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DES MARCHÉS FINANCIERS

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## Capital Markets Union The contribution of the AMF to the call for evidence of the European Commission on the EU regulatory framework for financial services

**On 30 September 2015, the European Commission issued a call for evidence on the EU regulatory framework for financial services. This initiative is part of the Commission's action plan on building a Capital Markets Union (CMU).**

### A welcome initiative

In response to the 2007-2008 financial crisis, the EU co-legislators adopted a number of reforms, in part under the political impetus of the G20. These reforms have at times radically altered the regulatory landscape in which the various financial market participants operate. More than 40 pieces of legislation have been adopted over a five-year period. These legislative initiatives touched on the supervisory architecture and means of supervision as well as the organisation of markets themselves. As a regulator, the Autorité des marchés financiers (AMF) actively participated in and supported the European Commission in its work needed to restore financial stability and confidence in Financial markets.

European Commissioner Michel Barnier's term, during which these reforms were adopted, was marked by the urgent need for action. While some pieces of legislation have not yet been implemented and continued vigilance is still needed concerning the emergence of new risks, progress has been made in identifying and repairing the main failures of the financial system. On the economic front, the banking and financial system has stabilised while, on

the political front, the new European Commission has sought to put the assessment of reforms at the centre of its legislative method before any new legislative action is taken.

In December 2014, after the election of a new European Commission chaired by Jean-claude Juncker, the AMF expressed its wish that an initiative be launched to assess the rules already adopted so as to ensure the overall consistency of the regulatory reform efforts, by way of a technical assessment addressing problems identified in implementing pieces of legislation that sometimes present compatibility issues. The AMF reiterated this message in its response to the Green Paper on the CMU and also emphasized that the CMU should promote the effective and consistent implementation of reforms that are already underway and those that have been announced, and endeavour to maintain a regulatory stability that is required for the development of markets and market participants.

**Against this backdrop, the AMF welcomes the call for evidence on the EU regulatory framework for Financial services** to enable the European Commission to collect detailed information on duplications, inconsistencies, gaps and rules that may have unintended consequences.

## **The danger lies in undoing the adopted legislative reforms**

While the AMF supports the objectives and purposes of the call for evidence, it **would like to use these introductory remarks as an opportunity to warn against the risk of a general reversal of the reforms undertaken in recent years**. The call for evidence should not be used to undermine the stabilising and constructive work that has been accomplished. Moreover, such a reversal could damage the EU's credibility in the eyes of its international partners in light of the commitments made in Pittsburgh in 2009.

**The call for evidence should instead be an opportunity to determine which proportionate and carefully considered adjustments** are required to ensure the overall consistency of the legislation and avoid complex, burdensome and insufficiently effective mechanisms. The idea is therefore not to embark on a path that would result in substantial changes to the pieces of legislation that have been adopted but to promote a pragmatic approach that aims for appropriate interactions between the laws and facilitates their operational implementation.

## **Promoting the quality and stability of standards**

As a regulatory policy priority of the AMF, the issue of quality and stability of standards is one of its central points of focus. To that end, it welcomes the assessment of the legislation prompted by the call for evidence, all the more so as the call for evidence forms part of the broader "better law-making" initiative and of the European Commission's REFIT (Regulatory

Fitness and Performance) programme. Building balanced and well-calibrated regulations requires the simultaneous strengthening of the ex-ante impact assessments which must be supported by a robust methodology and quantitative data. For instance, impact assessments should be carried out in order to examine the possible unintended consequences in terms of circumventing regulation that certain regulatory exemptions could entail.

As such, **the “better law-making” initiative is a welcome development in that it aims to be a defining and cross-cutting element that pervades the EU’s entire policy development process**, one key aspect of which being to articulate the ex-ante and ex-post dimensions of the assessment of legislation under discussion. This is also true of the REFIT programme which aims to analyse EU legislation and, where necessary, adapt it to the needs of economic players to promote a simple, clear, stable and predictable regulatory Framework.

Ensuring consistency among legislative initiatives also requires a stable regulatory framework. Today, this regulatory stability is more vital than ever given the period of anaemic growth. Economic players need visibility to secure their decision-making. To that end, **it is critical that adopted legislative acts be given time to take effect** before any work is initiated that might result in premature legislative changes. **The AMF therefore invites the European Commission to appropriately calibrate any actions that could result from its analysis of the consultation responses.** The AMF also notes the need to set realistic deadlines for preparing draft technical standards and for revising adopted legislative acts, which will also help improve the stability of laws and regulations.

Well aware of both the need for an assessment and the potential pitfalls associated therewith, **the AMF sought to prepare a positive and constructive response** to help the European Commission services identify the various matters within the scope of the call for evidence. It also wanted its response to be proactive by suggesting solutions to the problems it had identified. The AMF therefore chose to submit the most pragmatic and understandable response possible. It is organised around five themes that reflect the priorities the AMF believes should guide legislative action.

## 1. The principle of proportionality in EU financial legislation

The European Commission sought to take a pragmatic approach as part of its action plan on building the Capital Markets Union. This approach, which the AMF supports, should in particular acknowledge the principle of proportionality when developing organisational requirements that apply to entities regulated by the AMF. In our view, there are three aspects to this principle: the calibration of the rule, the adjustment of its implementation and the adaptation of supervision through a risk-based approach. Without providing such flexibility in legislation, the risk is that only large players are able to apply the existing

substantial and complex body of standards, leading to the unintended consequence of market concentration. **The principle of proportionality must be a tool that provides flexibility to the rules in order to promote an appropriate implementation that takes into account the diversity of market participants in a manner consistent with the regulatory objectives of market integrity and investor protection.** For further flexibility, it may also be worth considering the possibility of giving the European Supervisory Authorities the power to adjust the implementation of a rule through mechanisms such as no-action letters.

