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1 February 2016

CFA Institute response to the European Commission's Call for Evidence on the European Union (EU) regulatory framework for financial services

CFA Institute submitted a response to the European Commission's Call for Evidence on the European Union (EU) regulatory framework for financial services on 29 January 2016.

The response covered challenges with the practical application of several financial services laws in the EU Member States. The legislations in question include, among others, the Market Abuse Regulation & Criminal Sanctions Directive, the Alternative Investment Funds Directive, and the Accounting Directive.

The CFA Institute response was informed by submissions provided by CFA Society France, CFA Society Italy, CFA Society Poland, and CFA Society Netherlands. The final response was submitted via the European Commission's online questionnaire and is reproduced below.

BANKING AND FINANCE

Call for evidence: EU regulatory framework for financial services

Fields marked with * are mandatory.

Introduction

The Commission is looking for empirical evidence and concrete feedback on:

- A. Rules affecting the ability of the economy to finance itself and growth;
- B. Unnecessary regulatory burdens;
- C. Interactions, inconsistencies and gaps;
- D. Rules giving rise to unintended consequences.

It is expected that the outcome of this consultation will provide a clearer understanding of the interaction of the individual rules and cumulative impact of the legislation as a whole including potential overlaps, inconsistencies and gaps. It will also help inform the individual reviews and provide a basis for concrete and coherent action where required.

Evidence is sought on the impacts of the EU financial legislation but also on the impacts of national implementation (e.g. gold-plating) and enforcement.

Feedback provided should be supported by relevant and verifiable empirical evidence and concrete examples. Any underlying assumptions should be clearly set out.

Feedback should be provided only on rules adopted by co-legislators to date.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-financial-regulatory-framework-review@ec.europa.eu.

More information:

- on this consultation
- on the protection of personal data regime for this consultation

1. Information about you

*Are you replying as:
- a private individual
- (selected) an organisation or a company
- a public authority or an international organisation

*Name of your organisation:

CFA Institute

Contact email address:

The information you provide here is for administrative purposes only and will not be published

josina.kamerling@cfainstitute.org

*Is your organisation included in the Transparency Register?
(If your organisation is not registered, we invite you to register here, although it is not compulsory to be registered to reply to this consultation. Why a transparency register?)
- (selected) Yes
- No

*If so, please indicate your Register ID number:

89854211497-57

*Type of organisation:
- Academic institution
- Consultancy, law firm
- Industry association
- Non-governmental organisation
- Trade union
- Company, SME, micro-enterprise, sole trader
- Consumer organisation
- Media
- Think tank
- (selected) Other

*Please specify the type of organisation:

Association of investment professionals

* Where are you based and/or where do you carry out your activity?

Belgium

* Field of activity or sector (*if applicable*):

at least 1 choice(s)

- [ ] Accounting
- [ ] Auditing
- [ ] Banking
- [ ] Consumer protection
- [ ] Credit rating agencies
- [ ] Insurance
- [ ] Pension provision
- [ ] Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- [ ] Market infrastructure operation (e.g. CCPs, CSDs, Stock exchanges)
- [ ] Social entrepreneurship
- [ ] Other
- [x] Not applicable

Important notice on the publication of responses

* Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?
(see specific privacy statement)

- (•) Yes, I agree to my response being published under the name I indicate (*name of your organisation/company/public authority or your name if your reply as an individual*)
- ( ) No, I do not want my response to be published

2. Your feedback

In this section you will have the opportunity to provide evidence on the 15 issues set out in the consultation paper. You can provide up to 5 examples for each issue.

If you would like to submit a cover letter or executive summary of the main points you will provide below, please upload it here:

Please choose at least one issue from at least one of the following four thematic areas on which you would like to provide evidence:

A. Rules affecting the ability of the economy to finance itself and grow

You can select one or more issues, or leave all issues unselected

- [ ] Issue 1 - Unnecessary regulatory constraints on financing
- [ ] Issue 2 - Market liquidity
- [x] Issue 3 - Investor and consumer protection
- [x] Issue 4 - Proportionality / preserving diversity in the EU financial sector

Issue 3 – Investor and consumer protection

Please specify whether, and to what extent, the regulatory framework has had any major positive or negative impacts on investor and consumer protection and confidence.

How many examples do you want to provide for this issue?

(•) **1** example ( ) **2** examples ( ) **3** examples ( ) **4** examples ( ) **5** examples

Please fill in the fields below. For any additional documentation, please use the upload button at the end of the section dedicated to this issue.

Example 1 for Issue 3 (Investor and consumer protection)

* **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Please select at least one item in the list of the main adopted EU legislative acts below.
Please do not tick the "other" box unless the example you want to provide refers to an legislative act which is not in the list (other adopted EU legislative acts, national legislative acts, etc..). In that case, please specify in the dedicated text box which other legislative act(s) the example refers to.

