



MANAGED FUNDS
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Herrn Hartmut Krüger
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15 March 2019

Dear Mr Krüger

The Alternative Investment Management Association¹ (“AIMA”) and Managed Funds Association² (“MFA”, together with AIMA, the “Associations” or “we”) welcome the opportunity to respond to the Bundesministerium der Finanzen (“BMF”) regarding its consultation³ on experiences with and possible need for amendments to MiFID II and MiFIR.

The Associations support the goals underlying the MiFID II project of improving transparency and investor protection. However, the initial and ongoing compliance burdens associated with MiFID II are very significant and it is not clear that these efforts have translated into measurable improvements in transparency and investor protection. Ultimately, these costs are likely to be borne by investors in some form.

Accordingly, we believe that any future review of the framework must carefully consider these compliance costs as part of an overall cost benefit analysis and any compliance requirements that to do not materially improve transparency and investor protection should be streamlined or eliminated. In the appendix to this letter we highlight points of particular importance to our industry that we hope will be specifically considered as well.

Some of the points we address reflect aspects of the regime that are already being discussed at European level, including the equivalence framework and periodic auctions. In addition, we

¹ The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than \$2 trillion in hedge fund and private credit assets.

² Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

³ Available online at:

https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_VII/19_Legislaturperiode/Konsultationen-zur-EU-Finanzmarktrichtlinie.html.



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address aspects of the regime that are particularly relevant for our members including rules on payment for research, reporting requirements and market data.

We also note the relevance of MiFID II provisions in the context of Brexit, and urge policymakers to make full use of the MiFID II equivalence framework to ensure that firms can continue to trade without disruption; this is particularly pertinent in the context of the share trading obligation.

We would be happy to discuss any aspect of this submission with you further – please contact Adam Jacobs-Dean, Head of Markets, Governance and Innovation, AIMA (ajacobs-dean@aima.org), or Jennifer Han, Associate General Counsel, MFA (jhan@managedfunds.org) or Michael Pedroni, Executive Vice President and Managing Director, International Affairs, MFA (mpedroni@managedfunds.org).

Yours sincerely,

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Annex 1

Trade and transaction reporting

We support the trade and transaction reporting objectives of MiFID II. However, implementation of and on-going compliance with trade and transaction reporting obligations has been one of the greatest compliance challenges associated with MiFID II for our members, requiring significant one-off and on-going investment in reporting systems. Our members report, depending upon their size, that they may have multiple information technology and other employees daily working on transaction reporting in order to comply with ESMA's transaction reporting specifications. Under the current requirements, transaction reporting is and will remain highly resource-intensive. We therefore believe the BMF, the Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"), other national competent authorities ("NCAs") and ESMA should begin reviewing the transaction reporting specifications. We think the regulatory purposes for transaction reporting under MiFID II may have been frustrated by the overly complex ESMA guidelines on transaction requirements and are concerned that NCAs are not receiving quality data.

Transaction reporting has become very burdensome for a few reasons. First, ESMA requires a tremendous level of detailed data points across its [65] prescribed reporting fields. Many of these fields can only be populated based on information received from the sell-side (e.g., capacity in which the order was executed, time of execution, whether the transaction was executed with a systematic internaliser, etc.), which information is generally transmitted to the buy-side via FIX messages in a format that is not easily convertible into the ESMA-prescribed format. Second, as the industry has not developed a standard protocol, each sell-side investment firm has developed its own FIX message specification requirements, which adds to the complexity for our investment manager members (i.e., buy-side investment firms) in compiling data from the sell-side, interpreting and recompiling the data in a format consistent with the ESMA guidelines, reconciling the data with its own internal trading records, and producing a daily transaction reporting file for submission to an ARM (for onward submission to relevant NCA). In some cases, our members must utilize the services of one or more third-party vendors to assist in this arduous task.

