>We support the use of the optional exemption but believe the fact that only firms who do not hold client assets can fall inside it creates a distortion.</p> <p>We are very supportive of the Treasury’s proposal to exercise the exemption in Article 3 of the directive. We also support Treasury’s proposals for the treatment of firms who violate the terms of the exclusion and believe that it constitutes a proportionate and effective deterrent.</p> <p>We are not convinced the proposed treatment of firms breaching the exemption will work given the reliance on self-reporting. The FSA should consider on a case-by-case basis whether firms should lose their exemption. Such consideration should be based on set criteria against which firms could appeal. Can firms give advice without being subject to MiFID?</p> <p>We agree with the Treasury’s proposal on exercising the optional exemption in Article 3.</p> <p>The extension to the RAO to accommodate MiFID should not apply to firms that are able not to be investment firms by virtue of Article 3 of MiFID. Therefore, in the new definition which is proposed for “investment firm” in (b) the words “other than the United Kingdom” should be deleted. The effect of not doing so would be to subject UK Article 3 firms to the MiFID override. We do not believe that the treatment proposed for firms who violate the terms of the exclusion is proportionate. The consequences of a firm breaching the qualifying conditions are draconian given that a firm may not be aware of its breach of the conditions at the relevant time, for example, where a breach is disclosed long after the event by the auditors. Instead, we suggest that a breach of condition should be treated as any other regulatory breach especially given there is no right of appeal against the FSA’s decision to withdraw the benefit of the exemption.</p>
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	<p>We agree that the article 3 exemption should be utilised in the UK. We do not though believe that it is desirable for firms who violate the terms of the exclusion to remain exempt for a period under the procedure proposed. This procedure appears to us to be unnecessarily complicated and we are of the view that the exemption should apply in the same way as other exemptions in the RAO; that is, for so long as the firm seeking to rely on the exemption complies with its terms. We agree that creating an incentive for firms to report breaches would be desirable, but it seems to us that this could be achieved by simply allowing the FSA to permit exempt treatment to continue (with effect from the breach) provided that the breach is reported in a specified period. A period of 6 months to report a breach may be unduly long.</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>We fully support the automatic assignment of permissions to those firms who hold current equivalent permissions. As far as possible this approach should cover the move from the ISD to MiFID. We would encourage the FSA to put in place similar transitional type provisions, most importantly in the area of existing client classifications.</p> <p>We support the common sense approach which has been adopted in relation to the proposed transitional provisions.</p> <p>They do appear to be.</p> <p>We believe the transitionals as worded are sufficient to provide an orderly transition of the current ATS regime to the MTF regime under MiFID. We see no problem with the provisions regarding the automatic permission extension to cover investment firms for the wider range of financial instruments.</p> <p>We support the three proposed transitional provisions, and further recommend that transitional provisions are drafted for the transposition of existing customer categorization to the MiFID regime.</p> <p>The transitionals may give firms permissions for activities they do not undertake, which is undesirable.</p>

	<p>The proposed transitional provisions should be sufficient.</p> <p>We support the common-sense approach that the Treasury has proposed. In addition, we have some comments on the drafting:</p> <p>i) It is not clear why safeguarding and administration of assets is excluded from Article 31, since permission is granted in relation to specific types of investment in the same way as for the other regulated activities specified (and it is included in Article 32).</p> <p>ii) We think that the following additional paragraphs of Section C of Annex 1 of MiFID may need to be added to ensure comprehensive coverage:</p> <ul style="list-style-type: none"> - Commodity option etc.: paragraph 1; - Futures (excluding commodity future): paragraphs 8 and 9; - Commodity future: paragraphs 1 and 4; - Rolling spot forex contract: paragraph 9; - CfDs: paragraph 9 - Spread bet: paragraphs 5, 6, 7, 8 and 9. <p>We support the proposed approach of minimizing the impact of the increased scope on investment firms, as set out in article 31.</p> <p>We would suggest more leniency in the timetable proposed as many firms will still be assessing member state implementation on the dates set.</p> <p>We do not agree with the need for an additional regulated activity of operating an MTF and, therefore, do not agree that Article 30 is necessary. We agree with the automatic extension of permissions under Articles 31 and 32.</p> <p>We would support each of the transitional provisions contained in the Consultation.</p>
