SP/AGA
N° 2810_02/Div

EUROPEAN COMMISSION
Directorate General Internal Market and Services
Financial services policy and financial markets
Securities markets

markt-consultations-mifid@ec.europa.eu

Interest representative register number:
5975679180-97

Paris, 1st February 2011

AFG RESPONSE TO THE PUBLIC CONSULTATION BY THE EUROPEAN COMMISSION ON THE REVIEW OF THE MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE (MIFID)

The Association Française de la Gestion financière (AFG)[1] welcomes the Commission's consultation on the review of the MiFID and thanks for the opportunity to express the French asset management's opinion on the topic. Indeed, having submitted widely this consultation paper will permit gathering all points of view, including the investors' point of view through an asset management association like ours.

[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 411 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups.

AFG members are managing 2600 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 1600 billion euros managed from France, i.e. 23% of all EU investment funds assets under management), wherever the funds are domiciled in the EU, and second at worldwide level after the US. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes and products such as regulated 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).

We would like to express our regret that the time allocated to such a broad scope issue (with no less than 148 questions) is too short and therefore does not permit respondents to explore at full extent implications of the proposed changes.

AFG would encourage the Commission to listen carefully to the views of investors like ourselves as the interests of those for whom trading is essentially a cost of doing business should be placed ahead of those for whom it is a source of profit. In this way investors connected with the real economy will be assured that revisions to MiFID will operate to serve their needs and so promote confidence in the European markets.

2 – DEVELOPMENTS IN MARKET STRUCTURES

The MiFID was conceived as a pillar within the regulatory initiative that aimed towards organising a harmonised European securities market.

AFG was always of the opinion that it carried the danger of fragmenting the markets, leading to increased costs and to a weakening of their depth and the accuracy of the price discovery process. Three years after MiFID became applicable the time has come to address failures and further enquire shadow areas in the reshaped (post Mifid) markets organisation.

The current range of trading venues recognised by MiFID does not cover all organised trading (ex: BCNs, inter-dealer broker systems); the picture is incomplete. It is therefore necessary to create an additional category so as MiFID may capture the full spectrum of organised trading. Indeed, a same trading activity should have the same regulatory treatment so that regulatory arbitrage is discouraged.

However, the definition of the OTFs should be clear enough so as to permit capturing truly matching/concluding facilities and exclude purely routing facilities. Indeed, a more precise definition would help excluding for example Fixed Income electronic trading platforms that are in fact only “request for Quotes”.

Our members would strongly like to see encouraged by the regulation the set-up of a definition for a standard connexion protocol between the manager’s Execution Trading System / Order Management System and the OTFs (like the already existing FIX protocol). Otherwise, each and ever OTF will likely develop its own connectivity format and impose it to the user resulting in unnecessary increased connexion costs. Moreover, our members would expect the costs of these systems to be borne by the OTFs and not by the buy-side users. It would also be very desirable for users to be able to trade on these OTFs baskets of instruments (such as CDS or IRS).

Ensure fair competition among trading venues by aligning as much as possible the type of constraints and requirements between types of venues was a demand already expressed by our members. If our members clearly perceive that the Commission’s proposals relative to the market structure illustrate its will of ensuring a fairer competition between trading platforms and increasing the regulatory surveillance of the new types of facilities, nevertheless they would like to stress the general question of costs. Indeed, our members would like to raise the problem linked to the new obligations that have been created by MiFID that generated costs that were finally passed on to the final client. The efficiency of the review of MiFID encompasses also the need to tackle with the cost of MiFID obligations compared to the competition-generated gains. This will help appreciate possible costs that would come as a consequence of the market structures harmonisation that is sought.

When assessing the consequences of the MiFID implementation and if there is a need to strike a balance regarding actual measures to be taken, we would like to point out the need to differentiate between how players differing by asset size were (and will) be impacted. It is not sure that competition-generated costs in the post MiFID landscape actually benefit equally to the different types of users.

Technological advances in electronic trading towards lower latency make up an undeniable constitutive feature in the current equity markets' architecture. Venues should ensure everyone gets trading data at the same time, with the same priority and at the same level of access.

Massive order cancelling may clearly be problematic from a market fairness and integrity point of view. A ratio of orders to transactions executed may constitute a solution. We don't think HFT should be asked to provide liquidity on an ongoing basis; as for instance when HFT is an asset management strategy, the only objective is to perform in the best interest of investors. Our members agree on requiring specific risk controls for automatic trading (real time controls on financial exposures and reinforcement of operational risk controls).

