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Interest representative register number:
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Mr David WRIGHT
Deputy Director General
DG Internal Market and Services
European Commission
2-4 rue de Spa
1000 Brussels
Belgium

16 July, 2009

Re: AFG's response to the European Commission Communication on *European financial supervision*

Dear David,

The Association Française de la Gestion financière (AFG)¹ would like to thank the European Commission for submitting to public consultation its Communication regarding the European financial supervision. As you may remember, AFG had already actively contributed to the excellent Larosière report, by pro-actively delivering a position paper to the group in the context of its work.

¹ The Association Française de la Gestion financière (AFG) represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include 409 management companies, either independent or belonging to French or foreign banking or insurance groups.

AFG members are managing more than 2400 billion euros in the field of investment management. In terms of financial management location, it makes in particular the French industry *the leader in Europe for collective investments* (with more than 1300 billion euros managed by French companies, 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 terms of fund domiciliation, French funds are respectively second in Europe and third at worldwide level. In terms of product interests, our association represents – besides UCITS – the employee savings schemes funds, hedge funds/funds of hedge funds as well as a significant part of private equity funds and real estate funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA) and of the European Federation for Retirement Provision (EFRP). AFG is also an active member of the International Investment Funds Association (IIFA).

On this basis, we are glad to provide for the following comments on the Communication. Before entering the substance of the Communication itself, we wish to stress some general issues.

General comments:

Without prejudice to our position on the content of the Communication, we are somewhat surprised by the timing of this public consultation as compared to the timing followed by the Commission in submitting the same Communication to the Council. Indeed the Council has already taken an official position on this Communication during the European Council of 18/19 June. Therefore, we can reasonably wonder to which extent this public consultation will still have some impact as compared to the current inter-institutional process already launched. For the future consultations, we would suggest that the Commission consults before submitting its positions to the Council (and European Parliament if the case arises);

On the substance of the Communication, we generally agree on the proposals made by the Commission in order to build a stronger and more efficient cross-border supervisory system in the EU, both on macro-economic/systemic issues and micro-economic issues. However, we think that the Commission and the European institutions more generally should go even further;

1. First, we strongly believe that the welcomed increased power of the 3 Authorities necessitates a more robust governance pattern. Stakeholders should, indeed, get really involved in the fact finding, the solution drafting and the decision making mechanisms. It implies, in particular, a more systematic use of the Market Participants Consultative Panels and a revision of their composition. Stakeholders (such as asset managers for the European Securities Authority) could/should also be represented in the colleges of the Authorities.
2. For instance, although we agree that the 3 Authorities of the European System of Financial Supervisors (ESFS) should leave the daily supervision to national regulators/supervisors, the practical smooth functioning of such a balance will work only if national supervisors/regulators have the same powers in each Member State. Today, it is not the case and frequently it generates already significant difficulties in cross-border cooperation or in getting a similar implementation of EU legislation at national level. The case of the Market Abuse Directive, the first Lamfalussy Directive, is clear: in spite of giving a minimum list of powers to national regulators, the practical powers diverge in practice, generating delays in cross-border exchanges of information between regulators in practice. It means that even if we get, as we strongly wish, 3 empowered Authorities at pan-European level, the fact to rely still on differently empowered authorities from one Member State to another will reduce the overall efficiency of the whole system;
3. From another perspective, the Communication falls short of answering our expectations, as it does not mention enough the fact that getting a fully efficient European supervisory system requires making use of Regulations instead of Directives. With Directives, some part of powers will still rely in national legislators, which are not bound to following Level 3 standards for instance, which would (in the

new system) be binding only for national supervisors/regulators. The Communication should have more vocally asked for reinforcing the scope of Regulations vs. Directives. This point was made clear by the Lamfalussy Report in 2001, is still valid and surprisingly enough is not made as clear in this Communication;

4. From a governance perspective, the independence of the 3 Authorities is not enough guaranteed in our view. The “standards” should be endorsed by the Commission but then there is a clear risk of potential pressure by the Commission to get standards that they could endorse: such an approach could harm the independence of the Authorities;
5. Last but not least, the legal status of the 3 Authorities is not fully clear to us and remains crucial though to ensure an efficient and independent process of pan-European supervision.

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Detailed comments:

1. Regarding the European Systemic Risk Council (ESRC):

- a. We agree that to a large extent central banks are the most important types of supervisors at stake;
- b. However, regarding the seeking for advice by the ESRC towards private-sector stakeholders, we think that the industry of asset management should be consulted among others: we think we are not less impacted by systemic issues and decisions than consumer representatives – the latter being quoted in the Communication in relation to the ESRC;
- c. We fully agree that from a worldwide perspective, the ESRC should be expected to increase the influence of the EU in any global risk warning system;
- d. However, we think that the Communication should have made clearer that in addition to early warning systems, the ESRC should obviously play a major role for facilitating the global coordination once systemic risks have occurred;
- e. Last, although it is probably difficult to act otherwise at this stage, the lack of legal personality for the ESRC may limit the practical impact of its actions in the future.