- [ ] Accounting Directive
- [ ] AIFMD (Alternative Investment Funds Directive)
- [ ] BRRD (Bank recovery and resolution Directive)
- [ ] CRAs (credit rating agencies)- Directive and Regulation
- [ ] CRR III/CRD IV (Capital Requirements Regulation/Directive)
- [ ] CSDR (Central Securities Depositories Regulation)
- [ ] DGS (Deposit Guarantee Schemes Directive)
- [ ] Directive on non-financial reporting
- [ ] ELTIF (Long-term Investment Fund Regulation)
- [ ] EMIR (Regulation of OTC derivatives, Central Counterparties and Trade Repositories)
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- [ ] ESAs regulations (European Supervisory Authorities)
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- EuVECA (European venture capital funds

- [ ] Regulation)
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- [ ] PSD (Payment Services Directive)
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- [ ] Statutory Audit - Directive and Regulation
- [ ] Transparency Directive
- [ ] UCITS (Undertakings for collective investment in transferable securities)
- [ ] Other Directive(s) and/or Regulation(s)

* **Please provide us with an executive/succinct summary of your example:**
(If applicable, mention also the articles of the Directive(s) and/or Regulation(s) selected above and referred to in your example)

CFA Institute believes that the introduction of criminal sanctions under the revised Market Abuse legislation (directive on criminal sanctions for market abuse) was an important positive step in strengthening the enforcement capabilities of authorities and providing a more credible deterrent to market abuse. In general we are broadly supportive of the new market abuse regime which must be transposed in the national law in each Member State by 3 July 2016.

However, the directive on criminal sanctions for market abuse is affected by the principle called ‘non bis in idem’, which prevents the possibility of carrying cumulative actions by both administrative and criminal enforcement authorities. In other words, the ‘non bis in idem’ principle is considered to be violated under the directive on criminal sanctions for market abuse where criminal procedure is initiated for market abuse that is already subject to administrative sanctions. Accordingly, under the non bis in idem rule national legislators must choose between administrative and criminal proceedings for each market abuse offence.

For example in France, the ‘non bis in idem’ rule puts an end to thirty years of efficient practice of parallel administrative and criminal sanctions. Under the Monetary and Financial Code (MFC) in France, suspected market abuse cases can be prosecuted by both the French Financial Markets Regulator (AMF) and the criminal courts. The AMF undertakes administrative sanctions to protect the well-functioning of markets. Criminal courts undertake criminal sanctions for market abuses cases with high consequences, or cases with an intention to defraud that have potentially broader societal consequences.

The administrative sanctions are undertaken by the AMF’s Enforcement Division. The Enforcement Division has specialized investigators, often with financial market experience, and the procedures take approximately two years. The criminal sanctions are undertaken by criminal courts, and the procedures last approximately ten years, and sometimes up to 14 years (please see the supporting AFM Working Group report for details). The timeframe under the criminal court system is thus much longer, and the outcomes are more uncertain (partly due to numerous recourse possibilities), than in the administrative procedures.

CFA Institute appreciates the desire to develop a practical solution that would ensure an optimal efficiency for both types of sanctions, and/or the continuation of the cumulative/parallel sanctions practice. As criminal procedures often take a long time, the inability to pursue such sanctions in parallel with administrative sanctionsmay weaken investor protection mechanisms.. Market abuses cause damage to well-functioning capital markets, investor protection, and investors’ confidence in capital markets. For that reason, market abuse enforcement rules are highly important.

* **Please provide us with supporting relevant and verifiable empirical evidence for your example:**
(please give references to concrete examples, reports, literature references, data, etc.)

Report by the AMF Working Group on ‘non bis in idem’ (May 2015); available in France at: http://bit.ly/23r5i8r

A press release in English is available at: http://bit.ly/1TlQzr3

* **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

CFA Institute believes that enforcement rules should ultimately enhance the protection of markets and investors, through efficient administrative and criminal actions. Accordingly, an efficient enforcement system should allow either simultaneous administrative and criminal proceedings, or, if this is not possible due to the recent legislative changes in European jurisprudence, an effective and timely split between the two types of proceedings on the basis of solid criteria. As the directive on criminal sanctions for market abuse must be transposed into national laws by 3 July 2016, this matter should be examined further.

We also believe that a robust criteria for an effective spilt between administrative and criminal proceedings for market abuse cases is important. The potential criteria to determine which proceedings to use could include, for example, the seriousness of the offense or the degree of harm to societal values; the complexity of the offense; national and/or international character of the violation; and the expected timeframe of proceedings.

One possibility could also be the introduction of a maximum delay of three to six months that could be set to decide between administrative/criminal proceedings. The delay could enhance the deterrence effect of the enforcement system, as well as reduce uncertainty for market participants.

In addition, as market abuse cases are complex and can cover several jurisdictions, also cross-border cooperation among national competent authorities should be facilitated through improved information sharing and adherence to common sanctioning regimes. These changes could lead to better investor protection and to enhanced market integrity in the European Union.

If you have further quantitative or qualitative evidence related to issue 3 that you would like to submit, please upload it here:

Issue 4 – Proportionality / preserving diversity in the EU financial sector

Are EU rules adequately suited to the diversity of financial institutions in the EU? Are these rules adapted to the emergence of new business models and the participation of non-financial actors in the market place? Is further adaptation needed and justified from a risk perspective? If so, which, and how?

