AUTORITÉ
DES MARCHÉS FINANCIERS

AMF

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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

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

- ☐ Issue 1 - Unnecessary regulatory constraints on financing
- ☐ Issue 2 - Market liquidity
- ☒ Issue 3 - Investor and consumer protection
- ☒ 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

Example 1 for Issue 3 (Investor and consumer protection)

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

Article 15 of the Prospectus Directive (Article 21 of the Commission's legislative proposal for the Prospectus 3 Regulation): Presentation and verification of marketing materials during a public offering of securities or admission to trading

* Please provide us with an executive/succinct summary of your example:

There is no obligation to verify marketing materials and home Member State competence is not the most adapted to investor protection and, ultimately, to pan-European marketing of capital market transactions. The authority of the home Member State (and not of the host Member State) is indeed merely authorised – but not required – to perform this verification.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

In the case of passported prospectuses, home Member States exercise this power rarely or not at all (lack of internal resources, linguistic challenges if the passport involves multiple countries, different marketing approaches, no knowledge of the local investor pool, different approach to retail investors, etc.) and in practice the power is exercised by certain host Member States in the relative absence of guidance in the directive.

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

It is important that the future Prospectus 3 Regulation enshrines a principle of host Member State control over marketing materials that does not prevent the passport from functioning properly. The host Member State is indeed in a better position to judge whether these materials are suited to the behaviour and local investment habits, particularly retail investors. Similarly, the language in these materials can constitute a true obstacle to the exercise of a control by the home Member State.

Example 2 for Issue 3 (Investor and consumer protection)

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

MiFID, Article 34: Allow EU firms to provide services throughout the Union.

* Please provide us with an executive/succinct summary of your example:

Certain market participants obtain their authorisation in one country and provide services almost exclusively in other countries, tying up the home country's monitoring and supervision capabilities.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Misselling can be difficult to sanction in the host country.

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

Improve oversight of cross-border marketing by assigning clear jurisdiction to the authority of the country in which the product is sold.

Example 3 for Issue 3 (Investor and consumer protection)

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

MiFID and MiFID 2

* Please provide us with an executive/succinct summary of your example:

Platforms that are easily authorised in certain countries but that do not respect regulations. Example: no real suitability test, impossibility for clients to recover their funds. Investor protection is thus not adequately ensured.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

There are significant risks in terms of investor protection. Investors incur heavy losses, sometimes their entire investment, without prior knowledge of the risks involved. In some cases, they invested the larger part of their savings. An AMF study on contracts for difference and Forex shows that 9 out of 10 clients lose money (in the case of regulated entities physically present in France). With respect to non-regulated entities and regulated entities with no physical presence in France, operating under the freedom or providing services regime, it is conceivable that nearly 100% of clients lose money.

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

ESMA's intervention in order to harmonise the implementation of regulation.

Example 4 for Issue 3 (Investor and consumer protection)

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

Undertakings for Collective Investment in Transferable Securities (UCITS)

* Please provide us with an executive/succinct summary of your example:

Currently, each national competent authority ("NCA") is able to carry out the supervision of marketing documents of investment funds marketed in their jurisdiction taking into account its internal structure and the specificities of its market players, by checking these documents either on ex-ante (potentially with a formal approval given) and/or on ex-post basis.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

A potential change to the current system that would deprive host NCAs of the capacity to supervise the marketing documents of investment funds marketed on their territory would:

- Harm the host NCAs' capacity to accomplish their mission to ensure investor protection;
- Entail significant additional costs and operational challenges for the NCAs and indirectly for the market players that they supervise; and
- Force home NCAs to assume responsibilities for ensuring a safe and proper marketing of funds whereas they do not benefit from the adequate knowledge to maintain the current level of supervision in this area.

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

These different elements imply that the host authority must have the power to supervise marketing material.

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?

- ☐ 1 example
- ☒ 2 examples
- ☐ 3 examples
- ☐ 4 examples
- ☐ 5 examples

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

UCITS V Directive (2014/91/EU) and AIFM Directive (2011/61/EU)

The UCITS V and AIFM Directives contain provisions on managers' compensation designed to ensure that their interests are aligned with those of investors whose funds they manage. The guidelines on remuneration policies that apply to alternative investment fund managers (2013/232), adopted in accordance with the AIFM Directive, offer some leeway for the smallest entities after an assessment of a number of proportionality criteria (nature of the business, domestic or cross-border activity and complexity of the investment strategies). The principle of proportionality indeed warrants a reduced burden of requirements for small asset managers. As a result, by virtue of the proportionality principle, the AIFM guidelines permit the non-application of certain rules to small asset managers that manage funds that meet the above mentioned criteria. As such, these guidelines allow, for instance, the non-application ("disapplication") of rules related to payment processes or those establishing a remuneration committee.

