CE – Registre des représentants d'intérêts – Numéro AMAFI :
Assoc 97498144

An English version
is available after page 11

EUROPEAN COMMISSION'S CONSULTATION ON MiFID REVIEW

Contribution de l'AMAFI à la réflexion européenne

1. L'Association française des marchés financiers comprend plus de 120 entreprises membres, rassemblant environ 10.000 salariés. Ces entreprises sont actives sur les marchés de titres de capital et de créance, leurs dérivés et les dérivés de matières premières. Elles y agissent pour compte de clients ou pour compte propre et fournissent l'ensemble des services d'investissements et des services auxiliaires prévus par la directive MIF, tandis que d'autres sont des infrastructures de marchés (marché réglementé et MTFs), de compensation ou de règlement-livraison.

L'AMAFI est, dans ce contexte, intéressée au premier chef, par le travail de révision de la directive MIF aujourd'hui entrepris par la Commission européenne sur le fondement d'un document de consultation publié le 8 décembre dernier, et pour lequel les contributions des parties prenantes sont attendues le 2 février. L'AMAFI contribue d'ailleurs aux réflexions européennes en ce domaine depuis l'origine : elle avait ainsi participé aux travaux ayant conduit à l'adoption de la directive sur les services d'investissement, à l'époque en tant qu'Association française des sociétés de bourse – AFSB ; elle a également été active, sous la dénomination d'Association française des entreprises d'investissement - AFEI, dans les réflexions et travaux qui ont conduit à l'adoption de la directive MIF. A ce dernier titre, l'Association a notamment été membre du groupe de travail qui à l'été 2000 avait aidé la Commission européenne à définir les grands axes sur la base desquels a été lancé à l'automne suivant le processus d'élaboration de cette directive.

2. Avant toutefois de répondre aux nombreuses questions que comporte ce document de consultation, l'AMAFI souhaite faire part d'un certain nombre d'observations générales qui lui paraissent tout à fait essentielles pour que le travail de révision aujourd'hui entrepris puisse atteindre pleinement les objectifs ambitieux qui lui sont assignés.

Ces observations générales sont formulées en français et en anglais, alors que les réponses aux questions ne le sont qu'en anglais. En conséquence une version anglaise se trouve à partir de la page 12.

Sommaire / Summary

I. – OBSERVATIONS GENERALES

Une révision nécessaire par rapport aux interrogations formulées par un certain nombre d'émetteurs et d'investisseurs

3. L'AMAFI soutient totalement la démarche de révision aujourd'hui engagée par la Commission européenne. Depuis la mise en œuvre de la directive MIF, des évolutions tout à fait notables de la structure des marchés européens se sont produites, dont certaines soulèvent de nombreuses interrogations de la part des émetteurs et des investisseurs. Ces interrogations conduisent parfois au sentiment que le marché est aujourd'hui plus fragmenté et plus opaque qu'hier, avec une efficience amoindrie du processus de découverte des prix, et que dans un certain nombre de situations, il fonctionnerait moins au bénéfice de ses utilisateurs finaux que des intermédiaires financiers qui l'animent.

Ces questions sont importantes et légitimes, même si la perception qu'elles traduisent est certainement en partie faussée par la survenance, au moment même où la directive entrait en vigueur, d'une crise financière qui, pendant de nombreux mois, a gravement affecté le fonctionnement normal des marchés. Les marchés financiers sont au cœur du bon fonctionnement de l'économie européenne et la confiance est au cœur du bon fonctionnement des marchés : dans une perspective où le rôle des marchés financiers apparaît inévitablement appelé à s'accroitre au cours des prochaines années en tant qu'outil de financement des entreprises, il est vital que, ni les émetteurs, ni les investisseurs ne puissent douter de la qualité et de l'efficience des marchés financiers qui servent leurs besoins. De ce point de vue, l'action entreprise aujourd'hui par la Commission européenne est donc primordiale : sa légitimité intrinsèque n'est pas discutable.

Mais une approche qui va focaliser les critiques avec des risques induits forts pour la détermination des bonnes solutions de régulation

4. Face aux enjeux ainsi sous-tendus par la révision, la Commission européenne a choisi une approche qui présente au moins quatre inconvénients majeurs dont la conjonction va vraisemblablement conduire à nombre de critiques. Ce facteur doit être d'autant plus pris en compte que beaucoup de ces critiques, quand elles ne seront pas pleinement justifiées, ne pourront être discutées profitablement en l'absence de données de marché et d'études académiques suffisantes permettant de se forger une opinion claire. Il en résultera une difficulté importante à tracer en conséquence des axes de régulation forts, servant à orienter utilement, non seulement le trilogue qu'au cours des prochains mois, le Conseil, le Parlement européen et la Commission vont mener, mais aussi le travail de déclinaison qui devra être ultérieurement mené par l'Autorité européenne des marchés financiers et, au-delà par chaque régulateur et superviseur financier national qui la compose.

➢ *L'absence de réflexion d'ensemble sur les objectifs que doit atteindre la régulation proposée en termes de marché*

5. Le document de consultation présenté par la Commission européenne est tout à fait paradoxal : après un auto satisfecit introductif sur le fait que la directive MIF aurait pleinement atteint les objectifs qui étaient les siens, ce sont 147 questions qui sont posées sur 83 pages, pour revisiter en pratique la quasi-totalité des points qui composent la directive MIF.

Si l'AMAFI considère qu'en matière d'organisation de marché, la plupart des questions soulevées par la Commission européenne sont pleinement pertinentes, et nécessitent effectivement un examen attentif, elle observe toutefois que ces questions s'articulent largement autour du même noyau fondamental que

celui qui, au terme de débats souvent passionnés, a été tranché il y a seulement sept ans. Or, il faut rappeler qu'à l'époque, cet arbitrage a été opéré avec la conviction que c'était les bons choix qui étaient alors opérés au profit de ceux-là même qui aujourd'hui, les mettent souvent le plus en question, à savoir les utilisateurs finaux des marchés que sont les émetteurs et les investisseurs.

6. Dans ce contexte, l'AMAFI ne peut qu'être fortement préoccupée de constater que les propositions que formule la Commission ne sont précédées d'aucune réflexion d'ensemble sur le cadre général dans lequel doit s'inscrire le marché et, en regard, sur les objectifs généraux que doit poursuivre l'action de régulation.

- ***Une absence de réflexion d'ensemble d'autant moins satisfaisante qu'elle conduit inévitablement à une perte de la maitrise des conséquences attachées***

7. L'Europe peut d'autant moins se permettre de ne pas mener une réflexion d'ensemble sur l'organisation des marchés, et principalement des marchés actions qui sont aujourd'hui au centre de l'attention (*v. infra § 13*), que les marchés et leur fonctionnement optimal sont des enjeux trop importants pour procéder de façon empirique en réorientant, de façon plus ou moins substantielle, tous les sept ou dix ans, leur cadre de régulation. Les conséquences des choix de régulation opérés doivent absolument être maitrisés, même s'il ne peut être bien sûr envisageable de les figer une fois pour toute.