How many examples do you want to provide for this issue?

(x) **1** example ( ) **2** examples ( ) **3** examples ( ) **4** examples ( ) **5** examples

Please fill in the fields below. For any additional documentation, please use the upload button at the end of the section dedicated to this issue.

Example 1 for Issue 4 (Proportionality / preserving diversity in the EU financial sector)

* To which Directive(s) and/or Regulation(s) do you refer in your example?

Please select at least one item in the list of the main adopted EU legislative acts below.
Please do not tick the "other" box unless the example you want to provide refers to an legislative act which is not in the list (other adopted EU legislative acts, national legislative acts, etc..). In that case, please specify in the dedicated text box which other legislative act(s) the example refers to.

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- [ ] CSDR (Central Securities Depositories Regulation)
- [ ] DGS (Deposit Guarantee Schemes Directive)
- [ ] Directive on non-financial reporting
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- [ ] EMIR (Regulation of OTC derivatives, Central Counterparties and Trade Repositories)
- [ ] E-Money Directive
- [ ] ESAs regulations (European Supervisory Authorities)
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- [ ] Motor Insurance Directive
- [ ] Omnibus I (new EU supervisory framework)
- [ ] Omnibus II: new European supervisory framework for insurers
- [ ] PAD (Payments Account Directive)
- [ ] PD (Prospectus Directive)
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- [ ] PSD (Payment Services Directive)
- [ ] Qualifying holdings Directive
- [ ] Regulations on IFRS (International Financial Reporting Standards)
- [ ] Reinsurance Directive
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- [ ] Statutory Audit - Directive and Regulation
- [ ] UCITS (Undertakings for collective investment in transferable securities)
- [ ] Regulation)
- [ ] SSR (Short Selling Regulation)
- [x] Transparency Directive
- [ ] Other Directive(s) and/or Regulation(s)

* **Please provide us with an executive/succinct summary of your example:**
(If applicable, mention also the articles of the Directive(s) and/or Regulation(s) selected above and referred to in your example)

Article 28 of the amended Transparency Directive (2013/50/EU) concerns sanctions to be imposed on companies, managers and supervisory board members for non-compliance with certain reporting obligations regarding financial transactions and confidential information. Article 28 notes that Member States should ensure that the sanctions include the possibility of including pecuniary sanctions that are “effective, proportionate, and dissuasive”. The Directive further notes the maximum limits of the sanctions, which are a pecuniary fine of up to €9 million for companies and up to €2 million for private individuals.

There are some concerns that the maximum limits have not been applied proportionally in all the Member States. CFA Institute would be in favour of further supervisory guidance to national competent authorities on how to apply the “proportionality” requirement under Article 28 of the amended Transparency Directive.

* **Please provide us with supporting relevant and verifiable empirical evidence for your example:**
(please give references to concrete examples, reports, literature references, data, etc.)

We would be in favour of further guidance to Member States on how the “proportionality” of the maximum fines is applied across Europe. For example, an investment professional working in Poland, who is a member of CFA Institute, noted that Poland has applied the maximum levels of fines in the country. The fines are 40.000.000 PLN (just under €9 million) for non-compliant companies and 8.000.000 PLN (just under €2 million) for individuals.

Our understanding is that in Poland, the sanctions are to be imposed in an administrative way that does not follow the penal procedure (including the right of the accused to defend oneself, being considered not guilty until sentenced as guilty etc.). The proceedings do not include a court of justice, but the sanctions are given by the supervisory body (KNF). The only way of appeal is filing a complaint to an administrative court. The complaint does not suspend the execution of the sanctions. The person or entity that has been fined has to pay the fine before the case will be reviewed by an administrative court. Even in the case of a court overruling the supervisor’s decision, the company that has been fined may already have gone bankrupt with substantial losses to its shareholders.

There is no requirement that the penalty imposed should correspond to the entity’s or person’s assets or revenues (bar the possibility of increasing it in case of companies with very high revenues). This could mean that the sanctions regime in Poland could have a disproportionate impact on non-compliant firms and their shareholders vis-à-vis other European Union jurisdictions.

We would thus like to highlight that the application of “proportionate” sanctions implies that the specifics of each Member State’s markets and the size of businesses in relative and absolute terms should be taken into account when determining what level of sanctions to apply. This would not appear to have been observed in Poland, as one example. To achieve greater consistency in implementation of this directive, further guidelines on the application of the rules in different markets – such as how fines should correspond to revenues, assets, or other measurements – would be welcome, in order to create a level playing field and ensure similar treatment for firms of a similar size across jurisdictions.

* **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

CFA Institute would be in favour of a further clarification of what “proportionate” sanctions mean in the context of Article 28 of the amended Transparency Directive. We believe that further guidance, or a common base, to local authorities on the application of the proportionate sanctions could help to ensure consistency throughout the European Union and help ensure similar outcomes to firms of similar size. This in turn, would help with the establishment of a level playing field.