* Please provide us with an executive/succinct summary of your example:

ESMA is currently drafting guidelines on remuneration policies applicable to UCITS and AIF managers, in accordance with the UCITS V Directive. The definition of the proportionality principle, and the possibility to "dis-apply" that it allows, is again being debated.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

It is vital to maintain the approach used in the 2013 guidelines and the understanding of the proportionality principle as it was conceived during the drafting of the AIFM guidelines in accordance with Article 5, paragraph 4 of the European Union Treaty and the constant case-law of the European Union Court of Justice. Adopting a different approach to the proportionality principle, furthermore, would result in an excessive regulatory burden for market participants subject to the UCITS V Directive, without consideration for the nature of their business, whether they operate domestically or across borders, or the complexity of the investment strategies they pursue, a burden not warranted by the goals that this measure aims to achieve, i.e. aligning the interests of managers and investors.

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

It is therefore vital that the guidelines issued in application of the UCITS V Directive with respect to remuneration use the definition of the proportionality principle adopted for the purposes of the AIFM guidelines, in accordance with the conclusions drawn from the negotiations of the Level 1 of the UCITS V Directive.

Example 2 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

In Article 9(6) of EMIR, ESMA has been mandated to develop draft implementing technical standards specifying the date by which derivative contracts are to be reported, including any phase-in for contracts entered into before the reporting obligation applies. As a consequence, ESMA has developed implementing technical standards specifying that contracts concluded between 16 August 2012 and 14 February 2014 must be reported to a trade repository within three years provided that they expired before or on the reporting start date.

* Please provide us with an executive/succinct summary of your example:

The first data received by trade repositories on these specific transactions pose significant challenges especially in terms of reconciliations of reports, with very high failure rates and data of very low quality levels.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

These reports impose significant burden on reporting entities as they have to provide information on contracts that expired up to three years before the reporting start date for which all information asked is not necessarily available. For example, EMIR reporting relies on new standards like Legal Entity Identifier (LEI) codes that were not widely used prior to EMIR reporting enforcement. Moreover, the usefulness of such data for regulatory duties can be questioned given that these contracts have expired before the reporting start date.

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

The AMF is in favour of waiving the obligation to report contracts which were terminated before the reporting start date (i.e. 12 February 2014) as part of the Commission's consultation on the review of EMIR (Article 85 (1) of EMIR).

B. Unnecessary regulatory burdens

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

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

Issue 5 – Excessive compliance costs and complexity

In response to some of the practices seen in the run-up to the crisis, EU rules have necessarily become more prescriptive. This will help to ensure that firms are held to account, but it can also increase costs and complexity, and weaken a sense of individual responsibility. Please identify and justify such burdens that, in your view, do not meet the objectives set out above efficiently and effectively. Please provide quantitative estimates to support your assessment and distinguish between direct and indirect impacts, and between one-off and recurring costs. Please identify areas where they could be simplified, to achieve more efficiently the intended regulatory objective.

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

- ☐ 1 example
- ☐ 2 examples
- ☐ 3 examples
- ☒ 4 examples
- ☐ 5 examples

Example 1 for Issue 5 (Excessive compliance costs and complexity)

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

MiFID 2, Article 24: Limiting conflicts of interest

* Please provide us with an executive/succinct summary of your example:

The Level 2 rules on investment research would be extremely granular, specifying in reality the organisational structure to be set up, whereas they relate to conduct rules and thus not subject to the proportionality principle. Indeed, based on the advice of ESMA, these rules would notably stipulate: that a budget and invoicing system be established with each client, an audit trail of payments made demonstrating that they respect the criterion of enhancing the quality of the service to clients; without any consideration for the amount of the research budget allocated to each client.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Implementation costs potentially very high for small firms and out of proportion with the objectives sought.

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

Establish a minimum threshold of investment research purchase, below which the above mentioned rules do not apply.

Example 2 for Issue 5 (Excessive compliance costs and complexity)

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

MiFID 2, Article 27: Best execution obligation of client orders

* Please provide us with an executive/succinct summary of your example:

Beyond the implementation of a best execution policy, MiFID 2 provides for the publication of information on the quality of order execution by firms executing orders on behalf of clients, without regard to the volume of business.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The IT infrastructure required is substantial for what may potentially be a small amount of activity, whereas the information on such volumes is not necessarily relevant. The draft RTS 28 that ESMA sent to the Commission provides for an indication only if the volume transacted is below one order per day, which is excessively low and in any case does not relieve the firm of its publication obligation.

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

Only require publication above a certain minimum order volume (in a similar way to what the U.S. SEC Rule 606 provides for brokers having executed less than 500 client orders monthly over the quarter).

Example 3 for Issue 5 (Excessive compliance costs and complexity)

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

Article 9(1) of EMIR: Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository.