Si l'ajustement est nécessaire, la réorientation en profondeur l'est d'autant moins qu'il n'y a pas de certitude quant au fait que l'Europe reste durablement dotée des marchés et des acteurs nécessaires au financement de son économie, surtout quand aux côtés d'une industrie financière nord-américaine dont la puissance n'est ni discutable, ni discutée, on constate le développement rapide des marchés asiatiques, voire sud-américains. Pour que l'Europe conserve sa place face à ces différents pôles d'attraction, et ne court pas le risque de voir à terme le financement de son économie dépendre de marchés et d'acteurs situés hors de son territoire (*v. infra § 20*), elle ne peut se permettre de procéder à des expérimentations hasardeuses et doit impérativement, sur la base d'une réflexion approfondie, stabiliser autour de quelques principes fondamentaux le cadre d'organisation de ses marchés et des acteurs qui les animent.

- ***L'intégration dans le champ de la réflexion des aspects de protection des clients détourne sans raison véritable de l'enjeu premier de la réflexion***

8. La Commission a fait le choix, aux côtés des aspects d'organisation de marché, de mettre aussi en discussion les aspects relatifs à la protection des clients. L'AMAFI estime ce choix tout à fait malheureux car il conduit à placer sur le même plan ces deux sujets. Or, si l'un et l'autre sont indubitablement importants, ils ne peuvent pour autant revêtir la même priorité.

L'organisation du marché est aujourd'hui mise en question sur beaucoup d'aspects fondamentaux, ce qui n'est absolument pas le cas de la protection des clients. Sur ce dernier aspect, il faut en effet souligner que cette protection a remarquablement résisté à l'épreuve de la crise, à tel point d'ailleurs que le cadre issu de la directive MIF constitue aujourd'hui une source d'inspiration pour beaucoup de pays non européens qui réexaminent leur dispositif national de protection des clients.

9. En proposant de revoir sur de nombreux points le cadre de protection des clients, la Commission européenne fait face à un double risque :

- Le premier est celui de déstabiliser les établissements financiers, notamment les plus petits d'entre eux, qui pour la mise en œuvre de la directive MIF ont du récemment accomplir, dans des délais brefs, des adaptations profondes et nombreuses de leur organisation et de leurs procédures.

  Certes, par rapport à la nécessité qu'il y a d'apporter aux clients le niveau de protection qu'ils sont en droit d'attendre, l'exigence de nouvelles adaptations ne peut être récusée par anticipation pour ce seul motif. L'AMAFI estime cependant qu'elle est fondée à demander que soit d'abord démontré l'intérêt de telles adaptations dans le contexte où non seulement, il n'est pas mis en évidence de

défaillances criantes du cadre issu de la directive MIF, mais où en outre le poids des contraintes induites pour les établissements est un facteur de leur concentration de plus en plus rapide, avec les effets qui en résultent en termes de diversité de l'offre de services (*v. infra § 18*).

- Le second risque, probablement encore plus important, est que face à la difficulté que vont susciter le traitement des questions d'organisation de marché dans un contexte où beaucoup d'incertitudes subsistent (*v. infra § 14*), il ne peut être exclu que le débat politique se focalise avant tout sur la partie protection des clients pour laquelle la mise en évidence d'une action rigoureuse est aisée.

  Si cela devait être le cas, il est alors bien évident que l'enjeu premier qui justifie aujourd'hui l'action de la Commission européenne n'aura pas été traité.

➢ ***Des modalités de consultation discutables par rapport à l'enjeu***

10. L'AMAFI ne peut être satisfaite des conditions dans lesquelles la consultation est menée pour deux raisons principales.

- Les délais de consultation sont beaucoup trop courts, surtout par rapport à l'ampleur des questions abordées par la Commission européenne. La qualité de la contribution qui peut être apportée aux institutions européennes s'en ressent nécessairement. Cette moindre qualité de la contribution apportée résulte directement d'une moindre qualité du processus de discussion qui conduit à son élaboration, tant avec les entreprises que représente l'AMAFI, qu'avec les autres parties prenantes, qu'il s'agisse de ses homologues européens ou des investisseurs et des émetteurs. La capacité de la Commission à présenter au Conseil et au Parlement une proposition de texte dans laquelle les choix opérés auront été convenablement éclairés s'en trouve inévitablement altérée.

  En pratique, alors que le document de consultation a été publié beaucoup plus tardivement qu'escompté à l'origine, il semble que la volonté au travers d'une période de consultation courte serait de tenir ainsi un calendrier préfixé. Outre que l'on discerne mal les impératifs qui le structureraient, il en résulte nécessairement des interrogations quant aux conditions de prise en compte effective des remarques issues de la consultation, et donc des doutes quant à l'utilité de ce processus.

- Le choix d'une langue de consultation unique, l'anglais, est par ailleurs tout à fait paradoxal. Alors que la Commission souligne régulièrement sa préoccupation que les investisseurs, notamment particuliers, ne fassent pas plus entendre leur voix, le fait de ne consulter qu'en anglais conduit nécessairement à restreindre le nombre de personnes ayant la possibilité d'apporter leur contribution à la réflexion.

Réorienter la démarche autour de quelques grands axes

11. L'AMAFI s'estime d'autant plus fondée à critiquer certains aspects de la démarche menée par la Commission européenne qu'elle partage pleinement les objectifs de haut niveau qui sont aujourd'hui poursuivis en matière de marché. Sa préoccupation est que rien ne vienne entraver un travail de révision dont elle a déjà souligné l'importance pour répondre au questionnement public que déclenchent légitimement certains aspects de l'évolution des marchés (*v. supra § 3*) : l'enjeu que constituent pour l'Europe des marchés efficients exige cependant que ce travail soit mené avec rigueur et lucidité. L'Association rappelle ainsi que :

- Elle a toujours soutenu la nécessité d'une régulation forte des activités de marché. Sur ce point, elle renvoie notamment au document qu'elle a produit en novembre 2008 dans lequel elle définissait les axes de régulation à mettre en œuvre dans un contexte d'aggravation brutale de la crise financière, et qui pour beaucoup se sont vus consacrés au cours des mois qui ont suivis :

Réforme du système financier mondial - Analyses et propositions de l'Association française des marchés financiers, 20 novembre 2008 (*AMAFI / 08-58*).

- Elle a également toujours soutenu la nécessité de disposer de marchés fortement organisés, dotés d'une transparence suffisante et assurant l'efficience du processus de découverte des prix. Elle rappelle particulièrement à ce propos, que l'action qu'elle a menée sur ces thèmes en 2002 / 2003 a d'ailleurs conduit à l'insertion du dispositif d'internalisateur systématique dans la directive MIF : s'il n'a certes pas produit les effets escomptés, ce dispositif avait néanmoins pour objectif d'obliger certains participants qui auraient retiré du processus de découverte des prix un nombre trop important d'opérations, provoquant ainsi son affaiblissement, d'y contribuer sous une autre forme.

Les éléments de réflexion qui sont par ailleurs produits dans ce document en réponse aux questions soulevées par le document de consultation mettent d'ailleurs clairement en évidence que, sur nombre d'entre elles, les objectifs poursuivis par la Commission sont soutenus par l'AMAFI.