3 - PRE AND POST TRADE TRANSPAENCY

Our members favour improved transparency by the means of de-fragmentation, as post-Mifid market fragmentation comes at a cost in terms of transparency and integrity in the price discovery process. Indeed, an increasing portion of trading takes place outside the lit markets.

An increased transparency will permit us a better (and quicker) access to executed prices and thus permit to fulfil our own constraints in terms of delays for valuation, best selection and best execution.

Indeed, the collective asset management industry has a specific feature which is the valuation obligation. The reference to a fair market price is of highest importance. Liquidity is offered on a price formed in a process that respects market integrity and that permits performance analysis and fund comparison.

Transparency and Fair price formation: dark trading permits accessing to price references available without really contributing to the price formation. It is essential that the volume split between dark and lit trading in equities ensures enough confidence in the market about the fact that "all information about the asset" is taken into account and that the price formation has not been degraded.

In our view, an effective regulation on financial markets should seek to obtain the ultimate consumers' protection in a well-functioning market. Transparency of the order books and transactions, equitable competition between execution venues are key to maintain confidence in the market.

We favour a level playing field for post-trade reporting among all market participants (RMs, MTFs and OTC) so as to obtain a consistent consolidated view of the market's liquidity.

However, our members acknowledge the need to adapt the transparency regime by the asset class as non-equities encompass several different asset classes.

4 - DATA CONSOLIDATION

Ensuring best conditions to gather a data of quality in a standardised and easy to process format is an objective our members approve. It will help addressing the reduced clarity around post trade information resulting from MiFID implementation. However, if we agree with the concept of reporting through APAs, we would like to remind that this should not engender additional costs to investors. This raises the question about the economical model behind an APA.

AFG members approve the setting up of a Consolidated Tape under the option A (legally appointed non profit body) so as to permit to have a common and reliable data base for post-trading data. Option A bears less conflicts of interest and is an appropriate solution especially in a domain of key public information to gather and disseminate in a fragmented market.

5 – MEASURES SPECIFIC TO COMMODITY DERIVATIVE MARKETS

A same entity may act for different types of clients in a same consolidated transaction and the resulting reporting may not be accurate by classes of end clients. Our members question the cost effectiveness of the new reporting measure.

6 – TRANSACTION REPORTING

Our members are supportive of a common regime for transaction reporting that may truly be used by both the respondents and the regulatory bodies. Our members find it difficult to set up the proposed regime when it comes to identifying the decision chain and they are against the provision of the trader IDs, at least for the asset managers. Again, we are against additional costly constraints of reporting to be incurred by the industry if the gathered information is not meant to be truly and efficiently used.

7- INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES

The Association Française de la Gestion financière (AFG)[2] welcomes the Commission services' consultation on legislative steps for the packaged retail investment products (PRIPs) initiative. But AFG regrets the inadequately short length of the consultation period in view of the crucial topics it covers.

[2] 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. They are entrepreneurial or belong to French or foreign banking or insurance groups.

AFG members are managing 2300 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 1300 billion euros managed from France, i.e. 23% of all EU investment funds assets under management), wherever the funds are domiciled in the EU, *and second at worldwide level after the US*. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes and products such as regulated 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 Investment 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).

AFG wishes to stress the following points:

- ✓ Asset managers and investment firms always act honestly, fairly and professionally in accordance with the best interests of its clients. This principle is the basis of all relationship with investors.
- ✓ Cases of mis-selling products result from a failure in the conduct of business and not in a failure of regulation. Several poor practices or conflicts of interest described in this consultation were foresighted by the MIFID first version. Indeed there exist lots of rules imposed by the current regulation to curb poor practices and to improve investor protection and provision of investment services. These rules should be first implemented and poor practices punished in the event of non-compliance before creating new rules. So AFG encourages regulators to ensure their implementation via level 4 of the Lamfalussy process.

7.1 Scope of the Directive

7.1.1. Optional exemptions for some investment service providers

(84) **What is your opinion about limiting the optional exemptions under Article 3 of MiFID? What is your opinion about obliging Member States to apply to the exempted entities requirements analogous to the MiFID conduct of business rules for the provision of investment advice and fit and proper criteria? Please explain the reasons for your views.**

AFG agrees with the Commission's proposal to limit optional exemptions. Exempted entities should also be subject to analogous MIFID rules as conduct of business for the provision of investment advice and fit and proper criteria. AFG supports this proposal which would harmonize investor protection regimes and enhance fair competition / level playing field between intermediaries.

