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Unit G3

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AFG RESPONSE TO EUROPEAN COMMISSION CALL FOR EVIDENCE ON THE MIFID TRANSPOSITION QUALITY CHECK

The Association Française de la Gestion financière (AFG)¹ welcomes European Commission's call for evidence on the MiFID transposition quality check. Indeed, as mentioned by the Commissioner last year concerning "*a real risk that the dream of a single new rule book replacing 27 existing rule books could turn into a real practical nightmare*", we consider there is still a real risk of over-regulation and competition distortions in the implementation and interpretation of MiFID due to regulators' practice. In particular, we've identified several points of over-transposition in the French General Regulation (Règlement Général de l'AMF), mainly with the extension of the MiFID rules of conduct to subscription/redemption of UCITS' units by UCITS management companies and to the distribution of real estate investment funds (cf. infra). In the same way, we stress the fact that some regulators (and courts) could attempt to have a large interpretation of the scope of the investment advice, despite the fact the definition of this investment service seems to be clear ("personal recommendations to a client... in respect of one or more transactions relating to financial instruments").

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 405 management companies. They are entrepreneurial or belong to French or foreign banking or insurance 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 managed from France, i.e. 22% 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 also emphasize the need to clarify the interpretation of the directives on some points (for instance, best execution regime on OTC markets – cf. infra) or even to correct/precise some articles (for example the provision according which performance information must be based on complete 12-month periods (art. 27-4-b): we believe this restriction is not necessarily in the interest of fair, clear and not misleading information).

1.1 Authorisation procedure and requirements / maintenance of previous authorisation

- Is your home Member State requiring the fulfilment of additional requirements to those provided by MiFID in order to grant the relevant authorisation?

No, to our knowledge

- Have investment firms encountered any problem concerning the transition from the ISD to the MiFID regime?

Yes, considering the number and the importance of new and more formalized requirements of the MiFID regime, both on organisational provisions and on the rules of conduct. In a short time after the publication of the Implementation Directive (September 06 for the French version), it was a huge task, especially for small management companies, to modify – or to create – their operational processes, information systems, etc. There is no assessment of the cost of implementation of the MiFID regime for the management companies but we estimate it is significant, with recurrent expenditures.

- Have investment firms encountered other administrative, legislative, etc obstacles to the provision of investment services and activities and ancillary services for the financial instruments covered by MiFID?

No, to our knowledge

- Have transitional measures concerning information communicated for the purposes of ensuring cross-border activities, been respected (Article 71(4) MiFID)?

No problem, to our knowledge

1.2. Organisational requirements (initial and on-going)

- Have investment firms encountered any specific concern with respect to compliance, internal audit, risk management and senior management requirements (Articles 6-9 Directive 2006/73/EC)?

No, to our knowledge. But we've criticized the decision of the French regulator to extend the MiFID organisational requirements to real estate investment funds (OPCI).

- Have investment firms encountered any specific concern with respect to other organisational requirements, e.g. outsourcing, conflicts of interest, record keeping?

Outsourcing: via the content of the activities programme, the French regulator has decided to extend the MiFID outsourcing rules to the outsourcing of the UCITS management (UCITS directive).

Record keeping: we may have a concern with the link between MiFID provisions (especially on information obtained from clients or potential clients for suitability and appropriateness tests and on the record of personal transactions) and the French law “Informatique et Libertés” which protects the private life when creating or developing IT files. It seems that (i) the period during it is possible to retain the records is lower in this law than in MiFID, (ii) any file with personal information must be declared and authorised by a French independent authority (CNIL) in accordance with a long and complex procedure.

Personal transactions: we may also have a concern with the respect of the French social legislation, concerning the MiFID requirements in the case of outsourcing arrangements (“the investment firm must ensure that the firm to which the activity is outsourced maintains a record of personal transactions entered into by any relevant person and provides that information to the investment firm promptly on request.”). In the eyes of the French law, we’re not sure this MiFID provision is applicable.

- Have investors encountered any problem concerning the handling of complaints (Article 10 Directive 2006/73/EC)?

No, to our knowledge

1.3. Freedom to provide services and establishment of branches

- Are additional requirements being applied in host Member States when making use of the "MiFID Passport"?

No, to our knowledge

- Concerning branches, have supervisory authorities of the host Member States exceeded their competences with regard to Article 32(7) MiFID?

No, to our knowledge

2.1. Best execution

- Have investment firms encountered any obstacle in a given Member State concerning the MiFID requirements related to best execution?

Yes, concerning the interpretation of the European Commission position on best execution (EC letter – 19 March 2007) on OTC markets and the transactions in which the investment firm does not execute an order on behalf of a client (including a management company) and therefore does not owe an obligation of best execution to this client. What are really the duties of the management companies in these cases?