12. Dans ce contexte, l'AMAFI estime que la Commission européenne devrait revoir sa démarche autour des axes suivants.

➢ ***Dissocier clairement les sujets d'organisation du marché de ceux concernant la protection des clients, éventuellement en scindant en deux la directive MIF***

13. L'organisation du marché est, pour les raisons rappelées (*v. supra § 5 et s.*), absolument fondamentale. Il est donc nécessaire de concentrer la réflexion dessus, sans dérivatif possible. La réflexion devrait même envisager de façon prioritaire d'abord les problématiques liées au fonctionnement du marché actions. Ce sont en effet ces problématiques qui sont aujourd'hui principalement en question, étant par ailleurs rappelé que l'organisation du marché obligataire n'a pas soulevé de difficulté majeure et que les questions propres aux marchés dérivés, réelles mais d'une nature assez différente, sont traitées dans un autre cadre.

Cela ne signifie pas pour autant que certains sujets de protection des clients ne doivent pas être examinés. Leur urgence et leur priorité ne peuvent toutefois être placées au même niveau que les questions d'organisation de marché (*v. supra § 8 et s.*) : en matière de protection, il s'agit de parfaire sur certains points le cadre ; en matière d'organisation de marché, il s'agit en revanche de trancher des questions pour la plupart absolument fondamentales.

14. L'AMAFI estime d'ailleurs que la Commission devrait étudier sérieusement la possibilité de scinder la directive MIF en deux parties distinctes : l'une consacrée aux questions d'organisation des marchés, l'autre aux questions de protection des clients.

Cette scission aurait le mérite, non seulement de focaliser la réflexion sur chaque champ indépendamment de l'autre, mais également d'éviter que la directive MIF ne devienne un instrument encore plus complexe que celui qu'il est déjà (*v. aussi infra § 22*) : une directive de niveau 1, une directive et un règlement de niveau 2 et de nombreux textes de niveau 3, totalisant pour les seuls niveaux 1 et 2 pas moins de 135 pages …

➢ ***Cadrer l'action du niveau 1 autour d'objectifs et de principes de haut niveau en laissant le soin aux niveaux 2 et 3 de les décliner en mesures de régulation en tenant compte des résultats des études complémentaires qui sont indispensables***

15. Sauf à provoquer les mêmes difficultés que celles rencontrées lors de l'adoption de la directive MIF, il n'est pas souhaitable que le niveau 1 de régulation prenne des positions précises sur un certain nombre des sujets d'organisation de marché qui sont au cœur des questions qu'évoque la Commission européenne.

La problématique du Trading haute fréquence est tout à fait exemplaire de ce point de vue (*v. aussi infra commentaires sous 2.3*). Constater que l'intérêt économique et social de la technique est fortement discuté par certains, oblige sans nul doute à examiner très attentivement et rigoureusement cette question. Pour autant, il ne peut être ignoré que s'il n'existe pas d'étude réellement conclusive sur le sujet, le sens de la plupart de celles produites à ce jour est orienté en faveur d'un impact neutre ou positif. Une restriction à l'utilisation de cette technique, et plus encore son interdiction, ne peut donc procéder que d'études complémentaires. Dans le même temps, renvoyer à de telles études ne signifie pas priver le niveau politique de son pouvoir de décision : il lui appartient en tout état de cause de fixer l'arbre de décisions qui va organiser le cadre de régulation selon la réponse obtenue. L'acceptation de la pratique est-elle subordonnée à un impact seulement neutre ? Ou faut-il que cet impact soit nécessairement positif ? A quel niveau ? Si on doit aller vers une prohibition, comment fixer la vitesse en deçà de laquelle les transactions ne doivent pas pouvoir s'opérer ? … Dans ce cadre, un renversement de la charge de la preuve peut aussi être une manière de traiter le sujet : sans étude venant démontrer dans un délai à déterminer l'intérêt suffisant de la technique, la décision pourrait alors être prise de la prohiber …

16. Il faut donc réorienter la démarche autour d'une recherche des grands objectifs et principes qui appellent une décision du ressort des institutions politiques que sont le Conseil européen d'une part, le Parlement européen de l'autre. C'est à eux qu'il revient de faire les choix résultant de leur appréciation d'un intérêt général qui n'est pas seulement constitué de la somme des intérêts individuels, exprimés ou non.

Il appartient donc à la Commission de préciser les grands points d'articulation autour desquels elle proposerait au Conseil et au Parlement de structurer le texte de niveau 1. Sur un certain nombre de ces points, compte tenu de nécessité de réaliser des études complémentaires, elle peut d'ailleurs se contenter de présenter des alternatives face auxquelles le choix sera prédéterminé en fonction des conclusions produites par ces études.

➢ ***Une réflexion approfondie sur la concurrence est absolument indispensable***

17. Comme le rappelle la Commission dans l'introduction de son document de consultation l'un des deux objectifs de la directive MIF était « *to improve the competitiveness of EU financial markets by creating a genuine single market for investment services and activities* », car ajoute-t-elle « *Greater competition across Europe in the provision of services to investors and between trading venues is intended to contribute to deeper, more integrated and liquid financial markets, to drive down the cost of capital for issuers, to deliver better and cheaper services for investors, and thus to contribute to economic growth and job creation.* »

Par la suite, elle ne met aucunement en question ce constat liminaire, s'inscrivant ainsi dans le droit fil de sa position traditionnelle selon laquelle une concurrence renforcée est nécessairement bénéfique à l'intérêt général.

18. Pourtant, ce credo immuable mériterait d'être discuté de façon approfondie en matière d'organisation de marché. Si la directive MIF a indubitablement conduit à l'intensification de la concurrence entre plateformes de négociation, l'appréciation positive de cette situation ne va pas nécessairement de soit. Les facteurs suivants doivent ainsi être pris en compte :

- La concurrence entre plateformes a constitué l'un des éléments poussant à la concentration au niveau des intermédiaires. L'éclatement de la liquidité constatée sur les marchés actions oblige en effet ces derniers, pour servir au mieux leurs clients, à mettre en œuvre, avec les coûts en résultant, des moyens, notamment informatiques, toujours plus puissants pour rechercher cette liquidité tout en les obligeant à se connecter à une multiplicité de plateformes, voire à créer leur propre système interne (*dark pool* ou *crossing* interne).

- La concurrence entre plateformes est relative. Il n'y a pas de concurrence entre marchés réglementés, mais seulement entre marché réglementés et MTFs ou entre MTFs.

- Cette concurrence entre plateformes est fragile et probablement peu pérenne. Les MTFs n'ont acquis des parts de marché face aux marchés réglementés que sur la base de business modèles déficitaires. L'alignement des obligations que propose la Commission européenne, et que l'AMAFI considère totalement légitime dans son principe (*v. aussi infra commentaires sous question 23*), ne va toutefois conduire qu'à accentuer un peu plus le déséquilibre de ces modèles, et probablement les rendre insupportables. Le mouvement de rapprochement / concentration à l'œuvre depuis plusieurs mois entre marchés réglementés et MTFs ou entre MTFs semble ainsi inévitablement appelé à se poursuivre, avec une perspective de réduction sérieuse, voire totale de la concurrence créée depuis trois ans.