7.1.2. Application of MIFID to structured deposit

(85) **What is your opinion on extending MiFID to cover the sale of structured deposits by credit institutions? Do you consider that other categories of products could be covered? Please explain the reasons for your views.**

In relation with the Commission's consultation on the Packaged Retail Investment Products (PRIPs), AFG supports the proposal to extend MIFID rules to cover structured deposits.

As explained in its response to the PRIPs consultation, AFG supports also the proposal to include all substitute investment products to provide a level playing field. An investor should be protected with similar rules (in terms of information, conduct of business rules...) whatever the product he buys and whatever the distribution channel he chooses.

7.1.3. Direct sales by investment firms and credit institutions

(86) **What is your opinion about applying MiFID rules to credit institutions and investment firms when, in the issuance phase, they sell financial instruments they issue, even when advice is not provided? What is your opinion on whether, to this end, the**

definition of the service of execution of orders would include direct sales of financial instruments by banks and investment firms? Please explain the reasons for your views.

The rules should be the same for all substitute investment products (it does not have to include, though, the shares or bonds of the banks themselves) – see also our answer to Q90.

7.2 Conduct of business obligations

7.2.1. "Execution only" services

(87) **What is your opinion of the suggested modifications of certain categories of instruments (notably shares, money market instruments, bonds and securitised debt), in the context of so-called "execution only" services? Please explain the reasons for your views.**

Please refer to the AFG's answer to the 89th question.

(88) **What is your opinion about the exclusion of the provision of "execution-only" services when the ancillary service of granting credits or loans to the client (Annex I, section B (2) of MiFID) is also provided? Please explain the reasons for your views.**

AFG has no comment as this question does not relate to investment products/services.

(89) **Do you consider that all or some UCITS could be excluded from the list of non-complex financial instruments? In the case of a partial exclusion of certain UCITS, what criteria could be adopted to identify more complex UCITS within the overall population of UCITS? Please explain the reasons for your views.**

AFG strongly disagrees with the proposal to exclude certain UCITS from the list of non-complex financial instruments:

1. UCITS funds are managed under the UCITS directive investment rules which are strictly defined by regulation. And this is why UCITS are internationally recognised as a "retail" funds brand.
2. Excluding certain UCITS from the list of non-complex financial instrument would strongly weaken this brand.
3. Such a distinction would paradoxically lead to weaken investor protection. For example "non-complex" UCITS, only invested in shares, or bonds could be bought with execution only service contrary to a UCITS fund partially guaranteeing capital, even the latter is less risky as shares or bonds. "Complexity" often allows decreasing the risk.
4. The objective of the supervision of the "execution only" service is to avoid that an investor buys a financial instrument too risky for his needs. But complexity doesn't always mean risk. The objective of a complex product is often to reduce risk.
5. AFG admits that certain UCITS are less easy to understand (but not more risky) than simple financial instruments like shares or bond for example. But with the UCITS IV directive, the KIID will improve the information for investors. Its objective is to make all the UCITS more comprehensible. Investors will have fair, clear and not misleading information about the main characteristics of the product like risk and return. They will invest, even in execution only, in UCITS they will better understand.

6. Lastly, but very importantly, the task of distinguishing between so called “complex” and “non complex” UCITS would prove impossible.

AFG encourages the Commission to follow CESR’s proposal[3] to maintain UCITS as non-complex instruments.

(90) **Do you consider that, in the light of the intrinsic complexity of investment services, the "execution-only" regime should be abolished? Please explain the reasons for your views.**

AFG strongly disagrees with the proposal to abolish the “execution only” services. If they don’t want advice, investors (including non professional) should be able to buy financial instruments with “execution only” services. This regime seems particularly appropriate when order is provided through Internet.

Moreover, even with the “execution only” service, investor receives information about the investment product, notably the KIID for UCITS funds.

7.2.2. Investment advice

AFG would stress the following points:

- ✓ According to MIFID, “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”. This personal recommendation has to be suitable, based on a consideration of the person’s circumstances. So the investment advice is always lead by the best interest of the client and not by possible relationship between the advisor and the product’s provider. AFG considers that the idea of a dependent advice isn’t relevant.
- ✓ Nearly all commercial relationships lead to conflicts of interest when (food or electronic…) products providers pay their distributors to sell their products. Because customers are aware of relationships between providers and distributors (i.e. transparency), the conflict of interest is managed. As regards financial products, there can exist similar conflicts of interest. But, according to MIFID, AFG support the idea that these conflicts can be managed with transparency. If an investor knows that his advisor (a bank employee or an independent) works only with selected products providers and that there exist financial relationships between these providers and his advisor, the conflict of interest is managed.
- ✓ AFG strongly disagrees with the idea that there could exist a fair independent advice and an unfair dependant advice. Investment advice is an investment service, according to MIFID, regulated by rules. The MIFID investment advice service can’t be split in two different services, regulated with the same rules. Investor should expect the same service wherever he receives the financial advice.