* Please provide us with an executive/succinct summary of your example:

EMIR imposes the reporting obligation on all counterparties including all non-financial counterparties ("NFC") without any exemption. This means that even small NFCs are subject to reporting obligations. It should be noted that for the clearing obligation under EMIR, a distinction exists between small NFCs ("NFC-") and larger ones ("NFC+") and only NFC+ are subject to this clearing obligation. Moreover, one may doubt the usefulness of reporting intragroup transactions of "NFC-" as (i) these NFCs use derivatives nearly only for hedging purposes and (ii) these transactions are mainly constituted of foreign exchange ("FX") derivatives.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The reporting obligation puts a rather significant burden in terms of costs on entities that can be very small, and with an added value for regulators that is questionable. Moreover, the reporting obligation imposed on small entities that are not accustomed to regulatory reporting (as NFCs are not subject to MIFIR reporting and small NFCs are exempted from SFTR reporting, for example), might even lead to errors in reporting to the detriment of the overall quality of the data reported.

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

The AMF believes that "NFC-" should be exempted from intragroup transaction reporting.

Example 4 for Issue 5 (Excessive compliance costs and complexity)

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

Alternative Investment Fund Managers Directive (AIFMD), Article 6.4
Undertakings for Collective Investment in Transferable Securities (UCITS), Article 6.3

* Please provide us with an executive/succinct summary of your example:

In amending the AIFMD, MiFID 2 clarified a contentious point in relation to the passporting by managers of AIFs of MiFID-type services on a cross-border basis within the EU/EEA. However, Article 6.3 of the UCITS Directive does not allow UCITS management companies to perform the non-core service of transmitting and receiving orders of financial instruments whereas Article 6.4 of the AIFM Directive permits this practice.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

This inconsistency represents a burden for firms that undertake both UCITS and AIFs management.

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

The Commission should propose enabling UCITS management companies to perform the non-core service of transmitting and receiving orders of financial instruments as provided under Article 6.4 of the AIFM Directive.

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?

- ☐ 1 example
- ☐ 2 examples
- ☐ 3 examples
- ☐ 4 examples
- ☒ 5 examples

Example 1 for Issue 6 (Reporting and disclosure obligations)

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

EMIR (Article 9) requires counterparties and CCPs to report to TRs the details of any derivative contract. This includes both exchange-traded and OTC derivatives. MiFIR (Article 26) requires that investment firms which execute transactions in financial instruments report complete and accurate details of such transactions, which includes:

- financial instruments which are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made;
- financial instruments where the underlying is a financial instrument traded on a trading venue;
- financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue.

* Please provide us with an executive/succinct summary of your example:

The two regulations entail a duplication of reports for a significant portion of trading activities of counterparties, particularly the obligations linked to exchange traded derivatives. These contracts indeed represent a substantial number of overall contracts on a daily basis in terms of both transactions and positions as they are largely traded intraday. The regulatory overlap raises the question of the need for transaction reporting of exchange traded derivatives under both regulations.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Although the reporting requirements under both regulations cover the same transactions, the reporting formats differ significantly from one regulation to the other. For example, MiFIR adopts a buyer/seller scheme which is not the case with EMIR. As a consequence, the duplication of reports for the same transactions, on a trade-by-trade basis, poses a rather significant burden in terms of costs of reporting and data storage capacity for counterparties, trade repositories and also national authorities (who directly receive MiFIR reporting and have the duty to analyse the data).

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

The Commission should promote a consistent and global approach when dealing with legislation on reporting requirements.

Example 2 for Issue 6 (Reporting and disclosure obligations)

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

Under Article 81 of EMIR, ESMA has been mandated to develop draft regulatory technical standards specifying the frequency and the details of the information requested through reporting. As a consequence, Articles 1 and 2 of Regulation 151/2013 specify the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data. The data includes position reporting for commodities. In the same way, Article 58 of MiFID 2 defines position reporting that an investment firm or a market operator operating a trading venue which trades commodity derivatives or emission allowances or derivatives, must publish.

* Please provide us with an executive/succinct summary of your example:

The two regulations involve an overlap and a duplication of position calculations for reporting entities. Moreover, whereas the published information aims at bringing more transparency, it might generate confusion in the interpretation made due to differences in the perimeter of each regulation.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

These position calculations generate a waste in terms of costs: through EMIR, these calculations have to be made by TRs and under MiFID 2 the burden lies on financial intermediaries and trading venues, whereas they may cover the same transactions. For national competent authorities, this may generate difficulties in calculation reconciliations between the two regulatory frameworks.

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

Mutualisation of the two reporting frameworks might be achieved if the reporting obligation under MiFID 2 could be performed by trade repositories (which already have the duty to provide reporting of position levels for EMIR for commodity derivatives). The Commission should promote a consistent and global approach when dealing with legislation on reporting requirements.