Ces facteurs doivent être d'autant plus analysés que :

- L'offre de services paneuropéenne se concentre inéluctablement autour de quelques grands établissements financiers qui, seuls, ont la taille critique pour offrir la palette de services attendus et mettre en œuvre l'organisation nécessaire à cet effet.

- L'offre de services nationale se trouve peu à peu affaiblie devant supporter des contraintes identiques à l'offre paneuropéenne sans pour autant disposer des mêmes atouts, ce qui constitue particulièrement un enjeu en termes d'accès aux financements de marché par les SMEs.

- Peu d'émetteurs et d'investisseurs s'expriment pour appuyer le maintien d'une forte concurrence entre plateformes de négociation, considérant que les bénéfices qu'ils en tirent sont faibles, voire même que les inconvénients qui en résultent sont plus nombreux et plus importants.

19. De ces éléments, l'AMAFI n'en tire pas pour conséquence immédiate que le choix d'une concurrence entre plateforme de négociation n'est pas une solution adéquate. Elle considère d'une part que cette mise en concurrence était sans doute une étape indispensable pour bouleverser le monopole traditionnel des marchés réglementés, les forcer à innover et à réduire leurs coûts. Elle observe également que la disparition de l'incitation concurrentielle conduirait à déplacer l'enjeu sur la thématique de la gouvernance de ces plateformes, thématique dont on connaît par ailleurs la très grande complexité.

Pour autant, le sujet de la concurrence ne peut être éludé. C'est même sans doute le principal sujet à trancher au niveau politique que constitue le niveau 1 : il appartient au Conseil et au Parlement, avec l'aide de la Commission, de décider quel choix doit être opéré en la matière et d'en tirer les conséquences. Pour cela, il est indispensable que la Commission s'attache à réunir les éléments de nature à éclairer ce choix qui, au demeurant, concerne les plateformes de négociation, mais aussi de manière plus générale toutes les infrastructures de marché, y compris donc les chambres de compensation, les dépositaires centraux, les systèmes de règlement-livraison et les référentiels centraux.

20. Par ailleurs, et de manière plus générale, l'Europe doit aussi envisager les problématiques de concurrence par rapport à l'enjeu que constitue la maitrise d'activités financières qui sont totalement essentielles à son développement économique mais qui reposent sur des services qui peuvent être largement fournis à distance, en dehors donc du cadre de régulation particulièrement rigoureux qu'elle s'impose.

L'approche relativement souple, traditionnellement privilégiée en ce qui concerne les fournisseurs de services en provenance de pays tiers, doit sans aucun doute être d'autant plus réexaminée que force est de constater que certains pays non européens servent aujourd'hui de base à des entités qui, en réalité, agissent principalement au sein de l'espace européen. Il y a en tout état de cause un paradoxe évident à imposer aux intervenants européens un cadre de régulation particulièrement strict tout en laissant à des intervenants extérieurs la capacité à intervenir sur le sol européen sans supporter le même niveau de contraintes et sans fournir au client européen le même niveau de protection.

➢ ***Les marchés de dérivés de matières premières constituent une problématique trop importante pour pouvoir être correctement traitée dans la directive MIF***

21. L'AMAFI ne peut absolument pas suivre la Commission dans une démarche qui viserait à ce que la directive MIF appréhende plus complètement les problématiques propres aux marchés de dérivés de matières premières et à leurs intervenants, au travers notamment d'une redéfinition de la notion d'instruments financiers et d'une revue des exemptions aujourd'hui prévues en faveur de certaines catégories de personnes (*v. aussi infra commentaires sous les questions figurant au point 5*).

Ces marchés sont en effet autant rattachables au marché de leur sous-jacent physique qu'au marché financier *stricto sensu*. La compréhension et la maitrise d'un certain nombre de leurs ressorts sont donc indissociables de celles des marchés physiques sous-jacents. Il en résulte que pour traiter sérieusement et rigoureusement un sujet, lui aussi particulièrement fondamental parce que faisant l'objet d'une très forte attention de l'opinion publique, il est totalement nécessaire de le traiter dans un cadre ad hoc qui permette d'envisager les aspects propres aux marchés physiques sans lesquels un bon fonctionnement des marchés dérivés n'est pas envisageable.

22. L'AMAFI estime donc nécessaire que les questions de régulation des marchés dérivés de matières premières soient traitées dans le cadre d'une directive spécifique, distincte de la directive MIF. Cette directive pourra d'ailleurs utilement intégrer les problématiques d'abus de marché, elles-aussi fondamentales, mais dont le traitement restera nécessairement largement insuffisant s'il ne s'appuie pas sur une définition du niveau d'information attendu sur le marché physique. Dans ce cadre, il est bien évident qu'une directive Dérivés de matières premières pourra néanmoins reprendre à l'identique nombre des solutions posées par la Directive MIF d'une part, la directive Abus de marché d'autre part.

Isoler les questions relatives à la régulation des marchés dérivés de matières premières est d'ailleurs d'autant plus important que l'enjeu est d'éviter que la directive MIF ne constitue un texte extrêmement complexe mêlant de trop nombreux aspects et comportant de multiples dérogations (*v. supra § 14*).

➢ ***Les problématiques de reporting doivent aussi être appréhendées en termes d'exploitation efficiente par le régulateur***

23. Au regard des enseignements révélés par la crise, l'AMAFI considère que l'un des enjeux centraux de l'action de régulation des marchés concerne aujourd'hui la fourniture aux régulateurs et aux superviseurs des informations qui leur sont nécessaires pour réussir à appréhender un certain nombre de ressorts du marché et de ses évolutions, et être ainsi en mesure de mettre en œuvre les correctifs qui peuvent s'avérer nécessaires. En ce sens, l'AMAFI soutient donc totalement les initiatives permettant aux régulateurs d'améliorer leur connaissance des intervenants et des opérations que ceux-ci réalisent.

Pour autant, alors que cette amélioration induit des coûts de mise en œuvre non négligeables pour les intervenants, il ne peut être ignoré pas que la quantité d'information toujours plus grande mise à disposition de chaque régulateur n'est pas toujours exploitée avec l'efficacité qui peut être attendue. Peu de régulateurs européens disposent en effet aujourd'hui des capacités de traitement nécessaires à cet effet.

24. Compte tenu de l'enjeu que représentent une supervision et une régulation efficientes des marchés, surtout dans un environnement d'intégration européenne, la réponse à ce constat ne peut certainement pas consister à demander que les informations à transmettre au régulateur soient limitées à celles qu'il a la capacité de traiter utilement. Il faut impérativement en revanche que la Commission intègre dans sa réflexion cette dimension en examinant :

- D'une part, les moyens minima dont devrait disposer chaque régulateur ;
- D'autre part, les possibilités de mutualisation qui devraient être mises en place au cas où certains régulateurs ne pourraient faire face à leurs obligations.