(91) **What is your opinion of the suggestion that intermediaries providing investment advice should: 1) inform the client, prior to the provision of the service, about the basis**

[3] Technical Advice to the European Commission in the context of the MIFID Review – Investor Protection and Intermediaries (CESR/10-859).

on which advice is provided; 2) in the case of advice based on a fair analysis of the market, consider a sufficiently large number of financial instruments from different providers? Please explain the reasons for your views.

1) AFG considers that an intermediary providing investment advice should offer a range of products large enough to respond to the needs expressed by investors. But the variety of financial products providers isn't necessary if the range of types of products is large enough and if the investor is aware of the selection of providers.
An investment advice could also be provided on a narrow range of products if the investor is aware about that.

2) AFG disagrees with the idea that a fair advice is always based on a large number of financial instruments from different providers. If a financial group offers a range of "in house" products wide enough to respond to the needs of the investors, the advice based on this supply is also fair because the supply is large enough.
Indeed the investor protection is improved when an investment advisor selects some products or providers he knows and monitors. A fair analysis of the market is unrealistic: for example there exist more than 11000 mutual funds in France.

The investment advice service objective is to recommend some financial products to an investor as regards as his personal situation. Following this personal recommendation, the investor decides or not to invest. The personal recommendation can't be qualified as unfair because the range of products supplied by the intermediary isn't very large.

Under current MIFID rules, fair/suitable recommendations can and must be expected in all distribution channels, regardless of ties with specific product providers.

So, AFG strongly disagrees with the proposal to ban acceptance of inducements/distribution fees by intermediaries as long as details of such payments are clearly disclosed to investors in accordance with the current MIFID rules (art. 26 b).
Moreover, evidence shows that a large majority of retail clients are unwilling to pay for advice. Such proposal would entail very significant collateral damage as it would reduce access to advice for retail investors and it also affect the financial viability of many independent advisors.

(92) **What is your opinion about obliging intermediaries to provide advice to specify in writing to the client the underlying reasons for the advice provided, including the explanation on how the advice meets the client's profile? Please explain the reasons for your views.**

MIFID already imposes on intermediaries providing advice to "obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him". This test should explain the provided advice.

(93) **What is your opinion about obliging intermediaries to inform the clients about any relevant modifications in the situation of the financial instruments pertaining to them? Please explain the reasons for your views.**

AFG agrees with the proposal to obliging intermediaries to inform the client about any relevant modifications in the situation of the financial instruments. But the concept of "relevant modifications" should be defined. One solution for UCITS funds could be to refer to a significant change in the scale of risk: when a fund modifies significantly the KIID scale of risk, one could consider that it implies a "relevant modification" in the situation of the UCITS.

(94) **What is your opinion about introducing an obligation for intermediaries providing advice to keep the situation of clients and financial instruments under review in order to confirm the continued suitability of the investments? Do you consider this obligation be limited to longer term investments? Do you consider this could be applied to all situations where advice has been provided or could the intermediary maintain the possibility not to offer this additional service? Please explain the reasons for your views.**

AFG agrees with the necessity to specify investment advisors duties but we disagree with the proposed ways to extend advisory duties. For example, keeping the situation of clients under review in order to confirm the continued suitability of the investment is very difficult to manage (Is an annual basis updating really relevant?). Indeed, AFG supports the idea that the client should also inform the intermediary about his own situation. An annual revision, by the intermediary, of the client's situation wouldn't capture the infra-annual changes.
Moreover, according to current MIFID rules (art. 26 b. from the 2006/73/CE directive), intermediaries providing advice have to supply provisions to improve this investment service to justify long term distribution fees. For example, to provide a suitable advice, intermediaries keep the situation of financial instruments under review to inform investors (potential or not) about the products' evolution. The needed infrastructure allowing keeping products under review increases costs of investment advice. Indeed, such a service justifies, among others, long term distribution fees from products providers to intermediaries.