## 2. Reporting requirements: promoting an efficient use of data gathered by regulators

A large number of the reforms of the EU financial regulatory framework are having and will have the effect of increasing the number of reporting requirements imposed on regulated entities for surveillance and risk monitoring purposes. Some of these requirements are already in force. The Markets in Financial Instruments Directive (MiFID), the Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR) and the Alternative Investment Fund Managers Directive (AIFM) contain reporting obligations. There will soon be more to come once MiFID 2 and the Regulation on Securities Financing Transactions (SFTR) take effect. The simultaneous application of all these reporting obligations will increase the volume of data collected and produce a parallel increase in data flows between national authorities and between the latter and ESMA.

Now is the time **to take stock of all the data gathered under all these pieces of legislation to make sure they can be used as effectively as possible for market supervision purposes.** Better use of data means in particular **improving their quality, streamlining reporting and giving ESMA the powers needed** to implement common solutions and optimise the IT tools used by the competent national authorities and ESMA for supervisory purposes.

## 3. Legislative clarity and stability: aiming for better interaction between rules

The last five years have been a period of intensive law-making. In its response to the call for evidence, the AMF has sought to emphasise the need for greater clarity and stability of the legislative acts. This can be met only through improved interaction between pieces of legislation. **It is therefore important to promote better interaction between cross-cutting legislation such as EMIR and sector-specific legislation such as the AIFM and UCITS Directives.**

Similarly, the AMF would like to encourage closer interaction between pieces of legislation within different sectors (capital markets, banking and insurance). In terms of interaction, it would also be preferable to determine how to better coordinate the entry into application of

the various levels of EU legislation in order to provide more regulatory clarity to economic operators and to provide relevant parties with enough time to allow for the proper implementation of reforms. For instance, the application of level 1 legislation – Regulations and Directives – should only be possible if the level 2 acts – required delegated and implementing acts – have been adopted and are readily applicable. In addition, level 2 provisions should provide for a certain transition period if they require market participants to proceed with significant organisational or technical changes. In order to contribute to the enhancement of the quality of standards, consideration should be given to allowing ESMA to take on a larger role in both the drafting of legislative acts and the legislative process. Without prejudice to EU treaties, ESMA could thus contribute its practical knowledge of financial markets and thereby help identify and resolve certain issues during the level 1 process which otherwise could only appear at a later stage during the level 2 process.

#### 4. Defending the EU's competitiveness at the international level

**This issue relates to the external dimension of EU financial regulation.** Third country regimes provided for in the various pieces of EU legislation seek to allow third country financial market players access to European markets while guaranteeing the protection of EU investors and the integrity of the internal market.

However, an analysis of EU financial legislation shows that **there is no harmonised approach to third country regimes**. If the multiplicity of regimes is due to the nature of the services, entities or products covered by each of the various pieces of legislation, the lack of consistency is **harmful to the clarity of European law and to the international positioning of the EU as a financial centre**. The multiplicity of third country regimes also complicates the setting of a global EU strategy by third country financial market players. Lastly, certain cross-border provisions that are not harmonised at EU level pave the way to regulatory arbitrage opportunities among Member States.

The consequence being:

- to deter third country market players wishing to undertake activities and provide services in the EU;
- to reduce cross-border capital flows and negatively impact the financing of the EU economy;
- to risk a competitive disadvantage of the European market in comparison to other financial centers.

In a context where the globalisation of markets and their interconnectedness requires a consistent implementation and supervision of the principles of regulation at international

level, the AMF considers that **the EU must continue to assert its role on the world stage and ensure that international convergence is not achieved at the expense of general EU interest**. For that purpose, whereas the approach taken so far is based on a unilateral opening of the EU to third country market players, it is important to defend the competitiveness of EU financial activities. This is a key issue that the legislator must consider in order for EU market players to be able to develop their business internationally based on a level playing field. To this end, an approach based on the mutual recognition of regulatory frameworks must be promoted. It is also vital to take **better account of the status of international work when drafting EU legislation to avoid undermining the competitiveness of the EU financial industry**.

## 5. The role of the European Securities and Markets Authority (ESMA) in supervisory convergence

It is important for ESMA to refocus its efforts on its supervisory priorities as it itself announced in its strategic plan published in June 2015. This goal requires that **ESMA step up the use of its legal powers** to promote a shared interpretation of the rules. In particular, ESMA should **develop the use of more targeted and pragmatic peer reviews that quickly result in concrete convergence proposals**. It must deploy all the tools at its disposal to foster the development of a shared supervisory culture, resolve differences in interpretation or practices between authorities through its mediation powers, and promote cooperation in the supervision of cross-border transactions within the Union. **Where necessary, ESMA must use its powers in relation to breach of Union law**, as well as make full use of the powers assigned to it under sectoral legislation, for example with respect to prohibiting or restricting certain financial activities that threaten the orderly functioning and integrity of the financial markets or the stability in whole or in part of the financial system in the Union.

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#### Legal information:

Head of publications: The Executive Director of AMF Communication Directorate. Contact: Communication Directorate – Autorité des marchés financiers 17 place de la Bourse – 75082 Paris cedex 02