



CJ/SJ - n° 2201/Div.

Mr. Fabrice Demarigny
Secretary General
Committee of European Securities
Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

Paris, March 6, 2007

AFG RESPONSE TO CESR'S CONSULTATION ON TRANSACTION REPORTING

Dear Mr Demarigny,

The Association Française de la Gestion financière (AFG)¹ welcomes the CESR consultation on Transaction Reporting under MiFID.

For several years now, AFG has been actively contributing to European discussions and consultations relating to the Markets in Financial Instruments Directive (MiFID), either directly or through the European Fund and Asset Management Association (EFAMA).

AFG reminds that in its answers to CESR's consultation on the use of data standard codes in the transaction reporting, it called for a consultation on the scope of transaction reportings. AFG thanks CESR for launching such a consultation.

¹ The Association Française de la Gestion financière (AFG)¹ represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include almost 400 management companies and more than 700 investment companies.

They are entrepreneurial or belong to French or foreign banking, insurance or asset management groups. AFG members are managing more than 2500 billion euros in the field of investment management, making in particular the French industry the leader in Europe in terms of financial management location for collective investments (with nearly 1500 billion euros i.e. 22% of all EU investment funds assets under management, wherever the funds are domiciled in the EU) and the second at worldwide level. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes funds and products such as regulated hedge funds and a significant part of private equity funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA).

Having said that, **AFG answers this consultation on behalf of the management companies that would ensure the execution transactions**. As already said, the execution of transactions is a rather exceptional activity for management companies. AFG, as also expressed by EFAMA in its own reply to this consultation, is of opinion that asset managers in almost all cases do not fall under the obligation of Article 25(3), as they do not “execute transactions” when they use an intermediary such as a broker or a dealer, but rather “place orders with other entities for execution”. In an annex to this response, you will find a summary of the obligations of asset managers regarding transaction reporting under MiFID, with specific examples of situations when they should be deemed ‘executing transactions’.

Introduction

Although AFG understands that the proposed guidelines do not constitute EU legislation and do not bind CESR members, we would like all CESR members to commit themselves to follow them.

Guidelines on Reporting by branches:

Question 1: Do respondents agree with the proposed guidelines?

Question 2: Do respondents consider that guidance is needed on which transaction is executed by a branch or by its head office for purpose of reporting it to the relevant competent authority? If yes, do respondents consider that transactions executed by a branch should be understood as those transactions booked by the branch?

Q.1: yes, we agree with the proposed guidelines since the solution proposed by CESR (i.e. a single authority, where the branch is located, to whom all the transactions made by the branch should be reported) is a convenient solution. However, it can only work if all the authorities agree with and implement the guideline: investment firms need legal certainty

Q.2: Although we agree with the fact that the competent authority shall be the authority where the branch is located, we need some clarification from CESR on what constitutes the ‘place of booking’. At the public Hearing of March 1, the definition given by CESR was ‘where the book is kept’ but this wording is not relevant for asset management operations but rather for brokerage. We also need a clarification on the definition of booking.

Guidelines of what constitutes execution of a transaction:

Question 3: Do respondents agree with the proposed guidelines?

CESR defines what the execution of transaction means. CESR distinguishes execution of transactions from the service of reception and transmission of orders. For the sake of clarity, CESR should also mention that execution of transactions is different from the service of placing of orders to intermediaries for execution.

Therefore, CESR should amend Para 19 to be read:

“MiFID transaction reporting regime is based on reporting of executed transactions and not directly information on individual orders. It is therefore necessary to separate execution of a transaction from reception and transmission of orders and/or placing orders for execution”.

AFG supports Para 22 where CESR states that transactions to be reported are transactions conducted by the immediate market facing investment firms and the transactions where the investment firm is undertaking the transaction on its own accounts.

In Para 23, AFG strongly disagrees with CESR's statement that "it is necessary to allow a certain margin of difference between members" and that therefore "to the extent permitted by MiFID, individual Members States may widen the scope of the national transaction reporting regime to include also "client-facing" investment firms in addition to the "market-facing" firms". We believe that the MiFID text does not allow such interpretation, that civil law does not allow as well such an extension, and that any widening of the scope would mean pure goldplating. As such national goldplating would be against the spirit of the Single Market and would put some firms at a disadvantage vis-à-vis their competitors by burdening them with high costs, CESR should not encourage it, but rather promote a common approach and convergence in the implementation of MiFID.