➢ ***Une démarche de régulation par la norme qui doit laisser place à une démarche passant d'abord par le contrôle et la sanction***

25. Nul ne peut mettre en cause le fait que le cadre normatif européen est aujourd'hui particulièrement exigeant sur de nombreux aspects. Il est certes possible de continuer à le renforcer mais le risque est d'aboutir à un niveau de contraintes qui :

- Soit disqualifiera définitivement un grand nombre d'intervenants, avec le risque d'amplifier encore un mouvement de concentration qui n'est pas sans soulever des interrogations fortes (*v. supra § 17 et s.)* ;
- Soit se traduira par une hausse importante des coûts pour les investisseurs et les émetteurs.

C'est pourquoi l'AMAFI estime aujourd'hui que le principal enjeu de la démarche d'intégration européenne porte moins sur l'harmonisation du cadre normatif que sur une harmonisation des pratiques de chaque régulateur national au niveau, tant du contrôle de l'application de la norme, que de sa sanction. C'est particulièrement vrai en ce qui concerne les aspects de protection des investisseurs. Outre que c'est à ce niveau que se constatent aujourd'hui les principales distorsions concurrentielles, il est nécessairement préoccupant que sur un marché financier intégré les mêmes comportements puissent être analysés différemment.

26. C'est sur ces questions d'harmonisation, domaine d'action qui entre pleinement dans le champ de l'AEMF, que l'effort doit donc prioritairement porter.

EUROPEAN COMMISSION CONSULTATION ON THE MiFID REVIEW

AMAFI's contribution to the European debate

1. The Association française des marchés financiers (AMAFI) has more than 120 members employing over 10,000 people which operate in equity and debt securities markets, equity and debt derivatives markets and commodity derivatives markets. They act on behalf of clients or on their own account, and deliver the investment and ancillary services provided for under MiFID. Some members also operate market infrastructure, such as the regulated market and MTFs, as well as clearing and settlement systems.

AMAFI is therefore keenly interested in the MiFID review currently being undertaken by the European Commission on the basis of the consultation paper published on 8 December, for which responses must be received by 2 February. AMAFI has been contributing to Europe's thinking in this area from the outset: under its previous name of Association française des sociétés de bourse (AFSB), it took part in the work that led to the Investment Services Directive. It was also active, as Association française des entreprises d'investissement (AFEI), in the discussions and work that brought about the adoption of MiFID. In this capacity, it took part in the working group that helped the European Commission in summer 2000 to decide on the broad framework used the following autumn to start the MiFID drafting process.

2. Before responding to the many questions in the consultation paper, however, we would like to make a few general observations that we feel are vital to ensuring that the review accomplishes all the ambitious goals set for it.

Our general observations will be in French and English. Our responses to the questions will be in English only.

I. – GENERAL OBSERVATIONS

The review is necessary given the questions raised among issuers and investors

3. AMAFI wholeheartedly supports the review process set in train by the European Commission. Since MiFID was implemented, the structure of European markets has undergone substantial changes, some of which are raising questions among issuers and investors. In some instances, these questions are creating a sense that the market is more fragmented and opaque than it used to be, that the price discovery process is less efficient and that, in some situations, end users benefit less than the financial intermediaries running the market.

These are important and legitimate questions, even if the feelings they echo are surely partly influenced by the financial crisis, which broke out just as MiFID was coming into effect and which severely disrupted markets for months. Financial markets play a crucial role in ensuring that the European economy operates smoothly, and orderly markets need confidence. Since financial markets look to play a growing role as a source of corporate financing in the coming years, issuers and investors must not have any concerns about the quality and efficiency of the markets that serve them. From this perspective, the European Commission's review is a vitally important, inherently legitimate, process.

However, the approach being taken will draw criticism, posing major risks in terms of finding the right regulatory solutions

4. Given the important issues associated with the review, the European Commission has chosen an approach that presents at least four major drawbacks, the combination of which is bound to draw much criticism. This concern is especially important because many of the criticisms, aside from those that are fully justified, cannot be fruitfully debated due to a lack of market data and academic research on which to base proper opinions. This will make it hard to establish key lines of regulation to guide discussions by the European Council, Parliament and Commission in the months ahead, as well as application by the European Securities and Markets Authority (ESMA) and domestic financial regulators and supervisors.

➢ *No overall discussion on the proposed regulation's supposed objectives in terms of market organisation*

5. The Commission's consultation paper is an exercise in contradiction. After a self-satisfied introductory section explaining that MiFID has met all its objectives, it sets out 147 questions over 83 pages, which to all intents and purposes revisit virtually all the points that make up the directive.

While AMAFI believes that most of the questions raised by the European Commission on the topic of market organisation are entirely relevant and require close examination, it nonetheless observes that these questions largely revolve around the same core issues that were settled just seven years ago amid often heated debate. Bear in mind that when those decisions were taken, it was in the certainty that they were the right choices for the constituencies that are now most critical of them, namely the end users of markets – issuers and investors.

6. AMAFI is therefore greatly concerned to see that the proposals put forward by the Commission have not been preceded by an overall discussion on the general framework of market organisation and, by extension, on the general objectives of regulatory action.

- ***The absence of an overall discussion is all the more unacceptable because it inevitably means a loss of control over the outcomes***

7. Europe cannot avoid an overall debate on the organisation of markets – especially the equity markets that are the main focus today (*see §13*) – because questions relating to markets and their optimal operation are too important to be approached empirically, with more or less substantial adjustments to the regulatory framework every seven to ten years. The consequences of regulatory choices must be controlled, even if, obviously, it may not be possible to settle them once and for all.

While an adjustment may be necessary, an in-depth reworking is not. In particular, there is no guarantee that Europe will always have the markets and participants needed to finance its economy, especially with Asian and even South American markets emerging alongside the unchallenged might of the US finance industry. If Europe is to hold its place against these other centres of attraction and avoid the risk of seeing the financing of its economy ultimately become dependent on markets and participants outside its territory (*see § 20*), it cannot afford to carry out risky experiments and must stabilise the framework for market organisation and participants around a set of core principles, based on in-depth deliberations.

- ***Addressing client protection issues needlessly diverts the discussion from its primary goal***

8. The Commission decided to open up the discussion to include client protection issues alongside aspects of market organisation. AMAFI feels this was an unfortunate decision because it puts the two matters on the same footing. While both are obviously important, they do not share the same degree of priority.

Numerous fundamental aspects of market organisation are now being questioned, which is simply not the case for client protection. On this point, we should stress that the protection framework performed remarkably well in the crisis, to the point that many non-European countries reassessing their national client protection arrangements are looking to the MiFID framework for inspiration.

9. By proposing to review numerous aspects of the client protection framework, the European Commission is running two risks:

- The first is that of destabilising financial institutions, and particularly the smallest ones, which have recently had to make many far-reaching adjustments to their organisation and procedures, in a short space of time, in order to implement MiFID.

  When measured against the need to provide clients with the level of protection they are entitled to expect, this argument alone is not enough to challenge the demands of new adjustments in advance. In AMAFI's view, however, it is right to ask that the value of such adjustments should first be demonstrated since, on the one hand, the MiFID framework has not been found to have any glaring problems, and, on the other, the burden of the constraints placed upon institutions is a factor in their growing concentration, which is affecting the range of services on offer (*see § 18*).