If you have further quantitative or qualitative evidence related to issue 4 that you would like to submit, please upload it here:

B. Unnecessary regulatory burdens

You can select one or more issues, or leave all issues unselected

- [ ] Issue 5 - Excessive compliance costs and complexity
- [x] Issue 6 - Reporting and disclosure obligations
- [ ] Issue 7 - Contractual documentation
- [ ] Issue 8 - Rules outdated due to technological change
- [x] Issue 9 - Barriers to entry

Issue 6 – Reporting and disclosure obligations

The EU has put in place a range of rules designed to increase transparency and provide more information to regulators, investors and the public in general. The information contained in these requirements is necessary to improve oversight and confidence and will ultimately improve the functioning of markets. In some areas, however, the same or similar information may be required to be reported more than once, or requirements may result in information reported in a way which is not useful to provide effective oversight or added value for investors.

Please identify the reporting provisions, either publicly or to supervisory authorities, which in your view either do not meet sufficiently the objectives above or where streamlining/clarifying the obligations would improve quality, effectiveness and coherence. If applicable, please provide specific proposals.

Specifically for investors and competent authorities, please provide an assessment whether the current reporting and disclosure obligations are fit for the purpose of public oversight and ensuring transparency. If applicable, please provide specific examples of missing reporting or disclosure obligations or existing obligations without clear added value.

How many examples do you want to provide for this issue?

- [x] **1** example
- [ ] **2** examples
- [ ] **3** examples
- [ ] **4** examples
- [ ] **5** examples

Please fill in the fields below. For any additional documentation, please use the upload button at the end of the section dedicated to this issue.

Example 1 for Issue 6 (Reporting and disclosure obligations)

* **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Please select at least one item in the list of the main adopted EU legislative acts below.
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- [ ] ELTIF (Long-term Investment Fund Regulation)
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- [ ] E-Money Directive
- [ ] ESAs regulations (European Supervisory Authorities)
- [ ] ESRB (European Systemic Risk Board Regulation)
- [ ] EuSEF (European Social Entrepreneurship Funds Regulation)

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- [ ] Transparency Directive
- [ ] UCITS (Undertakings for collective investment in transferable securities)
- [ ] Other Directive(s) and/or Regulation(s)

* **Please provide us with an executive/succinct summary of your example:**
(If applicable, mention also the articles of the Directive(s) and/or Regulation(s) selected above and referred to in your example)

The Accounting Directive (2013/34/EU) outlines the following elements: fundamental accounting principles; composition of financial statements; and specific consolidation, recognition, measurement and disclosure requirements. CFA Institute has noted some of our concerns on certain aspects of the requirements below.

In outlining the composition of financial statements, the Accounting Directive stipulates that financial statements must comprise of a balance sheet, a profit and loss statement, and selected notes to the financial statement. It also gives EU Member States the option to require large undertakings to include other statements, such as a cash flow statement or the statement of other comprehensive income (OCI).

OCI items are other revenue and expense items that are excluded from the income statement and included in comprehensive income, defined as “all changes in equity of an entity that result from recognized transactions and other economic events of the period other than transactions with owners in their capacity as owners”. Some of these gains and losses are later recognized in earnings, a process known as “recycling”, for instance when gains and losses on available-for-sale (AFS) securities are realized.

There are economically relevant gains and losses that are reported through OCI and these warrant investor scrutiny whenever assessing the performance of reporting entities (Hoogervorst 2014; CFA Institute 2015). For example, in 2014 IASB Chair Hoogervorst asserted his speech that OCI analysis would have enabled investors to predict the bankruptcy of auto sector companies. In addition, CFA Institute 2015 report showed that in the case of Dexia Bank, the analysis of losses reflected in OCI during the 2008 reporting period could have provided a more effective indicator of the distressed performance and erosion of asset value.

Until 2011, reporting entities could disclose OCI items as part of the statement of changes in stockholders’ equity along with distributions and contributions from shareholders under IFRS requirements (Maines and McDaniel 2000). Since 2012, firms are required to disclose OCI in a separate statement, a measure taken to enhance the transparency and consistent reporting of OCI items.

The Accounting Directive allows, rather than mandates, large undertakings to include the OCI statement as part of the overall set of financial statements. We are concerned that the leeway in the application of the Directive provides financial statement preparers with the flexibility not to be as consistent and comprehensive as desirable in their presentation of the OCI statement. For example, we have observed that some large banks, for example in Italy, still report items that ought to be reported as OCIs through the statement of changes in equity.

As to accounting principles, we are comfortable with most of the eight fundamental accounting principles. However, there is a need to align the Accounting Directive requirements with the IFRS conceptual framework. The update of the conceptual framework has been subject to considerable consultative input, including from European stakeholders. One of the most contentious issues in financial reporting has been on whether the concept of prudence ought to be included in the standard setter conceptual framework as an attribute of preparing financial reporting information. The latest IFRS conceptual framework exposure draft has proposed to do so, but not in any manner that trumps the need to present faithfully representational accounting information.