Example 3 for Issue 6 (Reporting and disclosure obligations)

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

MiFIR, Articles 65 and 90 paragraph 2.

MiFIR establishes a system for consolidated tape providers ("CTPs") that provides for a certain number of organisational requirements. The CTP system for equities and equivalent instruments provides that the data consolidation must be exhaustive (including data from all platforms and APAs), whereas it should be possible to exclude certain data sources (based on technical standards that are still being drafted) for instruments other than equities (derivatives, bonds, allowance emissions and structured financial products). The Commission will have to assess the operation of CTPs (by September 2018 at the latest for CTPs for equities and equivalent instruments, and by September 2020 at the latest for instruments other than equities) and, if need be, initiate a public procurement procedure led by ESMA for a commercial entity tasked with managing a consolidated reporting system.

* Please provide us with an executive/succinct summary of your example:

There must be a consolidated database of transactions at EU level in order to ensure in practice the transparency of markets. Such a database represents a vital tool in order for markets to function properly, for regulators and market participants to have a good understanding of markets, and for regulations to be applied effectively. Several provisions of MiFID 2 (for example, the systematic internalisation system or the transparency threshold calculation) require the collection and consolidation of information on a multitude of transactions. This is a costly and complicated exercise, which would benefit from being able to rely on one or more CTPs. However, it is uncertain at this point whether any candidates for official CTP status will come forward, especially considering the exhaustiveness for CTP for equities, which makes the system unappealing.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The drafting of technical advice regarding thresholds for systematic internalisation and the technical standards for the calculation of transparency thresholds has highlighted the lack of data available to regulators. Having consolidated databases is however critical for determining the appropriate thresholds. Furthermore, the use of a public database would enable to avoid differing views between regulators and market participants, which are often due to the use of different data sources.

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

Given the importance of a consolidated database and the significant uncertainty as to whether candidates providing such services (notably in the context of MiFID 2) will emerge in the medium term, it is vital to begin work to set up a European CTP for equities.

Example 4 for Issue 6 (Reporting and disclosure obligations)

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

Article 58 of MiFID requires members of regulated markets, MTFs and OTFs to report to the trading venue the details of their positions and the positions of their clients (and clients of those clients) on commodity derivatives.

* Please provide us with an executive/succinct summary of your example:

This reporting does not use existing reporting channels (transaction reporting or TRs) and aims at obtaining position data along a complex chain of intermediaries. NCAs might not be in a position to obtain such information from market participants and apply the position limits and commitments of traders (CoT) reports provisions.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Members of a regulated market do not have a comprehensive view of their clients' positions (only a clearing member could have it). It is even more complex when the chain of intermediaries involves several actors.

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

The position reporting architecture should be conceived differently and integrated in existing reporting tools.

Example 5 for Issue 6 (Reporting and disclosure obligations)

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

Under Article 9(6) of EMIR, ESMA has been mandated to develop regulatory technical standards specifying the details and types of reports of derivative contracts, and implementing technical standards specifying the format, the frequency and the standard of such reports.

* Please provide us with an executive/succinct summary of your example:

Implementing technical standards specify: (i) the details of the reports, i.e. a list of data elements that must be included in the report and their definitions; and (ii) the format of the data elements, including (where applicable) data-type, length, structure and list of allowable values. However, methods and arrangements for reporting and the form of the reports to be submitted by the reporting entities have been left to the discretion of the TRs, leading to significant data quality issues for regulators.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The analysis of the data received since EMIR reporting obligations became applicable on 12 February 2014 has revealed significant inconsistencies leading to very high failure rates in the reconciliation of reports, and data of very low quality levels for regulators. To improve data quality, an important work has been made at the level of ESMA and of national competent authorities leading to the definition of validation rules for reports received by TRs and a revision of regulatory and implementing standards.

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

EMIR is not prescriptive enough regarding methods and arrangements for reporting and the form of the reports to be submitted and it is important that the Level 1 of EMIR empowers properly ESMA. This is why ESMA, in its input as part of the Commission consultation on the EMIR review (Article 85 (1) of EMIR), proposed an amendment to Article 9(5) and (6) of Regulation (EU) No 648/2012 to be properly empowered regarding the methods and arrangements for reporting and the form of the reports to be submitted. The AMF supports this proposal.

Issue 7 – Contractual documentation

Standardised documentation is often necessary to ensure that market participants are subject to the same set of rules throughout the EU in order to facilitate the cross-border provision of services and ensure free movement of capital. When rules change, clients and counterparties are often faced with new contractual documentation. This may add costs and might not always provide greater customer/ investor protection. Please identify specific situations where contractual or regulatory documents need to be updated with unnecessary frequency or are required to contain information that does not adequately meet the objectives above. Please indicate where digitalisation and digital standards could help to simplify and make contractual documentation less costly, and if applicable, identify any obstacles to this happening.