7.2.3. Informing clients on complex products.

(95) **What is your opinion about obliging intermediaries to provide clients, prior to the transaction, with a risk/gain and valuation profile of the instrument in different market conditions? Please explain the reasons for your views.**

(96) **What is your opinion about obliging intermediaries also to provide clients with independent quarterly valuations of such complex products? In that case, what criteria should be adopted to ensure the independence and the integrity of the valuations?**

(97) **What is your opinion about obliging intermediaries also to provide clients with quarterly reporting on the evolution of the underlying assets of structured finance products? Please explain the reasons for your views.**

(98) **What is your opinion about introducing an obligation to inform clients about any material modification in the situation of the financial instruments held by firms on their behalf? Please explain the reasons for your views**

AFG supports the idea that intermediaries should inform investors about evolution of so called complex products, but "material modifications in the situation of the financial instruments" appears to be unclear and would have to be properly defined.

Such considerations make clear that UCITS should not be treated as complex instruments. For example:

- ✓ Independent valuation by intermediaries could not be applied to UCITS (or non UCITS funds also) as the valuation's responsibility lies with the management company
- ✓ The KIID (or similar document) and periodic reports which are at the disposal of the investor will fulfil most of required reports and their provisions should be sufficient
- ✓ UCITS are valued on a regular basis and this information is readily available to investors.

(99) **What is your opinion about applying the information and reporting requirements concerning complex products and material modifications in the situation of financial instruments also to the relationship with eligible counterparties? Please explain the reasons for your views.**

Though AFG supports the idea that even professional clients and eligible counterparties need clear and fair information, we do not see the need to apply such requirements to them. They can request necessary information and have sufficient knowledge to be able to evaluate it.

(100) **What is your opinion of, in the case of products adopting ethical or socially oriented investment criteria, obliging investment firms to inform clients thereof?**

. In the case of products adopting environmental or socially oriented investment criteria, we support to include such information in the product's investment strategy. A study should be made on the possibility to include an ESG assessment on all financial products. AFG has made it mandatory for retail funds calling themselves SRI to clearly explain why and report regularly on their ESG policy.

7.2.4. Inducements

(101) **What is your opinion of the removal of the possibility to provide a summary disclosure concerning inducements? Please explain the reasons for your views.**

AFG is not in favour of eliminating the possibility to provide a summary disclosure regarding inducements. Current MIFID rules provide the possibility for investors to request further information and, in practice asset managers note the poor interest in it from investors.

(102) **Do you consider that additional ex-post disclosure of inducements could be required when ex-ante disclosure has been limited to information methods of calculating inducements? Please explain the reasons for your views.**

AFG disagrees with the proposal to require ex-post disclosure. Only the ex-ante disclosure provides relevant information before conducting an investment. Ex-post information isn't useful for the client.
Moreover, MIFID rules provide the possibility for investor to request such information.

(103) **What is your opinion about banning inducements in the case of portfolio management and in the case of advice provided on an independent basis due to the specific nature of these services? Alternatively, what is your opinion about banning them in the case of all investment services? Please explain the reasons for your views.**

AFG very strongly disagrees with the Commission proposal to ban inducements in case of portfolio management and in case of advice provided on an independent basis. A complete and detailed impact assessment would have to be carried if the Commission wishes to continue to investigate this idea. It would be very crucial to entrepreneurial small size asset managers and IFAs.

1- Advice provided on an independent basis:

AFG strongly disagrees with the proposal to ban commissions paid by product providers to intermediaries providing an "independent" advice. As explained above with questions related to investment advice (especially Q91), AFG considers that the concept of independent/dependent advice isn't relevant. While AFG support the idea that an investor should receive the same investment advice service whatever the distribution channel, no reason justifies the distinction among the payment of the different distribution channels. We think that clear and fair information disclosed ex-ante to clients on the commissions received by the distributor is the best way to ensure investor protection, like the Commission services seem to recommend with the review of the Insurance Mediation Directive.

- ✓ Firstly, in continental Europe, investors can receive an investment advice service mainly through two main channels: with bank and insurance companies or with financial investment advisors. The competition between these two channels allows investors to get a quality investment advice service. Contrary to the objective of the Commission, banning the commissions paid by product providers to ("independent") financial investment advisors would affect their financial viability, especially for small size ones. It would lead to a decrease of these advisors and so strongly limit competition.
- ✓ This proposal would also drastically reduce open architecture. In France, 250 assets managers are "independent" (not tied to a bank or an insurance company). Their main distribution channel is based on ("independent") financial investment advisors. If investment financial advisors disappear, independent asset managers will not sell their products. Moreover, integrated distribution channels would not anymore have any incentives to sell other funds than "in house" funds.
- ✓ Furthermore, a large majority of retail investors are unwilling (or unable) to pay for advice. Banning commissions paid by product providers to ("independent") intermediaries is likely to reduce access to advice for retail investors, especially those investing small amounts. It would be a "pro-rich" measure.
- ✓ According to the UCITS IV directive, ongoing fees pay for asset management and for others service providers like distributors. These distribution fees pay for the assistance provided to the investor (like products selection, adequacy or suitability, eventually reporting and long term assistance…) and the distributors' monitoring on the product (information on evolution or changes…). Banning these distribution fees denies the entire service that can back a financial product sell (information, reporting, advice…).