Finally, we are concerned that the Accounting Directive may not be prescriptive enough in the practical application of the fundamental accounting principles in the Member States. The principles regard specifically the set-off, dis-applying substance over form, restricting materiality to presentation, and disclosure and prudence. The leeway on these options allowed to the Member States may contribute to undesirable diversity in reporting outcomes.

* **Please provide us with supporting relevant and verifiable empirical evidence for your example:**
(please give references to concrete examples, reports, literature references, data, etc.)

References:
CFA Institute. 2015. Analyzing bank performance: Role of comprehensive income. CFA Institute, February 2015.
Hoogervorst, H. (2014) In Speech by Hans Hoogervorst, IASB ChairmanIFRS Conference Tokyo, 3 September 2014.
Maines, L. A., and L. S. McDaniel. 2000. Effects of comprehensive-income characteristics on nonprofessional investors' judgments: The role of financial-statement presentation format. Accounting Review 75 (2): 179.

* **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Please see CFA Institute recommendations above.

If you have further quantitative or qualitative evidence related to issue 6 that you would like to submit, please upload it here:

Issue 9 – Barriers to entry

Please document barriers to market entry arising from regulation that the EU should help address. Have the new rules given rise to any new barriers to entry for new market players to challenge incumbents or address hitherto unmet customer needs?

How many examples do you want to provide for this issue?

- [x] **1** example
- [ ] **2** examples
- [ ] **3** examples
- [ ] **4** examples
- [ ] **5** examples

Please fill in the fields below. For any additional documentation, please use the upload button at the end of the section dedicated to this issue.

Example 1 for Issue 9 (Barriers to entry)

* **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Please select at least one item in the list of the main adopted EU legislative acts below.
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- [ ] SFD (Settlement Finality Directive)
- [ ] Solvency II Directive
- [ ] SSM Regulation (Single Supervisory Mechanism)
- [ ] Statutory Audit - Directive and Regulation
- [ ] UCITS (Undertakings for collective investment in transferable securities)

Area)

- [ ] SFTR (Securities Financing Transactions Regulation)
- [ ] SRM (Single Resolution Mechanism Regulation)
- [ ] SSR (Short Selling Regulation)
- [ ] Transparency Directive
- [ ] Other Directive(s) and/or Regulation(s)

* **Please provide us with an executive/succinct summary of your example:**
(If applicable, mention also the articles of the Directive(s) and/or Regulation(s) selected above and referred to in your example)

In the past, Alternative Investment Fund Managers (AIFMs) have not been allowed to offer Markets in Financial Instruments Directive (MiFID) services through the Alternative Investment Fund Manager Directive (AIFMD) passport in other EU Member States. The MiFID services are detailed in Article 6.4 of AIFMD, and include, among others, non-core services such as investment advice and safekeeping. In order to provide these services outside of the AIFM's home member state, the AIFMs have needed to establish a separate entity licensed as an investment firm in the "host" EU Member State.

However, due to the revision of the MiFID, Article 92 of Directive 2014/65/EU (MiFID II) modifies the provisions of the AIFMD so that an AIFM authorised to provide the MiFID investment services (as detailed in Article 6.4 of the AIFMD) has the right to provide these services on a cross-border basis in the EU. In order to do so, the AIFM would need an authorisation to provide these services outside of the home member state. This authorisation must first be granted by the AIFM's "home" competent authority; once approved, the authorisation request is sent to the "host" competent authority for approval. This was confirmed in the AIFMD Q&A published by ESMA on the 15th of December 2015 (available here http://bit.ly/1mlK3np ; page 23).

Nonetheless, the application of Article 6 of AIFMD in certain Member States has made the passporting of services challenging. For example in the Netherlands, AIFMs are required to register with the AFM (the Netherlands financial markets authority) as a manager of either collective (pooled) investments or as a manager of individual investments. They can also apply for both types of licenses.

The Dutch AFM has indicated that AIFMs wishing to passport services to a UCITS or other type of pooled fund platform must be registered as managers of individual investments. As a consequence, AIFMs who have the license to manage collective investments are not able to offer investment advice services in other Member States as per article 6.4 AIFMD. For instance, and AIFM with the collective investments license cannot act as delegated manager for a non-Dutch UCITS platform.

In addition, under the AIFMD rules, AIFMs cannot have separate licenses for AIFMD and for MiFID.

It would thus appear that certain AIFMs in the Netherlands registered as managers of collective investments are no longer able to passport their services (as defined in Article 6.4 of AIFMD) to the other EU Member States, unless they apply for the additional individual management license which does not seem relevant for the type of collective license in question.

* **Please provide us with supporting relevant and verifiable empirical evidence for your example:**
(please give references to concrete examples, reports, literature references, data, etc.)

CFA Institute was informed about the challenges with the passporting of investment advice under Article 6 of AIFMD by one of our members in the Netherlands who has sought authorisation to provide Article 6.4 services to a UCITS entity domiciled in another member state. He indicated that when the Netherlands migrated to the new AIFMD rules, all home AIFMs had to indicate whether they are a manager of collective/pooled investments, or of individual investments. The AFM did not approve the passporting request because the AIFM concerned held the collective investments license, not the individual investments license.

