

# The Implications of MiFID II for Financial Affiliate Service Providers

## Introduction

The Markets in Financial Instruments Directive (MiFID) is the EU legislation that regulates firms who provide services linked to ‘financial instruments’. MiFID II brings greater protection for investors and more transparency into all asset classes: equities, fixed income, ETF’s and foreign exchange.

This study intends to analyze the implications of MiFID II on the financial affiliate business, specifically for the FinTech company Brokerchooser which helps independent investors and traders to find an online broker fitting to their needs.

## The scope of MiFID II and Brokerchooser

MiFID II applies to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the European Union.

### ***Brokerchooser cannot be defined as an investment firm under MiFID II because:***

- ‘**investment firm**’ definition requires provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis.
- ‘**investment services and activities**’ mean reception, transmission or execution of orders in relation to one or more financial instruments or giving investment advice.
- ‘**investment advice**’ means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments.<sup>1</sup>

The services given by Brokerchooser is related to comparison of brokers according to customer needs and preferences which cannot be regarded as an investment activity or investment advice. Furthermore, according to an answer given by ESMA (European Securities and Markets Authority) “Advice to become the client of a particular investment firm (e.g. a particular portfolio manager), or to use its services in a certain way, would need to relate to one or more specific financial instruments in order to be considered as investment advice under MiFID”<sup>2</sup>. This makes it clear that, the services of Brokerchooser is not an investment advice to make it an investment firm regulated under MiFID II.

### ***Brokerchooser cannot be defined as tied agent under MiFID II because:***

- ‘**tied agent**’ means a natural or legal person who, under the full and unconditional responsibility of only one investment firm on whose behalf it acts, promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments...

Brokerchooser is not under the full and unconditional responsibility of an investment firm; so, it is not a tied agent.

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<sup>1</sup> Further information on definitions can be found on [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2014.173.01.0349.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.173.01.0349.01.ENG) Article 4: Definitions & Annex I

<sup>2</sup> Further information on the definition of advice can be found on [https://www.esma.europa.eu/sites/default/files/library/2015/11/10\\_293.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/10_293.pdf)

***The services of Brokerchooser cannot be defined as ancillary service under MiFID II because:***

- **‘ancillary services’** includes “investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments”.
  - **General Recommendation:** Recommendation about a transaction in a financial instrument or a type of financial instrument which is intended for distribution channels or the public.
  - **Generic Advice:** Advice that does not relate a particular investment or investments (advice on the merits of investing in one geographical zone rather than another or advice on the merits of investing in certain asset classes rather than in others.<sup>3</sup>

The services given by broker chooser is not related to transactions or type of specific financial instrument so, it cannot be regarded as an ancillary service. Also, generic advice about a type of financial instrument and general recommendations are not investment advice under MiFID II.

- **Introducing Broker:** There is no definition of Broker or Introducing Broker under MiFID or MiFID II.

Only Financial Conduct Authority (previously Financial Services Authority) of UK defines it as “a firm which introduces transactions relating to designated investments arranged (brought about) for its clients to a clearing firm”. Under this definition, Brokerchooser cannot be seen as introducing broker because it does not have a direct and ongoing relationship with a client and/or delegate the trade execution to a clearing firm.

In some websites, “Introducing Broker” term is used as “introducing clients to investment firms” which is the case of Brokerchooser but, it is not a legal definition. Even under this definition, since the role of Brokerchooser is introducing clients to investment firms but, not facilitating transactions, receiving and transmitting client orders, it cannot fall under the scope of MiFID II.

## Scope of Authorisation

Article 6 of MiFID II states that, if an investment firm is authorised from any member state (home member state) it is valid for the entire union. Additionally, Article 34 states that member states shall not impose any additional requirements on an investment firm or credit institution (who were authorised and supervised by the competent authorities of another member state in accordance with this Directive) in respect of the matters covered by MiFID II. So, a German investment firm may operate in Hungary and serve to a Dutch client. Also, following this statement, Brokerchooser does not need to seek approval from other member states as it is not an investment firm to be regulated by ESMA. Because, host member state (Malta) stated that Brokerchooser is exempt from the issues covered by MiFID II and imposing additional requirements by another member state to make it regulated by MiFID II is against this article.<sup>4</sup>

## Services by Third Country Firms

Under MiFID II, the provision of services by third country firms in the EU is subject to national regimes and requirements. Firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are

<sup>3</sup> Further information on the types of advice can be found on [https://www.esma.europa.eu/sites/default/files/library/2015/11/10\\_293.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/10_293.pdf)

<sup>4</sup> Further information on the scope of authorisation see Article 6 and Article 34 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2014.173.01.0349.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.173.01.0349.01.ENG)

established. This requirement does not apply where a third-country firm provides services at the “own exclusive initiative” of a person established in the Union because, the services cannot not be deemed as provided in the territory of the EU. But, where a third-country firm solicits clients or potential clients in the EU or promotes or advertises investment services or activities together with ancillary services in the EU, it should not be deemed as a service provided at the own exclusive initiative of the client. Brokerchooser’s broker comparison including third country brokers can be seen as promoting or advertising investment services of those third country firms.

Under MiFID II, ‘third-country firm’ means a firm that would be a credit institution providing investment services or performing investment activities or an investment firm if its head office or registered office were located within the Union. This makes it unclear that, whether the investment firms that do not have any legal presence (office, branch etc.) in the EU but advertised by Brokerchooser fall under MiFID II.

## Services to Third Country Clients

Every country has its own rules. The coverage of the regulations of related financial services authorities are similar to the coverage of MiFID II and they regulate the investment firms dealing with investment transactions/advice. For Switzerland, Australia and UK, Brokerchooser does not seem to require registering or authorisation. Because, Brokerchooser neither accept client assets nor trades shares and other securities; it also does not advise on transactions on investments.<sup>5</sup> For the specific case of Australia, it is explicitly stated that license is not needed for “informing another person that a licensee (or one of its representatives) is able to provide a particular financial service or class of financial services, and giving that other person contact details for the licensee or representative”

## Profit/Revenue Share

MiFID II does not forbid or impose any requirements related to profit/revenue sharing. It does not bring when or how to share revenues or distribute commissions. It requires more transparency (like disclosures) but, does not have any clause related to investment firms sharing their revenues with other investment firms.

Under article 24, the information on all costs and associated charges must include information relating to both investment and ancillary services, including the cost of advice, where relevant, the cost of the financial instrument recommended or marketed to the client and how the client may pay for it, also encompassing any third-party payments. This may cover the transaction related commissions i.e. if the commission to be paid is transaction based, then it seems to be disclosed. On the other hand, if the commission is given by the revenue of the broker, it is unrelated.

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For Switzerland: <https://www.finma.ch/en/authorisation/types-of-licensing/>  
<https://www.finma.ch/en/authorisation/fintech/>

For Australia: <https://asic.gov.au/for-finance-professionals/afs-licensees/do-you-need-an-afs-licence/>  
<https://download.asic.gov.au/media/3889417/rg36-published-8-june-2016.pdf> RG 36.19 and RG 36.72  
<https://download.asic.gov.au/media/3336151/rg244-published-25-august-2015.pdf> RG244.28

For The UK: <https://www.fca.org.uk/firms/authorisation/how-to-apply/activities> Designated Inv. Business  
<https://www.handbook.fca.org.uk/handbook> Article 53(1) (Advising on investments)

## Conclusion

Brokerchooser is not defined as an investment firm or a tied agent under MiFID II and its services cannot be deemed as investment service or investment advice. Because of this, MiFID II does not impose any requirements on Brokerchooser as a financial affiliate.















