

MiFID II
ESMA'S CONSULTATION ON THE REVIEW OF
THE TECHNICAL STANDARDS
UNDER ARTICLE 34
AMAFI'S AND FBF'S CONTRIBUTION

ABOUT AMAFI AND FBF

Association française des marchés financiers (AMAFI) is a trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities.

The Fédération bancaire française (FBF) has for mission to promote the banking and financial industry in France, Europe and around the world. It determines the profession's positions and makes proposals to public authorities and economic/financial authorities. FBF has 330 member banks including 117 foreign banks. Regardless of their size and status, credit institutions licensed as banks and the branch offices of credit institutions in the European Economic Area can, if they wish, become fully-fledged members of the FBF. The central bodies of cooperative or mutual banking groups are also fully-fledged members. The FBF is member of the European Banking Federation (EBF).

GENERAL OBSERVATIONS

AMAFI and FBF welcome the opportunity to respond to the ESMA's [consultation](#) on the review of the technical standards under article 34 of MiFID II, which is intended to (i) specify the information to be notified by, inter alia, firms wishing to provide cross-border services without the establishment of a branch and (ii) establish standard forms, templates and procedures for the transmission of information in this respect. The objective of this review is to enable national competent authorities (NCAs) to increase the effectiveness of their supervision of entities providing investment services on a cross-border basis.

Cross-border activities are a key element of the single market and AMAFI and FBF recognise the importance of allowing NCAs to be efficient in the supervision of these activities in order to maintain the protection of market participants and thus the confidence in the market and its attractiveness.

AMAFI AND FBF'S ANSWERS

1. Do you believe that newly added point (c) of Article 3 of the RTS and Part 3 (Overview) of Annex I of the ITS are missing any information?

Article 3 point (c) of the RTS and Part 3 of Annex I of the ITS proposed by ESMA in this consultation use the term “actively” several times. The Associations deem that this term should be defined. A lack of definition may otherwise lead investment firms to be uncertain about whether certain activities are active, and, as a result, may affect their application of these obligations.

AMAFI and FBF welcome the distinction between the situation where investment firms request a passport to “*actively target clients*”, for which they would have to notify NCAs of an overview of the host Member States concerned, and the situation where they request a passport on a precautionary basis only, which ESMA does not consider to amount to “*actively targeting clients*”. Nevertheless, we consider that ESMA could expressly recognize, that, in this latter situation, precautionary passports are not banned.

2. Do you agree that investment firms should notify their home NCA in case of any change to the list of home Member States where they actively target clients as well as the ones where they actively target retail clients and/or professional clients under Annex II of MiFID II?

Subject to clarification of the term “actively” as discussed above, the Associations agree with this proposal.

3. Do you believe that newly added point (d) of Article 3 of the RTS and Part 4 (Marketing means) of Annex I of the ITS are missing any information?

Newly added point (d) of Article 3 of the RTS and Part 4 of Annex I to the ITS requires investment firms to specify which marketing means they intend to use in the host Member State(s) where they intend to actively target clients.

AMAFI and FBF support that proposal and deem that no information is missing. Informing the home NCA of the marketing means used by the investment firm to target clients in host members States can enhance the transparency of investment firms’ activities, and therefore facilitate the supervision by NCAs of cross-border activities. Nevertheless, information to be provided under this obligation should remain general and not dwell on the technical means and channels used for marketing purpose, as these often change. Requiring too detailed information by way of regulation would not provide informative value.

As pointed out in Q1, the Associations remind that the concept of « actively » is unclear and should be defined.

4. Do you believe that newly added point (e) of Article 3 of the RTS and Part 5 (Complaints) of Annex I of the ITS are missing any information?

Newly added point (e) of Article 3 of the RTS and Part 5 (Complaints) of Annex I to the ITS requires firms to indicate the language(s) for which the investment firm has the necessary arrangements to deal with client's complaints from the host Member State.

The Associations would welcome a clarification on whether the use of English alone would be acceptable. In other words, the proposition opens the debate on the possibility to only tick the "English" box in Part 5, Annex I, which we would welcome.

5. Do you believe that newly added point (f) of Article 3 of the RTS and Part 6 (Internal organisation in relation to the cross-border activities of the investment firm) of Annex I of the ITS are missing any information?

The newly added point (f) of Article 3 of the RTS and Part 6 of Annex I of the ITS proposes that investment firms applying for a passport include in their notification to the home NCA detailed information about their internal organisation in relation to their cross-border activities, especially:

- the functional and legal reporting lines relating to their cross-border activities;
- the arrangements that they put in place to ensure that the internal control functions have the capacity to control the cross-border activities (including those provided in a language other than English or the official language(s) of the home Member State); and
- the procedure for cross-border clients to submit and for the firm to deal with complaints resulting from their cross-border activities.

For the first two points, AMAFI and FBF would appreciate a clarification that this addition is applicable only when NCAs do not already hold the information listed above. Indeed, Article 6 of the delegated regulation 2017/1943¹ requires that investment firms provide general information on their internal organisation, which can include cross-border activities. In case the NCA already holds that information, this requirement puts an additional administrative burden on investment firms, without improving the effectiveness of the supervision.

¹ Delegated regulation (EU) 2017/1943 of European Commission of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on information and requirements for the authorisation of investment firms.

6. Do you agree that investment firms should notify their home NCA in case of any change to the internal organisation of the investment firm in relation to cross-border activities?

The notification regarding any change to the internal organisation of the investment firm in relation to cross-border activities would duplicate the notification due in accordance with point (f) of Article 3 of the RTS and part 6 of Annex I of the ITS. As it is, we believe that this notification is not relevant to reach the goals stated in the RTS.

Either way, the Associations disagree with the addition stated in Q5. Therefore, in case information mentioned in added point (f) of Article 3 of the RTS are already held by the NCA, the notification stated in Q6 has no purpose.

7. Do you believe that any other information should be requested within the scope of the RTS/ITS?

N/A

8. Do you have any comments on the changes made to Article 4 of the RTS and Annex III of the ITS?

N/A

9. Do you have any other comment or input on the draft RTS and/or ITS?

In line with the comments above, the Associations wish to remind that it is essential that the new requirements proposed in the draft RTS and ITS do not dwell into too much detail, which would increase the administrative burden on firms without bringing additional value. The will to facilitate and improve supervision of cross-border activities by NCAs should translate into proportionate requirements, to ensure the freedom of services and establishment within the EU is not unduly hampered and the objective of a Capital Market Union is supported.

Furthermore, AMAFI and FBF insist on the fact that the term “actively” is not clear and is likely to create legal insecurity for various reasons, including:

- The moment from which the passport is considered as “actively used” may be subject to different interpretations between investment services providers or Members States. If the notion indeed is construed too widely, the number of notifications may vary significantly and be excessive in certain Member States, at the expense of the harmonisation of the supervision practices.
- The notion overlaps with the notion of a passive passport, which in practice designates a passport that has been obtained but which is ultimately not used because, for instance, the activities have

not developed as expected in the host country. For that reason, AMAFI and FBF suggest that, in order to clarify the notion of "actively", the regime applicable to unused passports be specified.

- 10. What level of resources (financial and other) would be required to implement and comply with the amendments made to the RTS and ITS? When answering this question, please also provide information about the size, internal organisation and the nature, scale and complexity of the activities of your institution, where relevant.**

N/A

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