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

- ☒ 1 example
- ☐ 2 examples
- ☐ 3 examples
- ☐ 4 examples
- ☐ 5 examples

Example 1 for Issue 7 (Contractual documentation)

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

EMIR, Article 4: Clearing obligations

* Please provide us with an executive/succinct summary of your example:

The adoption of the first standards for the clearing obligation raises the issue of effective access by buy-side entities to clearing, particularly the smallest participants such as small management companies which use derivative instruments to hedge their risk in exceptional circumstances. There are two ways to approach this issue: on the one hand, the potential legal or financial obstacles to clearing house access by buy-side entities and, on the other hand, the protections afforded by EMIR to assets posted as margins, via individual segregation and/or portability. This applies to both direct and indirect access to clearing. In particular, significant obstacles that threaten the ability of asset managers to fulfil the central clearing obligation are regularly cited: they stem from the legal complexity of clearing models (“agency”, “principal-to-principal” or the compatibility of the proposed offerings with the constraints of the asset management industry, the lack of harmonisation of insolvency laws, or the number of segregation offerings available in Europe), from their prudential treatment or even from the deterring cost of individual segregation. Today, for a small firm, the array of clearing offerings in the EU appears complex, hard to decipher or even inaccessible. Certain clearing members could indeed refuse to have certain funds or credit institutions as clients because the volume of contracts to be cleared is too little or because of the costs of adding a new client.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Discussions with the industry have brought these difficulties to light as witnessed also by a number of press articles. Each time ESMA has consulted on the RTS that define the products eligible to clearing or related to "indirect clearing", buy-side entities have raised these problems and reiterated their preference for individual segregation and portability.

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

ESMA should be in charge of preparing a report on the effective implementation of segregation models as well as on effective access to clearing by buy-side entities, in particular asset managers, via an exhaustive study of the various obstacles mentioned above.

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
- ☒ Issue 11 - Definitions
- ☒ Issue 12 - Overlaps, duplications and inconsistencies
- ☒ 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

Example 1 for Issue 11 (Definitions)

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

Article 2.1(d) of the Prospectus Directive: Definition of a public offer of securities (or financial instruments) which drives the prospectus obligation

* Please provide us with an executive/succinct summary of your example:

The definition of an offer of securities to the public is understandably broad ("*a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, that might enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries*") but it gives rise to different interpretations in different Member States, which can affect whether or not a prospectus is required.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Two criteria in the definition appear to be particularly subject to different interpretations: - the “communication”, which may fall under the national rules applicable to direct marketing; - the “investor decision”, which is personal in nature and can be difficult to gauge when an operation is triggered by a decision of the general meeting of shareholders; this is also true of the nature and quantity of information that would enable an investor to decide whether or not to purchase the securities.

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

Unless a consensus can be established to clarify this definition in the up-coming Prospectus 3 Regulation, it would be useful to do so through a delegated act. A convergence of national interpretations could also be sought at Level 3.

Example 2 for Issue 11 (Definitions)

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

Article 8(c) of CRA 3: Double credit rating of securitisation vehicles The purpose of this article is to make ratings more reliable and to limit the conflicts of interest that arose during the subprime crisis. This falls under national supervision and not under the supervision of ESMA.

* Please provide us with an executive/succinct summary of your example:

The scope is poorly defined and is too broad in that it includes non-listed vehicles.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The securities markets regulator, when it has jurisdiction, does not have an extensive vision of the setting up of securitisation vehicles. The European Rating Platform (“ERP”) ratings database will not always be an adequate tool, because it assumes that one knows the issuer's identifier.

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

Limit the scope of the double credit rating obligation to securitisation vehicles required to issue a prospectus for the admission to trading or public offering of securities.

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?

☐ 1 example
☐ 2 examples
☐ 3 examples
☐ 4 examples
☒ 5 examples

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

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

EMIR, Article 25

* Please provide us with an executive/succinct summary of your example:

The third country equivalence methodology (particularly for CCPs) has shown certain limits (e.g. difficulties in negotiations with third countries, length and lack of transparency for certain negotiations and ESMA's inability to act once legislation has been recognised as equivalent).

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The third country legislation equivalence procedures (and their interaction with CRR) may possibly put EU market participants at a competitive disadvantage.

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

- In the short term: Revise EMIR to ensure that procedures for recognising third CCPs take into account the needed reciprocity between EU authorities and third country authorities, notably with respect to CCP supervisory methods.