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<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>The current restriction should be lifted for all firms not just MiFID firms to avoid competitive distortions. However, there should be a thorough review of existing financial promotions requirements is needed with a view to lightening the FSA requirements which are, in many respects, super equivalent to MiFID.</p> <p>We believe the restriction should be lifted for MiFID firms only since this is the correct way to transpose MiFID. Communications from non-MiFID firms will still be subject to the FSA’s overarching principles of ‘fair, clear and not misleading’. Therefore it is not necessary or appropriate to provide the FSA with the power to extend the detailed requirements under MiFID to these firms.</p> <p>At times, HMT’s desire not to over-implement might appear to reduce MiFID to mere legal text and disregard the fact that it can be seen as a consensus statement across the EU of appropriate investor protections in relation to certain investment activities. Consumers should not be presented with financial promotions produced to different standards by firms offering economically equivalent products. The restriction should be lifted for all firms.</p> <p>We support the lifting of the restriction in 145(3) for all firms to prevent competitive distortion and a complex regime for mixed status groups.</p> <p>We agree with the approach proposed. It gives firms some flexibility to choose a less onerous regime for relevant parts of their business if they think it worth their while.</p> <p>The lifting of the restriction should be limited to firms undertaking MiFID activities, any extension of the exclusion to other business areas would constitute gold-plating and be disproportionate.</p> <p>If MiFID requires the lifting of the s145(3) exemption it should be lifted for all firms to avoid creating additional complication in an already complex area.</p> <p>Given that similar customer protections may be needed regardless of whether products</p>
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	<p>with similar economic characteristics are provided by a MiFID or non-MiFID firm, we consider that the restriction on rule-making powers in respect of financial promotions should be lifted for all firms.</p> <p>We recognise that the intent behind this may be to enhance customer protection; however, we believe there are other means of achieving this that should be investigated first rather than increasing the scope of the FSA's powers. Therefore we do not support the lifting of this restriction.</p> <p>We do not see great difficulties with lifting the restriction for just MiFID firms, save to the extent the FSA concludes that it wishes to apply MiFID communications standards on a super-equivalent basis.</p> <p>Lifting the restriction for just MIFID firms with regards to the issuance of financial promotions for MIFID, would clearly create an uneven playing field within the UK, for no clear quantifiable benefit at either UK or EU level.</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>It is not necessary to continue the existing restriction. In the area of investor protection, the overriding objective should be to promote greater transparency. All types of investment fund should be made available to retail clients provided the risk to capital is capable of being disclosed. This needs to be coupled with an FSA simplification of the financial promotions regime for regulated products and a simplification of various FSA rules regimes for specific types of products.</p> <p>We welcome the fact that the Treasury is open to discussions regarding the removal of this restriction and we would certainly welcome greater simplification in this area. However, the promotion of unregulated collective investment schemes needs to be considered against the background of the Commission's Green Paper on Asset Management, the FSA's DP on wider-range retail investment products and the fragmentation of the European market for the distribution of non-UCITS products generally.</p> <p>The continuing prohibition would not implement MiFID properly, and gives other</p>

	<p>member states the opportunity to retain other local restrictions thereby inhibiting the single market. If an investment is suitable for an investor he should be allowed to buy it and in order to buy it, he may need to hear about it first. Restricting promotions reduces sales possibilities and may increase costs. MiFID imposes a variety of obligations on the promotion of financial instruments and provides protection to consumers through the suitability and appropriateness tests and the warning required for execution-only sales.</p> <p>We favour a relaxation of the prohibition. The “all or nothing” approach of the current regime based on whether a fund is regulated or not ignores the “complex”, “non-complex” distinction in MiFID and potentially puts UK firms at a disadvantage relative to others.</p> <p>The Article 19 requirements of the directive will make the restrictions on the promotion of unregulated collective investment schemes redundant without impacting on investor protection.</p> <p>The restriction should be retained. Individuals to whom funds would be promoted are not clients of the operator who lacks the incentive to protect investors. There is not necessarily an existing client relationship between the issuer of the promotion and those to whom it is being promoted.</p> <p>We believe it will be appropriate to retain the restriction.</p> <p>We see no reason why the promotion of unregulated collective investment schemes should be restricted in the UK when these products will be available to UK customers dealing with managers in other Member States. The effect of retaining the restriction would also appear to damage the competitive position of <i>UK firms</i> as regards their business with overseas customers. If there are issues about the promotion of unregulated schemes they should be addressed by targeted rules rather than by an outright ban. On the other hand, it is essential that any decision on changes to the financial promotion rules in this area should take into account the wider context, not</p>