- The second risk is probably even more important. Since questions of market organisation will be hard to tackle in a persistently uncertainty environment (*see § 14*), many participants may find it easier to avoid dealing with this aspect in depth, focusing instead on client protection issues, where it is simple to demonstrate that rigorous action has been taken.

  If this happened, it is obvious that the primary reason for the European Commission's current initiative would not have been addressed.

➢ *Consultation procedures are questionable given the issues at stake*

10. AMAFI is unhappy about the way the consultation has been held, for two main reasons.

- The consultation period is much too short, especially given the magnitude of the questions being addressed by the Commission. The quality of the contribution that can be provided to the European institutions will necessarily suffer as a direct result of the suboptimal process of discussion, whether with AMAFI's member firms or with other stakeholders, including fellow associations in Europe, investors and issuers. This will inevitably affect the Commission's ability to present the Council and Parliament with a proposed directive whose choices have been thoroughly explored.

  Although the consultation paper was published far later than originally planned, there appears to be a determination to stick to a pre-determined timetable by having a short consultation period. Quite apart from the fact that it is hard to see why this is so important, such an approach inevitably raises questions about the proper integration of consultation feedback and hence about the formal usefulness of the process.

- The use of one consultation language – English – is an odd choice. The Commission regularly stresses its concern that investors, particularly retail investors, are not making their voices heard loudly enough. Yet holding a consultation only in English necessarily restricts the number of people who can contribute to the debate.

Reorganise the approach around a few key areas

11. AMAFI feels that it is particularly justified in criticising some aspects of the approach taken by the European Commission because it fully supports the high-level market objectives being pursued. We are concerned that nothing should hinder a review that, as we have already stressed, is vital to addressing public questions rightly raised by certain market developments (see *§ 3*). But the importance of having efficient markets in Europe means that this process must be conducted in a rigorous, clear-headed manner. We would like to reiterate that:

- We have always advocated the need for strong regulation of market activities. On this point, see the paper that we published in November 2008 in which we set out the broad regulatory measures that ought to be implemented if the financial crisis suddenly worsened: Reforming the global financial system - Analyses and proposals by Association française des marchés financiers, 20 November 2008 (*AMAFI /08-58*). Many of the proposed measures were introduced in the following months.

- Similarly, we have always supported the need for a well organised market with adequate transparency and an efficient price discovery process. On this issue, we would point out that our work in these areas in 2002 / 2003 led to the inclusion of the systematic internaliser framework in MiFID. While this framework may not have produced the desired effects, it was nonetheless designed to force certain participants that had undermined the price discovery process by withdrawing too many transactions to contribute in another form.

The issues for consideration mentioned in this document in response to the questions in the consultation paper make it clear, furthermore, that AMAFI supports many of the Commission's objectives.

12. Accordingly, AMAFI believes that the European Commission should refocus its approach around the following.

- ***Clearly separate market organisation issues from client protection issues, potentially by splitting the directive***

13. Market organisation is absolutely fundamental, for the reasons mentioned above (*see § 5 et seq.*). The discussion must therefore concentrate on that issue, without distractions. Consideration should even be given to prioritising issues relating to equity market operation, which are the ones that are chiefly in question today. In this regard, note that the organisation of the bond market has raised no major difficulties, while issues specific to derivatives markets, which are real but of a different nature, are dealt with in a different framework.

This does not mean that certain aspects of client protection should not be examined. But they should not be given the same level of urgency and priority as market organisation issues (see *§ 8 et seq.*). The client protection framework needs to be fine-tuned in a few areas; in market organisation, however, some absolutely fundamental questions must be settled.

14. AMAFI believes moreover that the Commission should seriously consider splitting MiFID into two separate parts, one devoted to market organisation and the other to client protection.

As well as focusing discussions on each area separately of the other, this would also prevent MiFID from becoming even more complex than it already is (*see also below § 22*), i.e. a Level 1 Directive plus a Level 2 Directive and Regulation (running to a combined total of some 135 pages) along with numerous Level 3 documents.

- ***Focus Level 1 action on high-level principles and objectives, to be translated into regulatory measures at Levels 2 and 3 based on the results of the vital additional research***

15. To avoid running into the same difficulties as those encountered when MiFID was adopted, Level 1 regulation should not take precise positions on certain market organisation issues that are central to the questions being raised by the European Commission.

High-frequency trading is an excellent illustration of this point (*see also comments under 2.3*). The fact that the economic and social benefits of HFT are widely questioned in some quarters means that the issue should surely be carefully and rigorously studied. Yet it is also true that while no genuinely conclusive research has been done on this question, most of the studies done to date point to a neutral or positive impact. Restricting – and particularly banning – HFT can only happen after further research has been done. But giving this role to research does not deprive the political level of its decision-making power: in any case, it is at the political level that the decision tree will be established to organise the regulatory framework based on the research findings. Does the practice merely have to have a neutral impact to be accepted? Or does the impact have to be positive? At what level? If we are going to move towards a ban, how do we set the frequency above which transactions should not be conducted? Shifting the burden of proof may be another way to move forward, e.g. a technique could be banned unless additional research demonstrating that it generates sufficient benefits is produced within a given time period.

16. The approach thus needs to be reorganised around efforts to identify the overarching objectives and principles that require decisions from the political institutions, namely the European Council and Parliament. It is up to them to make these decisions based on their assessment of the general interest, which is not merely the sum of individual interests, whether expressed or not.

The Commission should specify the main points that it wants to present to Council and Parliament as the structuring elements for the Level 1 legislation. In some areas, given the need for additional research, the Commission could make do with describing alternatives whose selection will depend on the research findings.

➢ ***An in-depth discussion on competition is vital***

17. As the Commission recalls in the introduction to its consultation paper, one of the objectives of MiFID was "to improve the competitiveness of EU financial markets by creating a genuine single market for investment services and activities", because, it adds: "Greater competition across Europe in the provision of services to investors and between trading venues is intended to contribute to deeper, more integrated and liquid financial markets, to drive down the cost of capital for issuers, to deliver better and cheaper services for investors, and thus to contribute to economic growth and job creation".

It in no way questions this preliminary statement in the remainder of the document, remaining true to its traditional position, which is that greater competition is necessarily in the general interest.

18. But this immutable article of faith could be discussed in greater depth when it comes to market organisation. While MiFID has certainly brought about greater competition between trading platforms, this situation should not automatically be considered a success. The following factors must be considered:

- Competition between platforms is one of the factors that has led to concentration among intermediaries. Fragmented liquidity on equity markets has forced intermediaries to introduce – with associated costs – ever more powerful resources, especially IT solutions, to seek out liquidity, while at the same time requiring them to connect to numerous platforms or create their own internal systems (dark pools, internal crossing systems).

- Competition between platforms is relative. There is no competition between regulated markets, but only between the regulated market and MTFs or between MTFs.