- In the medium/long term: Revise the equivalence/recognition procedure, notably to strengthen ESMA's role in equivalence decisions themselves and to take in account the concerns of relevant national competent authorities regarding the impact on the financial market infrastructures they supervise, as well as EU rules for equivalence decisions.

Example 2 for Issue 12 (Overlaps, duplications and inconsistencies)

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

AIFM Directive (2011/61/EU) and EMIR Regulation (648/2012): Regime applicable to securitisation vehicles trading derivative contracts over the counter. EMIR stipulates different obligations for counterparties trading derivative contracts over the counter owing to the risks that these contracts entail. In this regard, EMIR makes a distinction between "financial counterparties" and "non-financial counterparties", the latter being in principal subject to a less restrictive regime. EMIR notably defines alternative investment funds managed by a manager authorised or registered under the AIFM Directive as "financial counterparties".

* Please provide us with an executive/succinct summary of your example:

The managers of certain alternative investment funds are exempt from the AIFM Directive. This is true of managers of securitisation vehicles. As a result, these securitisation vehicles are not "managed by a manager authorised or registered under the AIFM Directive". Because of the way these regulations interact, securitisation funds are classified as "non-financial counterparties" and are therefore governed by a more flexible regime than the one applied to other types of AIFs.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The interaction of existing regulations means that securitisation funds are usually only subject to the most flexible regime possible under EMIR, even though this flexibility is not always justified in terms of risks.

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

The regulations could be modified to impose a regime on securitisation funds that would be as strict as the one stipulated for other categories of AIFs, except in cases where these vehicles enter into securitisation that is simple, transparent and standardised.

Example 3 for Issue 12 (Overlaps, duplications and inconsistencies)

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

Draft Prospectus 3 Regulation (Article 20): Centralisation of prospectus publications

* Please provide us with an executive/succinct summary of your example:

The current mechanism for prospectus publication can generate duplications. At present, not all national competent authorities ("NCAs") publish the prospectuses. Under the proposed Prospectus 3 Regulation (Articles 20.5 and 20.6), prospectuses – or at least a list of them – would have to be published on each NCA's website, and ESMA would centralise it all using a storage system with free access and search functions.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Such a system of double publication by the NCAs locally and ESMA at European level could generate additional costs.

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

It would be better to have a single prospectus publication method: either at the level of each NCA or centralised directly by ESMA.

Example 4 for Issue 12 (Overlaps, duplications and inconsistencies)

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

EMIR and UCITS Directive

* Please provide us with an executive/succinct summary of your example:

Some coordination problems have arisen between the UCITS Directive and EMIR (limiting counterparty risk, obligation to enter into derivatives contracts with only certain entities).

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

- Counterparty risk on cleared OTC derivatives entered into by UCITS: ESMA's opinion to the Commission seeking to resolve these issues by proposing to subject the exposures of investment funds to CCPs and clearing members to separate ratios, cumulatively, where the segregation method used is not individual, is impossible to satisfy.

- Eligible counterparties: The use of certain clearing houses (notably non-EU) or their clearing members could be impossible.

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

- Regarding counterparty risk: exempt exposure by UCITS to CCPs authorised or recognised under EMIR from the counterparty ratio.

- Regarding eligible counterparties: exempt UCITS from EMIR requirements on eligible counterparties with respect to CVCPs authorised or recognised under EMIR.

Example 5 for Issue 12 (Overlaps, duplications and inconsistencies)

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

UCITS IV Directive (2009/65/EC) – PRIIPs Regulation (1286/2014) and the de facto obligation for UCITS to publish information starting 31 December 2016 in accordance with the PRIIPs Regulation, despite the transition period stipulated in Article 32 of the Regulation.

The UCITS Directive requires that firms create a key information document (KID) designed to provide prospective investors with all the information necessary on the UCITS in which they contemplate investing.

The PRIIPs Regulation calls for a key information document (KID) to be published by the manufacturer of the packaged retail and insurance-based investment product (PRIIPs), along with the rules for distribution and revision of the document. The principal stated goal is indeed to provide investors with material information on the proposed investment, as well as a tool for comparing the various products that are available to them.

* Please provide us with an executive/succinct summary of your example:

In the interest of the regulations working well together, and given the major differences in the types of information published in UCITS KIDs and PRIIPs KIDs, Article 32 of the PRIIPs Regulation exempts UCITS and AIFs that already publish a UCITS KID from publishing a PRIIPs KID until 31 December 2019. However, in accordance with the Level 2 of the PRIIPs Regulation, when a UCITS is the underlying asset of other PRIIPs, they are required to provide PRIIPs manufacturers with information that complies with the PRIIPs Regulation. This information focuses in particular on risks, performance scenarios and costs.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The categories of information required by the PRIIPs Regulation are substantially different to those required by the UCITS Directive. Notably, past performances are published as part of the UCITS KID, but only future performance scenarios may be reflected within a PRIIPs KID. The synthetic risk indicator stipulated in the UCITS Directive reflects only market risk, whereas the one called for in the PRIIPs KID is a score that combines market risk and credit risk. Insofar as a UCITS or AIF must prepare, in addition to a UCITS KID, information in accordance with the PRIIPs KID, the exemption given in Article 32 becomes irrelevant and, as a result, investment funds will be penalised because they will have to produce two different sets of information.