It's also important to note the French regulator has decided to extend the scope of best selection (of the brokers according MiFID) to the management of UCITS' units (article 314-75 of the AMF General Regulation) and of real estate investment funds (but nobody can explain the content of a best selection' policy for real estate activities...), and also to the selection of the financial analysts (article 314-75-1).

- Is best execution respected by all the market players? Are firms really looking for the best possible result? Are they taking all relevant venues into consideration?

We consider the French management companies respect their obligations concerning best execution/best selection. Moreover, we've no comprehensive assessment of the implementation of the best execution rules by all the market players. But we understand that management companies may face several problems in this area (the scale of these concerns depending on their size, their activities, etc.): how to obtain best execution reporting from their brokers in order (for the management company) to comply with its best selection requirements; which elements to take into account in order to review its best selection policy... We also stress the fact that the negotiations on terms of business between management companies and brokers are still on-going, so that it's uneasy to appreciate the real impact of best execution regime.

- Have investment firms encountered problems in accessing data enabling them to compare relevant venues?

Yes, but we have no technical analysis of this issue.

2.2.Information requirements

- Have investment firms been hindered in their provision of investment services/activities by the application in a given Member State of additional information requirements to those set up in MiFID and its implementing measures?

No, to our knowledge

- How are costs and associated charges disclosed to clients (Article 33 of Directive 2006/73/EC)?

This article has been correctly transposed in the French General Regulation (Règlement Général de l'AMF) and we've not heard about specific concern on its implementation.

2.3.Know your customer test

- Have investment firms/investors observed in some Member States that no clear distinction is made between suitability and appropriateness? Are investment firms applying the suitability and appropriateness tests in accordance with MiFID requirements?

To our knowledge, these requirements are correctly fulfilled.

- Have investment firms/investors encountered any obstacle in a given Member State concerning MiFID requirements related to the suitability and appropriateness tests?

To our knowledge, no specific issue on these tests

- Have investment firms/investors encountered problems in the provision of "execution only" services with regard to non-complex instruments (Article 19 (6) of Directive 2004/39/EC and Article 38 of Directive 2006/73/EC)?

Yes, in the interpretation of the conditions set up in article 38 (especially b)'criterion: "frequent opportunities to dispose of, redeem, or otherwise realize that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer").

2.4. Inducements

- Have you encountered any obstacle in a given Member State concerning the MiFID requirements related to inducements which hinder the provision of services?

No at this stage but we're still in talks with other professional bodies and with the French regulator to determine if it's necessary to precise the inducements rules (article 26 correctly transposed in the French General Regulation). We've also a concern about possible distortions among Member States (tougher rules in Italy for retrocessions to management companies providing a portfolio management service when receiving a commission in addition to the management fees received for this service?).

We also take this opportunity to stress an important over-regulation by the French regulator which has decided to apply all the MiFID rules of conduct to services/activities outside the scope of MiFID (subscription/redemption of UCITS' units by UCITS management companies).

3. Competition between trading venues

- Have investment firms encountered legal or administrative problems or other obstacles in obtaining a licence to operate a MTF or in operating as a systematic internaliser?

- Have investment firms encountered problems in the application of pre-trade transparency requirements for MTFs and systematic internalisers?

- Have investment firms encountered problems in relation to the use of published pre-trade transparency information in terms of availability, accuracy and commercial terms on which the information is provided?

- Have investment firms encountered problems in the application of post-trade transparency requirements?

- Could you identify any obstacles that due to an inaccurate transposition/application of MiFID hinder efficient price formation process or access to data related to price?

- Are there any problems concerning the access to central counterparty, clearing and settlement facilities and the right to designate settlement system?

Broadly speaking, the French management companies are not directly concerned by the requirements in this area and we've not heard about specific issues on it.

4. Transaction Reporting

- Have investment firms encountered any problem in fulfilling their transaction reporting obligations arising from MiFID and its implementing measures in a given Member State?

Yes, firstly because the scope of this obligation for the management companies depends on the fact they're executing an order (when they are considered to execute orders on OTC markets, they are also viewed as executing transactions in financial instruments and so they have to report to the regulator) and secondly because of possible over-transposition by the French regulator on the scope of the transactions to be declared (cash management of the management company).

5. Efficient Supervision/Cooperation among Authorities

- Have investment firms/regulated markets faced problems due to the fact that there is a lack of cooperation among competent authorities?

No, to our knowledge

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We thank CESR very much for taking into consideration our comments and remain at your disposal for any further questions. Please feel free to contact myself at 00 33 1 44 94 96 61 (e-mail: a.pithon@afg.asso.fr), our Head of International Affairs, Stéphane Janin at 00 33 1 44 94 94 04 (e-mail: s.janin@afg.asso.fr) or his deputy, Catherine Jasserand at 00 33 1 44 94 96 58 (e-mail: c.jasserand@afg.asso.fr).

Yours sincerely,

(signed)
Alain Pithon