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	<p>least the outcome of the consultations by both FSA and the European Commission.</p> <p>We do not believe that it is appropriate for the UK to continue to restrict the promotion of unregulated collective investment schemes (referred to as the “Fund Restriction”) in the UK on the basis that this would: i) amount to a super-equivalent implementation of MiFID; and ii) constitute a barrier to other EU firms undertaking business in the UK.</p> <p>We agree with the Treasury that MiFID permits the retention of the existing UK restriction on the promotion of unregulated collective investment schemes. However, we believe that this area is due for a review from a policy perspective, particularly in the light of pending decisions at the EU level on harmonisation of institutional and other non-retail funds (following last year’s Green Paper) and the conclusions of the FSA’s consultation into a wider range investment products.</p> <p>We agree that MiFID should not be attempting to amend the UCITS regime. With this in mind, it appears incongruous to have a registration scheme at all if there is no difference in the way in which regulated and unregulated schemes can be promoted. Therefore, the UK should continue this restriction (and thereby inherently protect UK consumers) because there are still considered to be incremental risks for investors in investing in these types of products. However, if all other EU Member States remove restrictions on the promotion of unregulated funds, the UK should act in similar fashion.</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>We consider that continued use of a Tied Agent register and specifically treating Tied Agents as a subset of the general class of appointed representatives provides sufficient legal certainty to encompass current business models.</p> <p>We support the proposal to treat Tied Agents as a subset of appointed representatives and consider that this provides sufficient legal certainty.</p> <p>Yes. We believe so.</p> <p>This seems appropriate.</p>

	<p>We are not clear as to whether the proposals for tied agents will affect the current arrangements in place for multi-tied agents.</p> <p>It will provide sufficient legal certainty.</p> <p>The approach proposed appears to be logical.</p> <p>Article 23 of MiFID states that firms and institutions are fully responsible for the activities of their tied agents. It is important that this responsibility only applies to activities related to the contractual agreement between the firm and the tied agent. We feel that it would be unreasonable for a firm to be held accountable for unrelated activities and ask that this be taken into consideration when HM Treasury and the Financial Services Authority (FSA) draft more detailed proposals.</p> <p>We consider that these provisions should work in principle.</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>Not to our knowledge.</p> <p>To implement MiFID the provisions at the end of articles 31 (1) and 32 (1) should be referred to on the face of FSMA. It is appropriate that there should be an explicit restriction on the FSA's rule-making powers. This may be added to by article 4 of the implementing directive.</p> <p>We are unaware of any provisions that contravene the prohibition.</p> <p>We are not aware of any such specific provisions.</p> <p>There could well be wider legal, contractual, financial or tax legislation which might prevent MiFID achieving an effective single market. We presume this will have been subject to a specialist review by the Treasury.</p> <p>It will be important to ensure that the implementation legislation conforms to the view</p>

	<p>that business conducted by the branch of an EEA firm in London with a client in another Member State should fall to be regulated by the FSA.</p> <p>No, although it will be important to keep the Level 2 material under review in this context.</p> <p>We are not aware of any further restrictions or prohibitions that would place the UK in contravention of articles 31(1) and articles 32(1).</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>We support allowing firms to use their existing notifications under ISD rules to passport under MiFID. The UK should work with other member states to take a consistent pan-European approach to the notification regime.</p> <p>The transitional and savings provisions for passporting are generally fine. We query, however, whether in Table 3 of schedule 12 to the draft MiFID regulations, it is appropriate for ISD rights in respect of instruments listed as items 3,4, 5 and 6 to apply to the wider range of MiFID instruments listed in item 4 in the MiFID column.