Third, the variety of market structures across different financial instruments and the manner in which orders are traded in each market (e.g., voice, FIX message, etc.) only add to the burdensome nature of transaction reporting. Even within a particular market, such as cash equities, a single order can be filled in parts (i.e., a "fill"), resulting in multiple transaction reports for a single trade. For example, consider the case of a 100,000 share order that an investment manager seeks to place in a particular equity security. In seeking best execution, the investment manager may choose to split this order by sending it to ten different investment firms as individual 10,000 share orders. Each investment firm filling the 10,000 share order may, in turn, seek to obtain best execution by breaking up the order into multiple smaller transactions, including transactions as small as five, ten or fifteen share transactions. Thus, for a single order of 100,000 shares, an investment manager may literally file hundreds or even thousands of transaction reports, potentially filing many thousands of individual transaction reports in the course of a week. Due to the complexity and burdensome nature of transaction reporting, we are concerned that NCAs are not receiving accurate or meaningful data. These challenges are further compounded by limitations in terms of the FIRDS database, which can make it difficult for investment managers to determine whether a particular instrument is subject to a reporting obligation.

We urge BMF to review whether the manner in which the transaction reporting obligations have been implemented can be simplified to reduce the burden on the private sector and ensure that NCAs receive more accurate and meaningful data.

In general our preference is for a reporting model where the sell-side is the primary reporting party given that sell-side firms typically have the scale necessary to be able to carry the costs associated with maintaining the operational infrastructure necessary for reporting; for buy-side firms, maintaining such systems represents a disproportionate burden given their scale and the significant duplication inherent in rules that require both sides of the transaction to make reports.

Market data

We have expressed our concerns to ESMA that the market data licensing practices of trading venues may not be in compliance with the MiFIR requirements regarding the provision of data on a reasonable commercial basis.⁴ Indeed, based on our members' experiences with the lack of transparency with respect to market data costs, the complexity of data licenses and lack of comparability in terms of trading venues' disclosures, we question whether venues are acting in compliance with the rules. We therefore welcome the fact that ESMA is looking at trading venues' practices when it comes to the provision of market data and believe this should be a priority area for any future review of MiFID II requirements.⁵

Specifically, we encourage policymakers to consider whether a more explicit approach of examining fees relative to revenue or costs is now warranted. As trading venues are by nature monopolies in the provision of their own market data, we believe that to provide data on a reasonable commercial basis, market data fees should have some relation to the cost of the production of the data. Many trading venues, including the London Stock Exchange, Borsa Italiana and Wiener Börse, charge market participants a separate "created works" or "derived data" license based on use of trading venue data to create (e.g., through mathematical or other manipulations or processes) new data.⁶ Trading venues clearly do not have any material production costs associated with a market participant's created works/derived data uses and, accordingly, we do not think such licenses meet the reasonable commercial basis provision of MiFIR.

Publication of trade data by Approved Publication Arrangements (APAs)

In the non-equity space, one of the key elements of MiFID II was to improve transparency by ensuring that APAs would publish post-trade transparency data in an easily accessible way and at a reasonable cost based on the principle of reasonable commercial basis. However, we have seen APAs engaging in practices that are contrary to the objectives of the legislation, including imposing

⁴ Article 13 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR). Available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN>.

⁵ ESMA Final Report Amendments to Commission Delegated Regulation (EU) 2017/587 (RTS 1), March 2018. Available online at https://www.esma.europa.eu/sites/default/files/library/esma70-156-354_final_report_rts_1_amendment.pdf.

⁶ See London Stock Exchange letter to Customers regarding changes to its Market Data products and pricing: <https://www.londonstockexchange.com/products-and-services/market-data/realtimedata/pricesandpolicies/lse-client-notification-jan-2019.pdf>; and London Stock Exchange Terms and Conditions available at: <https://www.londonstockexchange.com/products-and-services/market-data/realtimedata/pricesandpolicies/terms-and-conditions-2019.pdf>.

restrictions on access to data, publishing information in a format that prevents users from reading, using and copying the information, deleting data shortly after publication, not publishing data on transactions benefiting from a publication deferral and requiring market participants to submit search queries in order to access data. These practices appear motivated in part by a desire to compel market participants to subscribe to expensive data packages in order to obtain MiFID II transparency data that should be provided free of charge. ESMA has issued Q&As clarifying that these practices run counter to the objectives of MiFID II. APAs have, however, been slow in complying and therefore we believe that legislative change might be warranted to further address these practices.