2. Regarding the European System of Financial Supervisors (ESFS):

- a. We fully agree with the 5 lacks identified today by the Commission, regarding the Level 3 Committees as mere advisory bodies:

- i. There is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border institutions;
 - ii. Despite recent progress and the new provisions incorporated in a “UCITS IV efficiency package”, there is still scope for enhanced cooperation and information exchange between national supervisory authorities;
 - iii. Joint action by national authorities require a tour de force to take account of the patchwork of regulatory and supervisory requirements;
 - iv. National solutions are most often the only feasible option in responding to European problems;
 - v. Different interpretations of the same legal text abound;
- b. On the latter point, we would add that it often leads either to national gold-plating or conversely to national dumping (“tin-plating” or “plastic-plating”), create de facto a level playing field for financial service players and products from one Member State to another;
- c. Regarding the objectives assigned to the Authorities, we agree on the 8 functions proposed by the Commission, in particular:
 - i. Ensuring a single set of harmonised rules, through binding technical standards in specific areas as well as through interpretative guidelines to be used by national regulators in taking individual decisions such as licensing financial institutions;
 - ii. Ensuring consistent application of EU rules, with the possibility for Authorities to settle diverging opinions between national supervisory authorities or to adopt a recommendation for action addressed to the relevant national supervisor. *In our opinion this function is crucial. However, the power by the Commission to take a decision imposed to the relevant national authority is probably not enough: it should be for the Authority to take the decision itself, in order to be stronger vis-à-vis national supervisors. In addition, regarding individual decisions vis-à-vis financial institutions, we think that the powers of the 3 Authorities could be applicable not only in relation to requirements stemming from EU Regulations relating to the prudential supervision of financial institutions and stability, but more widely to all matters related to financial institutions;*
 - iii. Ensuring a common supervisory culture and consistent supervisory practices, through common training programmes and the development of cross-border delegation of tasks among national regulators;
 - iv. Giving full supervisory powers for some specific entities with pan-European reach, such as CRAs and CCPCHs. *Once again, we think*

that the development of such powers will highly depend on the development of Regulations vs. Directive in the near future;

- v. Ensuring a coordinated response in crisis situations. *We agree in principle but the example of short-selling taken by the Commission is not the good one: before coordinating responses, it is necessary to have a common European definition of the practices at stake. But in the specific case of short-selling, although it would have been highly desirable to get a pan-European coordination of short selling restrictions last year, it would not have been possible as the EU has not defined yet what it understand by 'short-selling' – and this difficulty is even more obvious at global level through the inability of IOSCO to provide for a common definition;*
 - vi. Collecting micro-prudential information from national supervisors. The Commission mentions here the setting up of a central European database. *We would suggest that this European database could be used not only for the Authorities themselves, but could also collect other types of information (such as the different national regimes on topics not yet fully harmonised at EU level, such as short selling or the requirements for disclosing thresholds in listed issuers' capital) which would be made publicly accessible in a common language, in order for market participants to get an easy access to such national information which is crucial when they trade on a cross-border basis;*
 - vii. Undertaking an international role, through technical arrangements as well as assisting the Commission in preparing equivalence decisions. *We think that this function does not go far enough, as Authorities should be fully empowered to prepare equivalence decisions, in order to fasten the decision processes and to keep the matter in the hands of specialists;*
 - viii. Safeguarding these competences, through the relevant sectorial legislation. *We fully agree that the decisions by the Authorities must be subject to review by the Community Courts;*
- d. Regarding the composition and the operational structure of the ESFS, we fully support the need for accelerating the work so that the strengthened framework will be up and running in 2010.
However, we think that as long as national regulators will not have the same powers at national levels, we will fall short of expectations. Therefore, either a higher convergence of national powers is undertaken by revising the sectorial European texts accordingly, or there would be a need to discuss the pros and cons of keeping national regulators. Another point regards keeping 3 sectorial authorities: we fully agree on it, but it remains to be seen how the coordination will work between the 3 in common areas such as ensuring a level playing field between financial

products – following the wish expressed by the Commission in this matter a couple of months ago.

It could be questioned why pensions and insurance are to be in the remit of the same Authority. If this is kept, then at least, the asset management industry and regulators should be called upon when pensions questions are discussed. Its consultative panels should incorporate, in particular, asset managers;

- e. Regarding the legal basis for the ESFS, the Communication considers that the Authorities can be established on the basis of Article 95 of the EC Treaty. *We think that the legal development of the Communication regarding the legal status of the Authorities is not clear enough and should be made more precise in the forthcoming texts to be proposed by the Commission this autumn.*

If you wish to discuss the contents of this letter with us, please contact myself at +33 1 44 94 94 14 (e-mail: p.bollon@afg.asso.fr), or Stéphane JANIN, Head of International Affairs Division at +33 1 44 94 94 04 (e-mail: s.janin@afg.asso.fr).

Sincerely,

Pierre BOLLON