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

Given that, on the one hand, the Commission has indicated that the UCITS KID does not meet the requirements of the PRIIPs Regulation and, on the other hand, UCITS and AIF managers that were supposed to receive a three-year exemption period have not budgeted the manpower or the funds needed to develop systems that will enable them to comply with the PRIIPs Regulation as of 31 December 2016, the AMF suggests that the entry into force of the PRIIPs Regulation should be delayed by one year.

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?

- ☐ 1 example
- ☐ 2 examples
- ☐ 3 examples
- ☐ 4 examples
- ☒ 5 examples

Example 1 for Issue 13 (Gaps)

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

Transparency Directive (dealing in particular with the harmonisation of information by a listed issuer and its main shareholders)

* Please provide us with an executive/succinct summary of your example:

There is no EU regime that oversees empty voting, in particular through the disclosure of net hedging positions in cases where derivatives are used for the purpose of such positions.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

Empty voting, especially during general shareholders' meetings, makes it possible to exercise voting rights without any true economic exposure to the stock. A certain number of concrete cases of "circumstantial" exposure have been witnessed in the EU over the past ten years and discussed in an ESMA report published in 2012.

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

The issue of empty voting should be addressed at EU level. This could be done as part of future revision of the Transparency Directive, for example by requiring disclosure of securities lending transactions above a certain threshold during general shareholders' meetings (similar to the French system introduced in October 2010) – with possible penalties for failure to disclose such information, including suspending voting rights – and of net hedging positions.

Example 2 for Issue 13 (Gaps)

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

EMIR, Recital 73

* Please provide us with an executive/succinct summary of your example:

Pursuant to EMIR (Article 1 and Title V), the provisions laid out by the regulation in respect of interoperability agreements only apply when the arrangements involve transferable securities or money-market instruments. As a result, arrangements involving derivative contracts are not covered by the regulation, even though they carry a higher transmission risk.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The result is legal uncertainty regarding the treatment of arrangements that has given rise to different interpretations among European institutions (ESMA, ESRB, CCP colleges). These different interpretations are detrimental to the emergence of a truly harmonised framework for CCP oversight.

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

Recital 73 of EMIR provides that given the additional complexities involved in an interoperability arrangement between CCPs clearing OTC derivative contracts, it is appropriate at this stage to restrict the scope of interoperability arrangements to transferable securities and money-market instruments. The AMF believes that the risks and complexities attached to such arrangements justify their prohibition.

Example 3 for Issue 13 (Gaps)

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

Prospectus Directive

* Please provide us with an executive/succinct summary of your example:

Proliferation of national investor disclosure standards for equity-based crowdfunding. Lack of EU harmonisation of disclosure by issuers and platforms to investors below the prospectus threshold.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

- National regimes: diverse disclosure rules and uneven levels of investor protection.
- Investment service provider platforms: few harmonised rules on information to be disclosed.

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

With a view to greater convergence among the regimes, specify in the Prospective Directive, or in a recommendation issued by the Commission, the minimum disclosure framework (which should be substantially different from that of the prospectus) and the corresponding liability regime for the platform and the issuer.

Example 4 for Issue 13 (Gaps)

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

AIFM Directive and MiFID 2 (Article 3 on optional exemptions) applying to crowdfunding activities.

* Please provide us with an executive/succinct summary of your example:

As stated in ESMA Advice 2014/1560 on investment-based crowdfunding released on 18 December 2014 and as revealed by the numerous national regimes, there is some legal uncertainty:
- on the definition and scope of investment services (RTO and investment advice) which form the basis of national regimes under the exemption provided by Article 3 of MiFID;
- as to whether AIFM framework (and to some extent EuVECA and EuSEF) should apply to specific structures using holding companies, as this does not seem to have been the actual intention behind the AIFMD;
- on how to adequately address certain risks, especially for platforms operating outside MiFID.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

National regimes, whether based on optional exemptions or the full MiFID regime, illustrate room for interpretation and may lead to some level of fragmentation or – when different interpretations of the same MiFID provisions are concerned – unlevel playing field.