- ✓ Banning commissions paid by product providers to ("independent") financial advisors would encourage these advisors to often change portfolio allocation (turning of portfolio) to receive entry fees.
- ✓ AFG understood that Commission wishes to favour long term advice service. In our point of view this long term advice service justifies a long term trail commission paid by the product provider to the intermediary who provides this service, according to the current MIFID rules.
- ✓ AFG supports the idea that ex-ante transparency would improve comparability among distributors and so would manage conflicts of interest. For example, in France the independent asset managers who currently collect lots of assets under management base their distribution on ("independent") financial advisors but the commissions they offer aren't the highest.
- ✓

2- Portfolio management:

AFG doesn't consider that commissions paid by product providers to portfolio managers should be banned.

- ✓ Firstly, these commissions allowed the development of the open architecture (that is the real competition between product providers). If such commissions would be banned, portfolio managers won't have any incentives to subscribe external funds if there is an "in house" fund suitable with the portfolio management.
- ✓ Moreover, the investor often expressly consents to these commissions being kept by the portfolio manager. In that case, these commissions reduce the fees charged to investor. If, they should be banned, fees would have to increase. As a result portfolio management service would be only affordable to wealthier investors.
- ✓ AFG supports the idea that it should be possible to inform the investor on the commissions paid by product providers in the annual report.

7.2.5. Provision of services to non-retail clients and classification of clients

(104) **What is your opinion about retaining the current client classification regime in its general approach involving three categories of clients (eligible counterparties, professional and retail clients)? Please explain the reasons for your views.**

AFG doesn't believe that the current client classification regime requires an adjustment because all clients can request to be categorized in an upper or in a lower category.

However, portfolio managers are considered as eligible counterparties and therefore do not enjoy the protection of best execution rules according to Art. 24 of MiFID Level 1, while they have to act in the best interests of the client according to Art. 45 of Level 2. The MiFID revision should require that portfolio managers be provided with best execution by the investment firms with whom they place orders notwithstanding the fact that the portfolio manager may be categorized as an eligible counterparty.

In other words, the provisions in Art. 24 (2) of MiFID Level 1 that "Classification as an eligible counterparty under the first subparagraph shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as clients whose business with the investment firm is subject to Articles 19, 21 and 22" should be amended to foresee that firms providing the service of portfolio management shall have the right to require a higher level of protection.

(105) **What are your suggestions for modification in the following areas:**
a) Introduce, for eligible counterparties, the high level principle to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading when informing the client;
b) Introduce some limitations in the eligible counterparties regime. Limitations may refer to entities covered (such as non-financial undertakings and/or certain financial institutions) or financial instruments traded (such as asset backed securities and non-standard OTC derivatives); and/or
c) Clarify the list of eligible counterparties and professional clients per se in order to exclude local public authorities/municipalities? Please explain the reasons for your views.

a) AFG agrees with the introduction of the broad conduct of business principle in the relationship with eligible counterparties.

b) AFG disagrees with the introduction of some limitations in the eligible counterparties regime. We consider that eligible counterparty's clients have sufficient knowledge on financial products. They also can opt anytime for a lower category.

(106) **Do you consider that the current presumption covering the professional clients' knowledge and experience, for the purpose of the appropriateness and suitability test, could be retained? Please explain the reasons for your views.**

AFG believes that the current presumption should be retained. We consider that professional clients have sufficient knowledge on financial products. They also can opt anytime for a lower category.

7.2.6. Liability of firms providing services

(107) **What is your opinion on introducing a principle of civil liability applicable to investment firms? Please explain the reasons for your views.**

(108) **What is your opinion of the following list of areas to be covered: information and reporting to clients, suitability and appropriateness test, best execution, client order handling? Please explain the reasons for your views.**

AFG disagrees with the proposal to introduce a principle of civil liability applicable to investment firms. Such a principle should stay on a national level.
Moreover, we believe that an impact assessment survey on a cost/benefit analysis should be undertaken before eventually introducing such a change in MIFID.