The other member state (in this case Ireland) mandates that when offering services to an Irish UCITS fund, the Dutch AIFM acts as a “discretionary” manager for the UCITS concerned. The Netherlands interprets this discretionary role as needing to hold the individual investments license. We understand that different jurisdictions may apply the passporting rules in a less restrictive fashion, which may create inconsistencies (and differing administrative burdens among jurisdictions) in the operation of a single market for funds services.

* **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

Guidance or legal clarification to national competent authorities on implementing the possibility to passport services (as defined in Article 6.4 of AIFMD) across the EU Member States would be welcome.

If you have further quantitative or qualitative evidence related to issue 9 that you would like to submit, please upload it here:

C. Interactions of individual rules, inconsistencies and gaps

You can select one or more issues, or leave all issues unselected

- [ ] Issue 10 - Links between individual rules and overall cumulative impact
- [x] Issue 11 - Definitions
- [x] Issue 12 - Overlaps, duplications and inconsistencies
- [x] Issue 13 - Gaps

Issue 11 – Definitions

Different pieces of financial services legislation contain similar definitions, but the definitions sometimes vary (for example, the definition of SMEs). Please indicate specific areas of financial services legislation where further clarification and/or consistency of definitions would be beneficial.

How many examples do you want to provide for this issue?

(•) **1** example ( ) **2** examples ( ) **3** examples ( ) **4** examples ( ) **5** examples

Please fill in the fields below. For any additional documentation, please use the upload button at the end of the section dedicated to this issue.

Example 1 for Issue 11 (Definitions)

* **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Please select at least one item in the list of the main adopted EU legislative acts below.
Please do not tick the "other" box unless the example you want to provide refers to an legislative act which is not in the list (other adopted EU legislative acts, national legislative acts, etc..). In that case, please specify in the dedicated text box which other legislative act(s) the example refers to.

- [ ] Accounting Directive
- [ ] AIFMD (Alternative Investment Funds Directive)
- [ ] BRRD (Bank recovery and resolution Directive)
- [ ] CRAs (credit rating agencies)- Directive and Regulation
- [ ] CRR III/CRD IV (Capital Requirements Regulation/Directive)
- [ ] CSDR (Central Securities Depositories Regulation)
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- [ ] Directive on non-financial reporting
- [ ] ELTIF (Long-term Investment Fund Regulation)
- [ ] EMIR (Regulation of OTC derivatives, Central Counterparties and Trade Repositories)
- [ ] E-Money Directive
- [ ] ESAs regulations (European Supervisory Authorities)
- [ ] ESRB (European Systemic Risk Board Regulation)
- [ ] EuSEF (European Social Entrepreneurship Funds Regulation)

- [ ] EuVECA (European venture capital funds Regulation)
- [ ] FCD (Financial Collateral Directive)
- [ ] FICOD (Financial Conglomerates Directive)
- [ ] IGS (Investor compensation Schemes Directive)
- [ ] IMD (Insurance Mediation Directive)
- [ ] IORP (Directive on Institutions of Occupational Retirement Pensions)
- [ ] Life Insurance Directive
- [ ] MAD/R (Market Abuse Regulation & Criminal Sanctions Directive)
- [ ] MCD (Mortgage Credit Directive)
- [ ] MIF (Multilateral Interchange Fees Regulation)
- [ ] MiFID II/R (Markets in Financial Instruments Directive & Regulation)
- [ ] Motor Insurance Directive
- [ ] Omnibus I (new EU supervisory framework)
- [ ] Omnibus II: new European supervisory framework for insurers
- [ ] PAD (Payments Account Directive)
- [ ] PD (Prospectus Directive)
- [ ] PRIPS (Packaged retail and insurance-based investment products Regulation)
- [ ] PSD (Payment Services Directive)
- [ ] Qualifying holdings Directive
- [ ] Regulations on IFRS (International Financial Reporting Standards)
- [ ] Reinsurance Directive
- [ ] SEPA Regulation (Single Euro Payments Area)
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- [ ] Statutory Audit - Directive and Regulation
- [ ] Transparency Directive
- [ ] UCITS (Undertakings for collective investment in transferable securities)
- [x] Other Directive(s) and/or Regulation(s)

* **Please specify to which other Directive(s) and/or Regulation(s) you refer in your example?**
(Please be short and clear: state only the common name and/or reference of the legislative act(s) you refer to.)

The proposed Securitisation Regulation

* **Please provide us with an executive/succinct summary of your example:**
(If applicable, mention also the articles of the Directive(s) and/or Regulation(s) selected above and referred to in your example)

CFA Institute welcomes the alignment of SME definition in the Prospectus Directive revision, MIFID/R II, and MAD/R. In all the legislations, SMEs are defined as companies with under 200000 euros in market capitalisation. However, there is no definition of a SME in the proposed securitisation legislative package.