In the same Para, it should be clearly stated that portfolio managers when providing the service of portfolio management execute transactions in very rare cases.

In this section, CESR should also clarify to which competent authority the investment firm should report when the transactions are directly executed by them and not through branches. AFG suggests that for reasons of clarity, simplicity and proximity, the competent authority should be the home authority (i.e. where the firm is located).

Guidelines on approval of reporting channels:

Question 4: Do respondents agree with the proposed guidelines?
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Yes, we agree to simplify the procedures in order to avoid unnecessary duplication of guidelines. But once again, this guideline can only work if all CESR members commit themselves to follow it.

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In conclusion, AFG would have appreciated that CESR addressed two more issues in its consultation paper: a single report per transaction and the limitation of liability on case of delegation of transaction reporting.

- On the first topic, MiFID does not require multiple reports (i.e. reports made by several parties to the transactions). We believe that a single report would be enough and avoid data storage problems and high costs issues. CESR should clarify which party to the transaction has the obligation to report.
- On the other topic, we call on CESR to provide for guidelines.
In the very few cases where asset managers will be deemed to be executing transactions, they will probably want and need to make arrangements to delegate transaction reporting to a third party (usually an intermediary). It is highly important to clearly define and limit their liability in those circumstances.

AFG believes that when an asset manager concludes a written agreement delegating the transaction reporting to a third party, and takes reasonable steps to verify compliance by the third party, the asset manager must be deemed to have fulfilled its obligations under MiFID. In practice, intermediaries will be reporting enormous amounts of transactions on a daily basis, and it would be impossible for the asset manager to find and check all transaction reports. Should asset managers be unable to rely on the third party with limited liability, they might be forced de facto to set up their own infrastructure, which would prove to be very costly for their clients.

Annex: Transaction Reporting under MiFID

1. “Executing a transaction” should be interpreted in the light of the fact that MiFID characterises investment firms by reference to the investment service or activity they perform. In this context it is apparent that “executing transactions” is an activity performed by firms which execute orders on behalf of customers (MiFID Annex 1, Section A(2)) or deal on own account (MiFID Annex I, Section A(3)) – that is to say, sell side firms. By contrast, the characteristic activity of asset managers is “portfolio management” (MiFID Annex I, Section A(4)), which, although it necessarily involves giving effect to decisions to buy and sell, is a distinct activity from “executing transactions”. The execution by an asset manager of its own investment decisions is an integral part of its service of “portfolio management”.

2. This basic distinction is clearly brought out by Article 45 of the Level 2 Directive. This Article refers to the asset manager “placing orders with other entities for execution”. It is only the “other entities” which perform the execution, the asset manager places orders. A similar distinction is drawn in Article 8 of the Level 2 Regulation (dealing with record-keeping), which refers to “firms that transmit orders to another person for execution”.

3. The fundamental difference between the roles of the asset manager and the sell side is equally determinative in cases where a transaction is executed by the sell side without the asset manager having “placed an order”. The asset manager goes to the sell side to obtain execution of its decision to deal. The same analysis therefore applies, and it is the sell side firm that executes the transaction.

4. The position is different where the sell side is not involved. Where an asset manager crosses a transaction internally, without putting it through a broker, a transaction reporting should be done by this asset manager.

5. Accordingly:

-- where an asset manager passes an order to another firm for execution by that firm, that other firm will execute the transaction;

-- where an asset manager accepts a quote from a dealer either directly or by means of an automatic dealing system (that is, trading with the dealer through the system), the dealer will execute the transaction;

-- where an asset manager crosses a transaction, without putting it through a broker, the asset manager itself would have to report the transaction.

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If you wish to discuss the contents of this letter with us, please contact myself at 01 44 94 94 14 (e-mail: p.bollon@afg.asso.fr), Stephane Janin, Head of International Affairs Division, at 01 44 94 94 04 (e-mail: s.janin@afg.asso.fr) or Catherine Jasserand, Deputy Head of International Affairs Division, at 01 44 94 96 58 (e-mail: c.jasserand@afg.asso.fr).

Yours sincerely,

(signed)

Pierre Bollon