</p> <p>A joint approach between EEA regulators would be helpful in transitioning passports. We would welcome confirmation from the Treasury that if the UK implements ahead of other countries, UK firms will be able to use their MiFID passports across the EU.</p> <p>We have no reason to believe the transitional provisions will not work and believe it is sensible to include transitional provisions in respect of passporting by non-UK firms.</p> <p>We support the Treasury’s proposed transitional provisions. Consistent implementation on a Pan-European basis is vital in this area.</p> <p>Yes, the transitional and savings provisions for passporting work.</p> <p>We think that the proposals generally work well although there may be questions about aspects of the “corresponding treatment” for instruments set out in Table 3 in Schedule 12 to the draft MiFID Regulations – for example, there may be a question about the</p>

	<p>extent to which the ISD definition/treatment of particular instruments is carried over into MiFID. As regards EEA firms, we think that it is appropriate to include passporting provisions in respect of them – provided that these provisions are expressed as taking effect subject to applicable rules in other Member States.</p> <p>We think that the inclusion of the transitional provisions, including schedule 12 to the MiFID Regulations, is helpful although we note the potential drawbacks noted in the Consultation Document. We think it is appropriate to include passporting provisions in respect of EEA firms.</p> <p>As noted in the consultation, in order for these transitionals to work, it will be necessary for all EU Member States to adopt a similar approach. Whilst the Directive does not need to be implemented until October 2007, it already seems likely that some Member States will not have implemented it by this time. This could lead to major competitive (dis)advantages, with incoming firms allowed to conduct business in all Member States, without having to comply with common conduct of business rules.</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-discriminatory access to clearing and settlement infrastructure?</p>	<p>Yes. We agree that clarity is needed on whether clear differentiation is to be made between an unsettled market contract entered into with a clearing house and entered into outside it. We cannot believe it to be legislative intent to prevent clearing houses from protecting themselves in the event of a default.</p> <p>Yes. We believe that the amendments are appropriate and correctly transpose the MiFID requirements. We also believe that the recognition requirements and the uncertificated securities regulations are the appropriate pieces of legislation for the incorporation of such changes.</p> <p>Yes, and the relevant pieces of legislation have been identified.</p> <p>Does the proposed change to paragraph 11 of Schedule 6 of the MiFID regs mean that an exchange’s default rules would no longer be expected to deal with contracts which it clears?</p>

	<p>Clearly the amendments will need to pass muster as providing non-discriminatory access but it will be important to ensure that any changes do not go further than is necessary for this purpose – for example, maintaining the effectiveness of the uncertificated securities regulations default rules. There may be an issue about whether it is sufficiently clear how the default rules will operate in all cases as regards “cross border access”.</p> <p>Although we support the Government’s approach, its success cannot be evaluated until clearing and settlement facilities have reviewed, and, where necessary, revised their rule books to bring about this approach.</p> <p>The Recognition Requirements and the Uncertified Securities Regulations appear to be the most appropriate regulations that can be changed to incorporate these particular MiFID provisions. If an exchange has only an indirect relationship with a clearing house we presume that that exchange would not be required to impose transparent and non discriminatory rules governing access to those facilities provided by such preferred partners. We would welcome confirmation of this interpretation from HM Treasury. We fully support the right of regulated markets to appoint a clearing house or settlement system based in another jurisdiction, and recognises that deletion of the phrase “by a recognised clearing house” will facilitate this. Nonetheless, we remain uncertain about how the interaction of the existing Part VII arrangements (which will continue to apply to the RIE) and the insolvency regime applicable to such clearing house or settlement system would work in practice. We would also suggest that the amendment should be limited to the deletion of the word “recognised” – the proposed amendment would appear to have the effect that an exchange which provided its own clearing would be required to have default rules only for those contracts (i.e. the back-to-back contracts) other than those registered with itself for clearing, which is presumably not the intention of the proposed amendment.</p>
<p>13. Do respondents believe that transposing Article 5(2) of MiFID in the recognition requirements for recognized investment exchanges provides sufficient</p>	<p>Yes. It is an appropriate methodology for taking forward the implementation of MiFID.</p> <p>Yes. We believe the recognition requirements are the correct place to incorporate the MiFID requirements for those RIEs wishing to operate an MTF. This approach is</p>