- Competition between platforms is fragile and probably not very sustainable. MTFs have won share from regulated markets only through loss-making business models. The alignment of obligations that the European Commission is proposing, and that AMAFI agrees is totally warranted in principle (*see also comments under question 23*), will merely further accentuate the imbalance in these models and probably make them unsustainable. The trend towards mergers/concentration in recent months between regulated markets and MTFs or between MTFs themselves thus seems set to continue, with the likelihood that the competition created in the last three years could be drastically reduced or destroyed altogether.

It is even more important to analyse these factors because:

- Pan-European service provision is inevitably concentrating around a handful of large financial institutions that are the only ones with the critical mass needed to offer the expected range of services and introduce the requisite organisation.

- Domestic service provision is being gradually undermined by having to comply with the same constraints as pan-European services without enjoying the same advantages. This issue is particularly important when it comes to access to market financing for small and midsized firms.

- Few issuers and investors are voicing support for maintaining strong competition between trading platforms, feeling that the benefits are small and may even be outweighed and outnumbered by the drawbacks.

19. AMAFI does not immediately conclude from this that the choice of competition between trading platforms is not a suitable solution. We believe that the introduction of competition was necessary to break up the traditional monopoly of regulated markets and force them to innovate and cut costs. In addition, getting rid of the competitive incentives would shift the issue to the question of governance for these platforms, a highly complex question, as we all know.

Even so, the question of competition cannot be avoided. Indeed, it is probably the most important question to be settled at the political level, that is, Level 1. The Council and Parliament, aided by the Commission, must decide what choice to make in this regard and consider the consequences. To achieve this, the Commission must gather the information that can help to inform this decision, which concerns not only trading platforms but also market infrastructure facilities more generally, including clearing houses, central depositaries, settlement systems and trade repositories.

20. On a more general note, Europe must consider competition issues in terms of maintaining control over financial activities that are utterly vital to its economic development but that use services that can be widely provided remotely, i.e. outside the particularly strict regulatory framework that it is imposing on itself.

The relatively flexible approach that has usually been taken until now with respect to service providers from third countries should thus surely be even more closely examined given that some non-European countries are now being used as a base for entities that in actual fact operate chiefly in Europe. In any event, it is obviously problematic that European participants should have to comply with a particularly strict regulatory framework while outside participants can operate within European territory without having to meet the same constraints and without offering European clients the same levels of protection.

- ***Commodity derivatives markets represent an issue that is too major to be properly addressed under MiFID***

21. AMAFI absolutely cannot support the Commission in an approach that seeks to expand MiFID so that it encompasses issues relating to commodity derivatives markets and their participants, notably by redefining financial instruments and reviewing of the exemptions currently allowed for certain categories of person (*see also comments under section 5*).

These markets are tied just as much to the market in the underlying commodity as to the financial market proper. It is therefore impossible to understand and capture some of their mechanisms independently of those of the physical markets. As a result, to deal seriously and rigorously with this issue, which is the focus of considerable public attention, a special framework is needed that can address the specific characteristics of physical markets without which derivatives markets cannot function properly.

22. For this reason, AMAFI believes that questions pertaining to the regulation of commodity derivatives markets should be dealt with under a separate directive from MiFID. This directive could also incorporate questions of market abuse, which are similarly fundamental, but which cannot be properly addressed if the approach is not based on a definition of expected disclosures on the physical market. If such an approach were taken, a Commodity Derivatives Directive could of course include as-is many of the solutions provided by MiFID and the Market Abuse Directive.

Isolating questions relating to the regulation of commodity derivatives markets would also help to prevent MiFID from becoming an extremely complex piece of legislation that combines numerous aspects with multiple discretions (see *§ 14*).

- ***Reporting issues also have to be considered in terms of efficient use by regulators***

23. Based on the lessons of the crisis, AMAFI feels that one of the central goals of market regulatory action today should be to provide regulators and supervisors with the information that they need to understand some of the forces and trends at work in the market and thus to be in a position to take corrective steps as required. Accordingly, AMAFI totally supports initiatives designed to enable regulators to improve their knowledge of market participants and transactions.

But while these improvements entail significant implementation costs for participants, the fact is that the ever-increasing amount of data being provided to regulators is not always used as efficiently as might be expected. Right now, few European regulators have the requisite processing capacity.

24. Given the importance of efficient market supervision and regulation, especially for the European integration process, the solution is certainly not to send regulators only data that they can properly process. The Commission must include this aspect in its deliberations, by examining:

- The minimum resources that each regulator should have;
- Possible pooling solutions if regulators are unable to meet their obligations.

➢ ***The standards-based regulatory approach should give way to an approach based on supervision and enforcement***

25. No one would argue that Europe's standards framework is extremely stringent in numerous respects. It would certainly be possible to continue strengthening the framework, but there is a danger that we might reach at a level of restrictiveness that would:

- either definitively disqualify many participants, with the risk of further exacerbating the concentration trend, which is raising concerns (see *§ 17 et seq.)*;
- or lead to a major increase in costs for investors and issuers.

For this reason, AMAFI believes that the main challenge for European integration today is not so much to harmonise the standards framework but to harmonise the practices of domestic regulators in terms of applying and enforcing standards. This is particularly true for investor protection. Aside from the fact that this is the area where the main competitive distortions are to be found, it is obviously a concern that the same actions might receive different assessments within an integrated financial market.

26. Efforts should therefore be focused on these questions of harmonisation, an area that falls within ESMA's jurisdiction.

II. – QUESTIONS

2. DEVELOPMENTS IN MARKET STRUCTURES

2.1. Defining admission to trading

(1) What is your opinion on the suggested definition of admission to trading? Please explain the reasons for your views

It is very difficult to respond to this question in the absence of proper explanation (1) of the reasons why this definition is proposed and (2) of what would be the consequences of such a common definition. Stating that a definition is proposed "*in order to add clarity to this concept and cope with recent developments in the financial markets (notably more instruments being admitted to trading on MTFs)"* is clearly not sufficient. AMAFI regrets that on a question which may have significant impacts, the Commission did not properly explain the purpose and impact of what it proposes.

Where is the clarity added? The aim of this concept is to identify financial instruments which have to observe a minimum level of standards, mainly in terms of information required under the Prospectus and Transparency directives. If the intention is to impose on the issuers which have their financial instruments admitted on a MTF or an OTF, but not on a regulated market, to respect the same level of information, AMAFI is clearly against the proposal : it would introduce too many constraints for a lot of issuers. If conversely this is not the intention, the proposal would add confusion.

2.2. Organised trading facilities

We understand that the notion of "Organised trading facilities" (OTF) would capture all facilities on which are negociated financial instruments, shares but also fixed income, derivatives, credit… However, it should be noted that the concerns at stake are raised by the evolution of the equity market since the implementation of MIFID but it is not sure that the issues for other financial instruments are identical.

Anyway, generally speaking, AMAFI supports the proposal of creating OTFs as soon as it is well calibrated for each type of financial instrument. Given the short delay of the consultation, AMAFI was not able to carry out a deep analysis for all the financial instruments and has concentrated its comments on the equity market.