We understand that the European Commission is already looking into further aligning the definitions in also other pieces of European Union (EU) legislation (as noted for example here: http://bit.ly/1F2vkEK). CFA Institute supports this initiative.

* **Please provide us with supporting relevant and verifiable empirical evidence for your example:**
(please give references to concrete examples, reports, literature references, data, etc.)

N/A

* **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

CFA Institute supports further aligning the definition of a SME in all EU legislation.

If you have further quantitative or qualitative evidence related to issue 11 that you would like to submit, please upload it here:

Issue 12 – Overlaps, duplications and inconsistencies

Please indicate specific areas of financial services legislation where there are overlapping, duplicative or inconsistent requirements.

How many examples do you want to provide for this issue?

- (x) **1** example
- ( ) **2** examples
- ( ) **3** examples
- ( ) **4** examples
- ( ) **5** examples

Please fill in the fields below. For any additional documentation, please use the upload button at the end of the section dedicated to this issue.

Example 1 for Issue 12 (Overlaps, duplications and inconsistencies)

* **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Please select at least one item in the list of the main adopted EU legislative acts below.
Please do not tick the "other" box unless the example you want to provide refers to an legislative act which is not in the list (other adopted EU legislative acts, national legislative acts, etc..). In that case, please specify in the dedicated text box which other legislative act(s) the example refers to.

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- [ ] EuVECA (European venture capital funds Regulation)
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- [ ] SFTR (Securities Financing Transactions Regulation)

- [ ] Solvency II Directive
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- [ ] UCITS (Undertakings for collective investment in transferable securities)
- [ ] Other Directive(s) and/or Regulation(s)

* **Please provide us with an executive/succinct summary of your example:**
(If applicable, mention also the articles of the Directive(s) and/or Regulation(s) selected above and referred to in your example)

Due to (i) low returns from more traditional forms of investments or ordinary deposits, and (ii) volatility in the markets, investment firms have responded to demand for higher yields by making alternative and more sophisticated investment strategies available to retail clients, often through the manufacturing and distribution of complex or structured investment products.

These complex or structured products allow retail investors' access to asset classes, market segments and investment strategies previously only available to professional clients.

The existing Markets in Financial Instruments Directive and Regulation (MiFID/R II) requirements on product governance should be sufficient, if correctly applied, supervised and enforced. However, compliance standards for the MiFID/R II rules on information to clients, suitability and appropriateness, may pose challenges to investor protection. The Regulation on 'key information documents for packaged retail and insurance-based investment products' (PRIIPs) also covers categories of products that are not easily determinable in an objective manner as either complex or non-complex.

Retail investors are facing the challenge of not being able to understand certain risks, costs and expected returns of some products and/or the drivers of risks and returns. This could hamper the investors' ability to make informed investment decisions and increasing the likelihood of unexpected losses.

CFA Institute believes that product manufacturing and distribution (e.g. marketing and sale), in particular to retail investors, is a key concern to assure a proper and satisfactory level of conduct from an investor protection perspective.

We believe that the definition of a "complex" product could be better clarified, in particular in the Regulation on Key Information Documents for packaged retail and insurance-based investment products (PRIIPs) and the revised Markets in Financial Instruments Directive/Regulation (MiFID/R II). A further clarification would enhance investor protection across the European Union (EU) and help ensure that in particular retail clients would better understand the products they buy.

Please provide us with supporting relevant and verifiable empirical evidence for your example:
(please give references to concrete examples, reports, literature references, data, etc.)

In Article 19(6) of MiFID and Article 38 of MiFID Implementing Directive, complex products and financial instruments have been identified as those not meeting the criteria of 'non-complex'. According to that criteria, the concept of complexity appears to be related to somewhat overlapping characteristics that are challenging to determine objectively. These include, for example, liquidity and the type of structure of the instrument themselves. Financial instruments with structures that make the risks and likelihood of return more difficult to understand, including platforms giving access to complex products, are likely to be considered 'complex'.

For these reasons, complexity has to be considered as a relative term, depending not only on the risk-reward profile of the product, but also on other characteristics.

The European Securities and Markets Authority (ESMA) has published an opinion on the MiFID/R II conduct of business rules ('MiFID practices for firms selling complex products'). The opinion specifies a set of characteristics useful in scrutinising the complexity degree of an investment product and lists a non-exhaustive set of examples of complex products. ESMA concludes this list by noting that the vast majority of structured products can be considered as complex products, without defining precise boundaries.

Is it useful to highlight, however, that the structuring of a product does not necessarily imply a certain degree of riskiness, as some structured (and complex) products may seek to contain risk while some plain vanilla products may be characterised by very high risk profiles. For example, a security linked to the Italian BTP-inflation may require a complex mathematical evaluation model, even if it could be deemed suitable for retail investors with a low-moderate risk tolerance profile. In the case of structured bonds, the pay-off is related to the value of interest rates or equity-market indices. Therefore the underlying is easy to identify and monitor, but the product evaluation may require very complex mathematical models.