<p>certainty about the regulatory regime for MTFs run by exchanges and sufficient flexibility?</p>	<p>consistent with the current regulatory framework governing the activities of RIEs and avoids the need for a separate authorization.</p> <p>We support the proposed implementation measures regarding RIEs in respect of article 5(2) and articles 37 and 38(3).</p> <p>The approach taken is the most sensible but it relies upon the development of clear guidance within REC.</p> <p>Yes. This is the approach most consistent with the existing regime.</p> <p>We believe this approach will provide sufficient certainty about the regulatory regime for MTFs run by RIEs.</p> <p>An MTF that is operated by an exchange would be subject to two sets of requirements, i.e. Title II and Title III provisions. Should HM Treasury transpose article 5(2) into the Recognition Requirements, we would recommend that the FSA provide formal guidance within REC on how the separate requirements overlap and which particulars in Title II are equivalent to Title III provisions. Such guidance should ensure that MTFs operated by regulated markets can operate on an equal footing with MTFs operated by investment firms. This is a necessary because, for example, the level of market surveillance required to be conducted by a regulated market is far greater than that required of an MTF. Any formal guidance within REC needs to provide sufficient certainty on how the regime will function for MTFs operated by exchanges, while at the same time not being too prescriptive so as to stifle competition, or provide investment firms with a competitive edge over regulated markets.</p>
<p>14. Is the proposed implementation of Article 37 of MiFID appropriate.</p>	<p>Yes. Clearly the FSA needs to use these powers judiciously and in the best interests of the market as a whole to ensure that recognized investment exchanges, as key interlocutors in the financial markets are prudently managed.</p> <p>Yes. It would appear to be consistent with the general approach taken by the Treasury to incorporate the new requirements into the existing RIE regime.</p>

	<p>Yes.</p> <p>Yes.</p> <p>This is appropriate.</p> <p>The use of the Recognition Requirements to impose article 37 is the most suitable method, mainly because the Recognition Requirements apply solely to regulated markets. The implementation of article 37 will give the FSA defined powers when a regulated market makes senior appointments. It is unclear at what level of seniority this requirement would begin and end.</p>
<p>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?</p>	<p>We are concerned that having higher thresholds for the notification of regulated markets could impede the proper supervision of these markets and is inconsistent with the approach taken to investment-firm run MTFs. It would be more appropriate to impose lower notification thresholds for market operators which are more consistent with those applicable to investment firms.</p> <p>Yes we believe that the approach is a good one and the thresholds seem sensible.</p> <p>Yes. We agree with the simplified approach and believe the thresholds seem appropriate.</p> <p>We are content with the proposed thresholds and the notification period and the three month period allowed to the FSA to object to proposed changes.</p> <p>The description of Article 38 (3) is quite broad in terms of the obligations for any persons proposing to seek control over an exchange. The use of a simplified version of the regime does appear to be the most suitable way to apply more certainty to article 38 and the provisions therein. The 50% threshold that triggers a notice of control is understandable as this amounts to a blocking vote. Notwithstanding this, the City Code on Takeovers and Mergers states that control means a holding of shares carrying 30%</p>

	<p>or more of the voting rights of a company. We are keen to understand HM Treasury’s view on whether the City Code’s approach has been taken into account in considering this matter. Further consideration should also be given to notification at 25%, which would allow a shareholder to block special resolutions; and above 50% and at 75%, which would allow a shareholder to pass ordinary and special resolutions respectively. In comparison, the 20% threshold does not appear to be aligned to either UK, or EU company law or to the UK listing rules. Clarification of why 20% was chosen as a trigger would be beneficial, in addition, has any thought been given to a lower trigger threshold considering that under UK company law, holdings of 3% and upwards have notification obligations? We note that the new Companies Act may amend existing provisions so this should also be taken into account. We further note that it might be sensible to consider the requirements in other EU countries. We are aware of a number of different approaches - e.g. notifications at increments of 5%; notification at 10%; notifications at 33.3%, 50% and 66.6% etc. Is harmonisation at EU level likely?</p>