7.2.8. Dealing on own account and execution of client orders

(111) **What is your opinion on modifying the exemption regime in order to clarify that firms dealing on own account with clients are fully subject to MiFID requirements? Please explain the reasons for your views.**

AFG believes that clients must receive all the protection attached to the provision of the service (and to his client category) event if a firm deals on its own account.

(112) **What is your opinion on treating matched principal trades both as execution of client orders and as dealing on own account? Do you agree that this should not affect the treatment of such trading under the Capital Adequacy Directive? How should such trading be treated for the purposes of the systematic internaliser regime? Please explain the reasons for your views.**

AFG has no comment.

7.3. Authorisation and organisational requirements

7.3.1. Fit and proper criteria

(113) **What is your opinion on possible MiFID modifications leading to the further strengthening of the fit and proper criteria, the role of directors and the role of supervisors? Please explain the reasons for your view.**

We would warn the Commission against imposing a general requirement for non-executive directors to be independent from the supervised company. While appreciative of independent expertise which should be sufficiently provided for among non-executive directors or within a supervisory board, we believe that proper inside knowledge of a firm and professional experience closely linked to the supervised activities are equally indispensable in order to ensure adequate internal oversight.

Moreover, AFG encourages the Commission to maintain coherence with UCITS and AIFMD in all the modifications related to authorisation and organisational requirements.

7.3.2. Compliance, risk management and internal audit functions

(114) **What is your opinion on possible MiFID modifications leading to the reinforcing of the requirements attached to the compliance, the risk management and the internal audit function? Please explain the reasons for your view.**

AFG believes that the three functions (compliance, risk management and internal audit) should be able to report directly to the board of directors and that the removal of the officers responsible for the internal control functions would be subject to prior approval by the board and should be notified to the supervisor. However, regarding the handling of client complaints, the compliance function should not be required to deal specifically with each and every complaint case. Depending on the internal allocation of responsibilities by investment firms, it should be sufficient for the compliance function to become involved in the general processing of complaints and to prepare periodic reports to the senior management.

7.3.3. Organisational requirements for the launch of products, operations and services

(115) **Do you consider that organisational requirements in the implementing directive could be further detailed in order to specifically cover and address the launch of new products, operations and services? Please explain the reasons for your views.**

(116) **Do you consider that this would imply modifying the general organisational requirements, the duties of the compliance function, the management of risks, the role of governing body members, the reporting to senior management and possibly to supervisors?**

AFG disagrees with this proposal. We consider that the launch of new products is marketing and/or industrial issues and does not deal with regulation.
Moreover, main asset managers sell their products indirectly via distributors, so it may be impossible to ensure compatibility of the product with the characteristics and needs of the client.

7.3.4. Specific organisational requirements for the provision of the service of portfolio management

(117) **Do you consider that specific organisational requirements could address the provision of the service of portfolio management? Please explain the reasons for your views.**

The suggested systems and procedures for ensuring implementation of the investment strategies agreed upon with clients are already common standard among asset managers and do not require regulatory enforcement.

7.3.5. Conflicts of interest and sales process

(118) **Do you consider that implementing measures are required for a more uniform application of the principles on conflicts of interest?**

AFG doesn’t consider that implementing measures are required for a more uniform application of the principles on conflicts of interest.

7.3.6. Segregation of client assets

(119) **What is your opinion of the prohibition of title transfer collateral arrangements involving retail clients' assets? Please explain the reasons for your views.**

(120) **What is your opinion about Member States be granted the option to extend the prohibition above to the relationship between investment firms and their non retail clients? Please explain the reasons for your views.**

(121) **Do you consider that specific requirements could be introduced to protect retail clients in the case of securities financing transaction involving their financial instruments? Please explain the reasons for your views.**

(122) **Do you consider that information requirements concerning the use of client financial instruments could be extended to any category of clients?**

AFG disagrees with the proposal to prohibit title transfer collateral arrangements involving retail or not client's assets. Such a prohibition would curb the system of securities lending which ensure financial markets liquidity. Moreover, such a proposal could strongly restrain the security of settlement securities systems.

But, AFG supports the idea that such title transfer should be specifically approved by the client (retail or not) o the basis of clear information/warning. Concerning non retail clients, contractual agreement would implement the condition in which the transfer will be effective.

(123) **What is your opinion about the need to specify due diligence obligations in the choice of entities for the deposit of client funds?**

It is important that any entity entrusted with clients' assets is carefully selected and that prerogatives are precisely defined. However, AFG believes that the diversification of such entities isn't relevant and disproportionate.