MIFID II cross-border framework

The equivalence mechanism established under MiFID II is a valuable part of the regime, which has the potential to broaden choice for European institutions and investors, while strengthening cross-border regulatory convergence. Brexit has naturally prompted questions about the design and operation of the equivalence framework, but it is also worth remembering that the framework is designed to be global in its application rather than simply address the nature of the UK-EU relationship after Brexit.

The ultimate challenge in the context of equivalence is ensuring that the framework balances the goal of making Europe accessible to global financial institutions with the need to ensure robust standards of investor protection and business conduct. In this regard, we have previously underscored our view that equivalence assessments should focus on the outcomes delivered by regulation and supervision, rather than detailed line-by-line correspondence of legal text.

Traded on a Trading Venue (Derivatives)

The concept of Traded on a Trading Venue (ToTV) is relevant in the context of determining whether certain derivatives are subject to the MiFID II transparency requirements. The very granular approach developed by ESMA in the ToTV assessment has created an incentive for certain market participants to duplicate ISIN codes for economically equivalent derivatives in order to engage in bilateral OTC trading that remains outside the transparency regime of MiFID II. As a result, many derivatives continue to be traded in the OTC space, undermining the intention of the Derivatives Trading Obligation (DTO). We believe that changes should be introduced to the ESMA assessment around ToTV to ensure that instruments that are economically identical to derivatives traded on MTFs and OTFs are also subject to the MiFID II transparency regime.

Speed bumps for equities trading

We are aware that a number of trading venue operators including Eurex are considering the introduction of 'speed bumps' or delays of certain orders. The proposed speedbumps are explicitly designed to give the fastest and most sophisticated traders the ability to selectively cancel their quotes to avoid filling investor orders. This is due to the asymmetric and discriminatory design of the proposed speedbumps – certain order types and market participants will bypass the speedbumps, while others will be subject to them. We believe that this does not improve the quality of the markets, undermines pre-trade price transparency by creating illusory liquidity (something that MiFID II was explicitly meant to avoid), violates the principle of non-discrimination

and undermines the ability of market participants to deliver best execution to their clients.

Inducements / payment for research

Given the importance of this issue to our members, AIMA and MFA look forward to a full consultation to discuss the new framework for research and inducements. The Associations have previously highlighted some specific challenges associated with implementation of rules on payment for research in fixed income markets. A number of our members report that the implementation of a framework where investment managers must pay for research on an unbundled basis has not led to a narrowing in spreads for fixed income instruments, meaning that some firms now carry additional ongoing costs in respect of research services. Feedback from members also suggests that brokers are open to negotiate on the price at which they will provide research, although it is not clear whether smaller managers have the same degree of bargaining power in this context.

In any future review of MiFID II, we encourage policymakers to consider whether the rules on inducements, including in the context of fixed income research, are achieving the intended policy goals and whether the requirements should be framed differently for different asset classes.

Periodic auctions

Given ESMA ongoing consideration of periodic auctions (“PAs”), we would like to note our support for this execution modality, including frequent batch auctions (“FBAs”), given that they serve to reduce both implicit costs and explicit costs to investors.

Our research shows that intra-spread trading generally, and PAs in particular, are beneficial to the market and save money for investors. We believe this is supported by the continued usage of these techniques by buy-side market professionals in the context of their pursuit of best execution and endeavours to maximize returns for investors following the implementation of the recast MiFID II.

We are not aware of any quantitative evidence that PAs have adversely affected quote stability, price volatility or market quality, and note that they constitute a very small proportion of European equities trading. We would therefore strongly oppose any proposal to limit the availability of such auctions because we believe this would cause significant harm to investors’ interests and impair firms’ ability to discharge their duties of best execution.

We also believe that competition between multiple execution venues and models, and the different means of accessing liquidity these present, is beneficial to investors and contributes to market integrity by reducing costs, improving price formation and discovery and diversifying risk across the financial system.

To the extent that an NCA does identify that an individual venue is structuring PAs in a manner that is intended to circumvent MiFID II transparency provisions, supervisory action in respect of that trading venue would be warranted; however, we caution against any approach that assumes that all PAs are identical in their parameters or that seeks to impose change on systems that are not in any way breaching rules.



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We hope that the value of periodic auctions will be kept in mind for any future review of MiFID II transparency provisions.