On the other hand, while illiquid products may be inappropriate for retail investors, it does not necessarily mean that the product is difficult to understand. In fact, illiquidity is linked more to the outstanding amount of the product than to the underlying. For example, the issuers are often also market-makers for structured bonds, and provide low liquidity for the bond in order to encourage the investor to hold it for a long time.

However, elements like leverage or option features embedded within derivative instruments could impair price alignment between the structured product and its underlying. This, in turn, complicates a proper value estimation on the part of the retail investor and the correct understanding of the related risks. In addition, the distribution of captive products like OICR or insurance products, which embed complex features that impair product transparency, may include concealed fees.

Good product governance should easily identify the complexity, and thus the inherent riskiness and the eventual suitability of the investment product to the retail investor. It should also detect embedded fees and commissions.

In a further opinion ('Structured Retail Products - Good practices for product governance arrangements'), ESMA focuses on certain aspects linked to the manufacturing and distribution of Structured Retail Products (SRP). The opinion develops a broad set of non-exhaustive examples of good practices, illustrating arrangements that firms could put in place in order to improve their ability to deliver on investor protection. These include (i) the complexity of the SRPs they manufacture or distribute, (ii) the nature and range of the investment services and activities undertaken in the course of that business, and (iii) the type of investors they target.

ESMA has specified that even though those good practices focus on structured products sold to retail investors, they have to be considered as a relevant reference also for other types of financial instruments, such as asset-backed securities or contingent convertible bonds, as well as when financial instruments are being sold to professional clients.

In Italy, Consob, the Italian National Competent Authority, has published two communications and one surveillance guideline on complex products. The 'Financial product distribution of complex products to retail investors' communication summarises the contents of the ESMA opinions both on complex as well as on structured products. The Consob communication (number 9019104 from 2009) on illiquid products introduces a defined but not exhaustive catalogue of 'Highly complex financial products'. The communication on illiquid products partially supports the Consob surveillance guidelines which aim to align product manufacturing and distribution coherently with target investors' interest and suitability.

* **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

CFA Institute would be in favour of a more harmonised definition of "complex" products. That, in turn, would enhance the levels of investor protection in the EU.

If you have further quantitative or qualitative evidence related to issue 12 that you would like to submit, please upload it here:

Issue 13 – Gaps

While the recently adopted financial legislation has addressed the most pressing issues identified following the financial crisis, it is also important to consider whether they are any significant regulatory gaps. Please indicate to what extent the existing rules have met their objectives and identify any remaining gaps that should be addressed.

How many examples do you want to provide for this issue?

- (x) **1** example
- ( ) **2** examples
- ( ) **3** examples
- ( ) **4** examples
- ( ) **5** examples

Please fill in the fields below. For any additional documentation, please use the upload button at the end of the section dedicated to this issue.

Example 1 for Issue 13 (Gaps)

* **To which Directive(s) and/or Regulation(s) do you refer in your example?**

Please select at least one item in the list of the main adopted EU legislative acts below.
Please do not tick the "other" box unless the example you want to provide refers to an legislative act which is not in the list (other adopted EU legislative acts, national legislative acts, etc..). In that case, please specify in the dedicated text box which other legislative act(s) the example refers to.

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- [ ] IORP (Directive on Institutions of Occupational Retirement Pensions)
- MAD/R (Market Abuse Regulation & Criminal

- [ ] Life Insurance Directive
- [x] Sanctions Directive)
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- [ ] Other Directive(s) and/or Regulation(s)

* **Please provide us with an executive/succinct summary of your example:**
(If applicable, mention also the articles of the Directive(s) and/or Regulation(s) selected above and referred to in your example)

Market Abuse Regulation (MAR) defines ‘closely related persons’ according to article 3.1.26. The definition includes spouses, but does not include partners unless the institution of partner relations is recognised by local law as equal to marriage. In a country where partner relations are not treated as equal to marriage, such as in Poland, partners of persons listed in article 3.1.25 are not covered by any duties, although they may be in an identical situation as if they were married.

Similarly, Article 3.1.26 of MAR mentions family members living in the same household with the managers, but only if they have been doing so for more than a year. Both situations constitute unforeseen gaps in the regulation.

* **Please provide us with supporting relevant and verifiable empirical evidence for your example:**
(please give references to concrete examples, reports, literature references, data, etc.)

Please see above.

* **If you have suggestions to remedy the issue(s) raised in your example, please make them here:**

CFA Institute is broadly in favour of the new European market abuse legislative package. We believe that the risk of incomplete application of MAR in Poland would be decreased if there were guidance or more precise clarifications within the market abuse legislation itself, on to whom the legislation applies.

If you have further quantitative or qualitative evidence related to issue 13 that you would like to submit, please upload it here:

D. Rules giving rise to possible other unintended consequences

You can select one or more issues, or leave all issues unselected

- [ ] Issue 14 - Risk
- [ ] Issue 15 - Procyclicality

Useful links

Consultation details
(http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm)

Consultation document
(http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-documen

Specific privacy statement
(http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/privacy-statement_en

More on the Transparency register (http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

Contact

✉ financial-regulatory-framework-review@ec.europa.eu