7.3.7. Underwriting and placing

(124) **Do you consider that some aspects of the provision of underwriting and placing could be specified in the implementing legislation? Do you consider that the areas mentioned above (conflicts of interest, general organisational requirements, requirements concerning the allotment process) are the appropriate ones? Please explain the reasons for your views.**

AFG has no comment.

8- FURTHER CONVERGENCE OF THE REGULATORY FRAMEWORK AND OF SUPERVISORY PRACTICES

8.1.1. Tied agents

AFG wishes that the Commission specifies if tied agent has the right to work with several investment firms or not.

(125) **What is your opinion of Member States retaining the option not to allow the use of tied agents?**

AFG supports a European harmonisation to implement a level playing field.

(126) **What is your opinion in relation to the prohibition for tied agents to handle clients' assets?**

AFG supports such a prohibition for tied agents to handle client's assets.

(127) **What is your opinion of the suggested clarifications and improvements of the requirements concerning the provision of services in other Member States through tied agents?**

(128) **Do you consider that the tied agents regime require any major regulatory modifications? Please explain the reasons for your views.**

AFG agrees with clarifications and improvement of the requirements concerning the provision of services in other Member States through tied agents.

8.1.2. Telephone and electronic recording

(129) **Do you consider that a common regulatory framework for telephone and electronic recording, which should comply with EU data protection legal provisions, could be introduced at EU level? Please explain the reasons for your views.**

(130) **If it is introduced do you consider that it could cover at least the services of reception and transmission of orders, execution of orders and dealing on own account? Please explain the reasons for your views.**

(131) **Do you consider that the obligation could apply to all forms of telephone conversation and electronic communications? Please explain the reasons for your views.**

(132) **Do you consider that the relevant records could be kept at least for 3 years? Please explain the reasons for your views.**

AFG has no comment.

8.1.3. Additional requirements on investment firms in exceptional cases

(133) **What is your opinion on the abolition of Article 4 of the MiFID implementing directive and the introduction of an on-going obligation for Member States to communicate to the Commission any addition or modification in national provisions in the field covered by MiFID? Please explain the reasons for your views.**

AFG supports such a proposal as it would help to improve the level playing field, the highest degree of harmonisation and the reduction of potential goldplating in Europe.

8.2. Supervisory powers and sanctions

(134) **Do you consider that appropriate administrative measures should have at least the effect of putting an end to a breach of the provisions of the national measures implementing MiFID and/or eliminating its effect? How the deterrent effect of administrative fines and periodic penalty payments can be enhanced? Please explain the reasons for your views.**

(135) **What is your opinion on the deterrent effects of effective, proportionate and dissuasive criminal sanctions for the most serious infringements? Please explain the reasons for your views.**

(136) **What are the benefits of the possible introduction of whistleblowing programs? Please explain the reasons for your views.**

(137) **Do you think that the competent authorities should be obliged to disclose to the public every measure or sanction that would be imposed for infringement of the provisions adopted in the implementation of MiFID? Please explain the reasons for your views.**

AFG has no comment.

8.3. Access of third country firms to EU markets

(138) **In your opinion, is it necessary to introduce a third country regime in MiFID based on the principle of exemptive relief for equivalent jurisdictions? What is your opinion on the suggested equivalence mechanism?**

(139) **In your opinion, which conditions and parameters in terms of applicable regulation and enforcement in a third country should inform the assessment of equivalence? Please be specific.**

(140) **What is your opinion concerning the access to investment firms and market operators only for non-retail business?**

AFG is in favour of clear international principles offering the same guarantees in terms of investor protection, transparency, business of conduct rules… It is necessary to clearly define the conditions in which third countries can provide services in the EU. Such a third country regime should not lead to a more favourable treatment than that given to EU investment firms.

Moreover, AFG strongly supports the idea that such a third county regime should be based on the principle of reciprocity. The conditions in which EU firms can provide services in the third country have to be same as the third country firms can supply services in the EU. The conditions for equivalence (in terms of regulatory and supervisory regimes) and especially reciprocity should be well defined by the Commission and closely monitored by Esma.

If you need any further information, please don't hesitate to contact Servane Pfister, at +33.1.44.94.96.64 (s.pfister@afg.asso.fr) or Adina Gurau Audibert, at +33.1.44.94.94.31 (a.gurau.audibert@afg.asso.fr) or myself at +33.1.44.94.94.29 (p.bollon@afg.asso.fr).

Sincerely Yours,

(signed)

Pierre Bollon