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

As acknowledged by the Commission in the CMU Action Plan, it seems premature and disproportionate to attempt to establish a new global European framework for crowdfunding activities. However there would be merit in improving the existing regime by specific changes to AIFMD and MiFID which could, for instance:
- establish a kind of “safe harbour” as regards AIF qualification;
- provide a definition of reception and transmission of orders, notably the notion of “orders”;
- create a new optional exemption under Art. 3 which would be better tailored to securities-crowdfunding;

- specify the notion of "personal recommendations to a client" in the definition of investment advice, and how it articulates with a suitability test;
- allow an "opt-in" regime for platforms offering securities which are not financial instruments (and therefore operating outside the scope of MiFID).

Example 5 for Issue 13 (Gaps)

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

AIFM Directive (2011/61/EU), Articles 37 and 67: Extending the AIFM passport to third countries

The AIFM Directive sets out an EU passport mechanism allowing AIFs managed by an EU manager authorised pursuant to the Directive to be managed and marketed between Member States. The Directive stipulates that one year from its entry into force (i.e. in July 2015), ESMA must issue an opinion on the functioning of the EU passport and its advice on extending the passport mechanism to third countries. If a decision was to be made to extend the AIFM passport mechanism to third countries, managers established in the relevant non-EU jurisdictions could manage EU AIFs, and market AIFs (EU or non-EU) within the EU, via the AIFM passport notification procedure, provided they have been authorised by a Member State of reference. The designation of the Member State of reference is subject to criteria set out in the Directive and which relate to the investment funds' marketing strategy. Authorisation is only possible if the third country manager meets all of the requirements set out in the Directive (unless it can demonstrate that it is impossible to meet a requirement owing to a national regulatory provision that has an equivalent effect notably with respect to investor protection).

* Please provide us with an executive/succinct summary of your example:

The Directive does not clearly specify the criteria that must be fulfilled for a positive recommendation of the passport extension. It covers, for example, *"the potential market disruptions and distortions in competition (level playing field) or any general or specific difficulties which EU AIFMs encounter in establishing themselves or marketing AIFs they manage in any third country",* but does not provide any further detail on the substance of this requirement.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The lack of a clear and objective methodology may undermine the fair treatment of non-EU jurisdictions, which may fear being scrutinized according to fluctuating and subjective criteria. The feeling caused by the lack of a clear and objective methodology for the relevant third countries could be detrimental to the appeal of the AIFM passport for non-EU firms, who may instead prefer bilateral negotiations with one or more EU Member States. The Directive is also silent on numerous aspects inherent to how the passport functions, notably on the criteria according to which third country managers may avail themselves of local regulations in order to be exempt from the requirements of the AIFM Directive. A lack of convergence on these issues in the EU could result in participants being treated differently and threaten healthy and fair competition on the EU market. Lastly, the approach taken in the AIFM Directive to the regime that applies to non-EU firms is different to the one adopted in other European texts. Such is the case, for example, of the MiFID 2 Directive (2014/65/EU), which requires a third country equivalence decision by the Commission. This lack of harmonisation in the regime that applies to third country market participants under EU law could affect the clarity of EU law in that respect. Furthermore, it does not allow EU institutions to put the experience gained in the context of one legislative text to use in the work they must perform under other regulations/directives.

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

It is vital that the Commission clarify these various criteria publicly and objectively. Such clarifications are essential in order for markets to operate soundly and for EU institutions to maintain their image. It is also important for the EU, to the extent possible, to adopt a consistent approach with respect to third countries in order to defend the EU's internal competitiveness.

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

Issue 14 – Risk

EU rules have been put in place to reduce risk in the financial system and to discourage excessive risk-taking, without unduly dampening sustainable growth. However, this may have led to risk being shifted elsewhere within the financial system to avoid regulation or indeed the rules unintentionally may have led to less resilient financial institutions. Please indicate whether, how and why in your view such unintended consequences have emerged.

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

☒ 1 example
☐ 2 examples
☐ 3 examples
☐ 4 examples
☐ 5 examples

Example 1 for Issue 14 (Risk)

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

EMIR, Article 5

* Please provide us with an executive/succinct summary of your example:

Certain sudden changes affecting the market (significant reduction in liquidity of a product subject to a clearing obligation, risk of default or a CCP or major clearing member becoming unable to perform) can render maintaining the clearing obligation counterproductive. This could be the case, for example, if a series of CDS became illiquid or if a new series lacked sufficient liquidity to necessarily have to be cleared. This could also be the case if a CCP that initially offered clearing for a given product were to decide, for whatever reason, to no longer offer this service. But the current mechanism does not allow ESMA to remove a product from the scope of the clearing obligation without adjusting its technical standards, a procedure that may be considered too lengthy in such circumstances.

* Please provide us with supporting relevant and verifiable empirical evidence for your example:

The potential for a regulatory obligation to amplify a crisis situation.

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

Implement a mechanism at EU level that would make it possible to suspend a clearing obligation quickly, temporarily and within a given framework.