<p>16. Do the proposals for the implementation of title 3 of the directive maintain the existing competitive balance between exchanges and firm-operated MTFs?</p>	<p>We do not consider that these changes materially affect the existing balances between pure exchange business and that conducted by investment firms.</p> <p>We believe that MiFID destroys the competitive balance between MTFs run by market operators and those run by investment firms where both act as “exchanges”. A functional approach to regulation requires that all primary markets should apply for RIE status.</p> <p>We believe the proposals are appropriate.</p> <p>The proposals do not worsen the competitive balance between RIE and firm-operated MTFs.</p> <p>The competitive balance between an MTF operated by a regulated market and an MTF operated by a firm may become distorted by the current proposals. We feel that the current drafting used by HM Treasury could lead to an MTF which is operated by a regulated market being subject to an unreasonable regulatory burden as it will have to comply with both Title II and III provisions.</p>

<p>17. Do you have any views on our implementation of MiFID enforcement powers as regards firms?</p>	<p>We support the provisions. The FSA should continue to use its investigatory and enforcements powers in a proportionate fashion, recognizing that most problems can and should be dealt with through supervision and wide-ranging engagement with the industry.</p> <p>We support the approach suggested to the transposition of the enforcement powers, particularly those in Article 50(2)(d). We are firmly of the view that under MiFID, the FSA should continue to use its enforcement powers in a proportionate fashion, recognizing that most problems could be dealt with through supervision.</p> <p>We do not believe the requirements of Article 50 are unduly onerous and are content to allow HMT to implement them in a pragmatic fashion.</p> <p>The approach seems reasonable.</p> <p>We do not see the need for any amendment to sections 166 and 167 of FSMA, as we do not interpret article 48 of the Directive as necessitating any curtailment or limitation of FSA’s powers to commission reports from experts.</p> <p>We are concerned about the potential implications of Article 57. One reading of this provision could imply that if a firm is a remote member of a regulated market, then the competent authority of that market may “address them directly” in respect of <i>any</i> part of the firm’s business. We would be grateful to know the Treasury’s interpretation of this provision.</p> <p>No. We agree with the approach suggested and believe that this will result in the lowest possible level of disruption.</p> <p>We agree with the approach taken in relation to implementation of MiFID enforcement powers.</p> <p>Most of the proposed enforcement powers are similar to those already available to the</p>
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	<p>FSA. However, the provision to allow the FSA to compel a UK firm to allow it access to that firm's overseas offices, may be frustrated by local laws and regulations which do not allow such access. This problem should be recognised to the extent which it can be without diluting the directive (probably by the FSA stating that it will not generally seek to exercise its powers in these circumstances).</p>
<p>18. Do you have any views as regards our implementation of MiFID enforcement powers as regards RIEs?</p>	<p>We believe the proposals are appropriate.</p> <p>We agree with the approach taken in relation to implementation of enforcement powers regarding RIEs.</p> <p>The approach taken by HM Treasury seems proportionate and preferable to imposing an enforcement regime which is similar to that for investment firms. However, we believe that such powers should only be used for enforcing clearly identified requirements or duties placed on regulated markets under MiFID and not for other, more general purposes. If the FSA chooses to exercise its power in terms of information requests, then it would be essential that the exchanges have a reasonable amount of time to respond. We would suggest that the drafting stipulates that such requests be made in writing.</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 markets notify issuers when their securities are admitted to trading on an MTF does not appear in the directive.</p> <p>The legislation inappropriately applies MiFID pre-trade transparency requirements for regulated markets to all markets operated by an RIE.</p> <p>We believe that there should be consistency of transparency and market oversight by operators of an RIE and an MTF of instruments admitted to trading on their respective markets. We are therefore relaxed about consistency between admission to trading requirements for any regulated market or MTF run by an RIE.</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 exemption to firms making direct-offer promotions who hold clients’ funds. - 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>Don’t apply best execution to the bond market.</p> <p>It is necessary to copy across the ISD exemption for “investment companies with fixed capital” in order to avoid regulating investment trusts. They could be exempted under the article 3 exemption.</p> <p>The UK should monitor the pace of implementation in other countries and adjust its own timetable accordingly.</p> <p>Products which cannot be sold cross-border such as ISAs and CTFs should be</p>
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	exempted from the scope of the directive. Direct-offer business should fall outside the appropriateness test.
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