

Opinion

Impact of the exclusion of fund management companies from the scope of the MiFIR Intervention Powers

1. Legal basis

1. ESMA's competence to deliver an opinion is based on Article 34 of Regulation (EC) No 1095/2010 (the 'Regulation'). In accordance with Article 44(1) of the Regulation the Board of Supervisors has adopted this opinion.
2. In this opinion to the EU institutions, ESMA calls for a modification of the scope of the powers of the National Competent Authorities (NCAs) and ESMA under Articles 40 and 42 of Regulation (EU) No 600/2014 (hereafter referred to as 'MiFIR Intervention Powers').

2. Background

3. According to Articles 40 and 42 of MiFIR, ESMA and NCAs may temporarily prohibit or restrict in the Union the marketing, distribution or sale of certain financial instruments, including units or shares in UCITS and Alternative Investment Funds (AIFs), whether the UCITS or AIFs in question are internally or externally managed, or financial instruments with certain specified features or a type of financial activity or practice.
4. Without prejudice to any national law that may allow NCAs to apply intervention powers to fund management companies, MiFIR Intervention Powers are explicitly addressed to investment firms authorised under Directive 2014/65/EU and credit institutions authorised under Directive 2013/36/EU (hereafter referred to as 'MiFID firms') when providing investment services and/or performing investment activities and to market operators including any trading venues they operate. This means the MiFIR intervention powers may be used to restrict or prohibit the marketing, sale or distribution of units or shares in specified UCITS or AIFs, or types of UCITS or AIF, by MiFID firms, or related activities or practices, provided that all the conditions set out in MiFIR are met. In particular, measures adopted by NCAs and ESMA cannot discriminate according to the origin of the financial instruments. For instance, if an NCA decides to take a measure against a specific type of UCITS or AIF, distributed, sold or marketed by MiFID firms, the measure will apply to all funds having the same characteristics irrespective of whether the fund is established in the jurisdiction of the NCA adopting the measure or marketed into that jurisdiction under the passport regime.



5. In this Opinion, ESMA draws the attention of the EU institutions to the consequences of the possible lack of clarity around the exclusion of UCITS management companies and Alternative Investment Fund Managers (AIFMs) from the scope of the MiFIR Intervention Powers.
6. In its response to the consultation on the Green Paper on retail financial services, ESMA has already invited the Commission to assess certain inconsistencies between the UCITS, AIFMD and MiFID II frameworks with a view to achieving further consistency in the area of, among other points, product intervention rules. The ESMA response noted that such consistency should not only be achieved when UCITS management companies and AIFMs provide MiFID services but also when these entities are directly marketing their units/shares in UCITS/AIFs¹. Moreover, the risk of regulatory arbitrage could potentially be magnified by other differences in the rules applicable to such direct marketing by fund managers compared to the rules applicable to the distribution through MiFID services².

3. Opinion

7. As stated in paragraph 4, and without prejudice to national laws, ESMA and NCAs may apply MiFIR Intervention Powers to MiFID firms and credit institutions only. This would mean that the MiFIR Intervention Powers cannot be addressed to AIFMs authorised under Directive 2011/61/EU (referred hereafter to 'AIFMD') and UCITS management companies authorised under Directive 2009/65/EC (including UCITS investment companies that have not designated a management company and internally-managed AIFs, i.e. self-managed UCITS and AIFs).
8. As part of their authorisation, AIFMs and UCITS management companies (hereafter referred to as 'fund management companies') may themselves market units or shares of the UCITS and AIFs they manage. If a restriction/prohibition were applied to MiFID firms in relation to the distribution of a type of UCITS or AIFs, that restriction/prohibition could not be applied to fund management companies because those entities are outside the scope of the intervention powers. This means that the distribution of the type of UCITS or AIFs subject to the restriction could continue through fund management companies if they decide to market their funds themselves.
9. In addition, fund management companies may be given permission under the AIFMD or the UCITS Directive to carry out certain MiFID services/activities (i.e. individual portfolio management, investment advice and, for AIFMs only, reception and transmission of orders) in relation to all MiFID financial instruments and not just units of collective investment undertakings (hereafter referred to as 'CIUs'). Fund management companies can also be given permission to carry out the MiFID ancillary service/activity of safekeeping and administration of assets in relation to units of CIUs.
10. Therefore, if a restriction/prohibition were applied to MiFID firms in relation to individual portfolio management, investment advice or reception/transmission of orders in relation to financial

¹ <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-response-commission-green-paper-retail-financial-services>, see paras 11 and 31.

² The ESMA response referred, among other things, to differences in areas of cost disclosure or product governance.



instruments, or in relation to safekeeping and administration of assets (for units in CIUs only), that restriction/prohibition, unless allowed under national law, could not be applied to fund management companies carrying out those services/activities for the same reasons as for the marketing of UCITS and AIFs.

11. Therefore, the way the scope of the intervention powers is designed under MiFIR could create a risk of arbitrage between MiFID firms and fund management companies for the provision of MiFID activities/services in relation to units in CIUs and, in some cases, other financial instruments too. ESMA is very concerned about this risk of arbitrage because it could reduce the impact of future measures by leaving outside the scope of the restrictions entities performing similar activities or distributing funds directly, as well as creating competitive distortions.
12. ESMA has assessed the potential impact of the exclusion of fund management companies from the scope of the MiFIR Intervention Powers.
13. There are already fund management companies which market their funds directly to investors and so could avoid any restriction or prohibition which might be imposed under the intervention powers in relation to the distribution of units in CIUs. In addition, as of 31 October 2016, based on the information available on ESMA's register of Registered Entities (<https://registers.esma.europa.eu/publication/searchAifmd>) a significant proportion of fund management companies already have the permission to provide MiFID services/activities. Indeed, 51% of the UCITS management companies have the permission to provide portfolio management and 45% of them investment advice. For AIFMs, the percentage is respectively 28%, 29% and 8% for portfolio management, investment advice and reception and transmission of orders. Even without any increase, this suggests that the potential for the arbitrage to have an impact in practice is significant. In this case the potential impact relates to the services referred to in Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive, not just the marketing of units of funds managed by the fund management company.
14. Moreover, in many Member States, there are financial group structures containing MiFID firms and fund management companies. Therefore, if a restriction was applied to MiFID firms, they could circumvent it by channelling the marketing of their own CIUs or the distribution of other financial instruments subject to the restriction through the fund management companies of the group which could be outside the scope of the MiFIR intervention powers.
15. Therefore, ESMA believes that the EU institutions should address the risk of arbitrage between MiFID firms and fund management companies. In particular, in addition to the powers available under MiFIR, NCAs and ESMA should have the powers to apply restrictions/prohibition directly to fund management companies. This would ensure that there is a common toolkit for NCAs and ESMA across entities and instruments, thereby contributing to a level-playing field between MiFID entities and fund management companies.