On the equity market, the issue of the increase of OTC transactions processed outside RM, MTF and IS has been raised by various stakeholders since the implementation of MIFID. It is not sure whether such an increase to the pre-MIFID is relevant as a lot of transactions outside the scope of reporting at the time are now included in it. It is nevertheless crucial, before taking any regulatory action, to analyze what is behind this assumption and what could be the consequences on the overall market structure. The current OTC trading can be divided into three main categories:

- The main part in amount is what is called the "non addressable liquidity", that is to say liquidity which by nature would never be display to the market participants by the investment firm which process this kind of transaction. This activity is mainly related to the derivative activity of the investment firm (hedging of options …). This activity was carried out long before the implementation of MIFID in the same condition than today and raises no specific issue.

- The transactions process through dark pools (for large in scale transactions or not) and crossing systems which are based on the pre trade transparency waivers (large in scale, reference price waivers ...) These systems are those defined as Organised trading facilities in the Commission's consultation paper. We do not have precise figures on these activities but according to our members that have put in place this type systems, it represent today about 10% of the overall liquidity.
- The "pure" OTC trading can be defined as bilateral trades carried out on an ad hoc basis between counterparties and not under any organised facility or system. This type of trading has always existed and do not raise any particular concern.

Given that it can be considered that about 10% of the liquidity (probably less if we only take into account systems which function on the basis of reference price waiver) are currently executed outside the MIFID trading venues. This situation raises various questions or concerns.

First, it is true that the today MIFID reporting and transparency regimes do not offer sufficient granularity, both for regulators and market participants, to understand and assess what is behind OTC trading.

Then, it is crucial that the regulators have the means to control that the "dark systems" put in place by the various actors really respect the MIFID provisions (i.e. conflict of interest, best execution, …).

Last, the lit market (RM and MTF) are challenged by systems which are based on pre trade transparency waivers. There, there is no evidence today that the quality of the price formation process has been altered but the situation could be different if the proportion of the orders executed trough these kinds of systems increased dramatically.

Having saying that, AMAFI considers that the proposal of the Commission to put in place organised trading facilities is welcome. It would lead to a better supervision of this kind of activities and give the regulators a tool to monitor the evolution of the volume of transactions that is processed through these systems. It also means that regulators and especially ESMA really have the power to assess the market evolution and the power to change the rules when it is required.

2.2.1. General requirements for all organised trading facilities

In this section, all developments are done only on the basis of the situation of the equity market. For bonds and derivatives markets the reasoning cannot be applied.

(2) What is your opinion on the introduction of, and suggested requirements for, a broad category of organised trading facility to apply to all organised trading functionalities outside the current range of trading venues recognized by MiFID? Please explain the reasons for your views.

AMAFI agrees with this proposal. It would lead to a better supervision of this kind of activities and give the regulators, ESMA, a tool to monitor the evolution of the market activities and change the rules when necessary.

(3) What is your opinion on the proposed definition of an organized trading facility? What should be included and excluded?

The proposed definition is accurate at least for equity markets.

(4) What is your opinion about creating a separate investment service for operating an organised trading facility? Do you consider that such an operator could passport the facility?

We support concept of creating separate investment service for the operating OTF. Being qualified as an investment service, OTF's operators would, de facto, be given the right to passport the activity.

(5) What is your opinion about converting all alternative organized trading facilities to MTFs after reaching a specific threshold? How should this threshold be calculated, e.g. assessing the volume of trading per facility/venue compared with the global volume of trading per asset class/financial instrument? Should the activity outside regulated markets and MTFs be capped globally? Please explain the reasons for your views.

Even if there is no evidence that the quality of the price formation process has been altered, the situation could be different if the proportion of the orders executed trough these kinds of systems, which are mainly based on the pre trade imported price transparency waiver, should increase dramatically. Therefore it could be useful to give a tool to regulators to monitor the evolutions of the markets practices.

The thresholds should be calculated at the equity level. Two thresholds should be put in place. One at the general level (for instance 20%) and one at the firm level (for instance 3%). When the general level is reached, each manager of on OTF should be obliged to reduce its activity proportionally.

The threshold should be based on the "addressable liquidity" that is to say the activity of RM, MTF, IS and OTFs.

The level of the proposed thresholds (20% and 3 %) should be based on further analysis on what is appropriate considering the need to preserve the quality of the price formation process.

2.2.2. Crossing systems

(6) What is your opinion on the introduction of, and suggested requirements for, a new sub-regime for crossing networks? Please explain the reasons for your views.

AMAFI welcomes this proposal. It would lead to a greater transparency on what is done on these systems.

(7) What is your opinion on the suggested clarification that if a crossing system is executing its own proprietary share orders against client orders in the system then it would prima facie be treated as being a systematic internaliser and that if more than one firm is able to enter orders into a system it would be prima facie be treated as a MTF? Please explain the reasons for your views.

For AMAFI this point needs to be clarified. Our comprehension is that an investment firm falls into the IS regime when it books the transaction against a house account or when proprietary trading of the investment firm has a privileged access. This does not mean that proprietary trading of the investment firm cannot participate to the system as soon as it is strictly treated like other participants of the system and that there is no resilient liquidity in the system.

2.2.3. Trading of standardised OTC derivatives on exchanges or electronic trading platforms where appropriate

AMAFI deeply regrets that on this key issue, the Commission has not given any explanation of the potential advantage of drawback of this proposition (*v. supra General observations,§ 6.*). For AMAFI two main factors could drive the evolution of OTC derivatives market to exchanges or electronic platforms.

The first one is the price formation process. Do organized markets with pre trade transparency provide better prices than OTC markets? The answer is not trivial and AMAFI considers that it mainly belongs to the investors to express their views on that point. One priority of the market model which has to be chosen is to satisfy their priority. It must be noticed that for derivatives, the cohabitation of OTC and organised markets has always existed. If it were clear that the organised model were the most efficient, investors would probably have already asked for an evolution towards this kind of organization.

The second factor is the regulatory framework. It is obvious that, contrary to organized market, OTC derivatives markets were mainly outside the scope of regulation and supervision by the regulatory bodies. The EMIR regulation will be put in place in order to address the systemic risk issue and to provide regulators with information on OTC transactions. It is not clear that a mandatory organised trading regime would really improve the quality of the supervision. Those were the case, it has to be documented by the Commission.

Besides that, it is surprising that the Commission suggests putting in place a more constraining market framework for OTC derivatives (without any exemption or waiver) than the current equity regime.

(8) What is your opinion of the introduction of a requirement that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities satisfying the conditions above? Please explain the reasons for your views.

See statement above.

(9) Are the above conditions for an organised trading facility appropriate? Please explain the reasons for your views.

See statement above.

(10) Which criteria could determine whether a derivative is sufficiently liquid to be required to be traded on such systems? Please explain the reasons for your views.

See statement above.

(11) Which market features could additionally be taken into account in order to achieve benefits in terms of better transparency, competition, market oversight, and price formation? Please be specific whether this could consider for instance, a high rate of concentration of dealers in a specific financial instruments, a clear need from buy-side institutions for further transparency, or on demonstrable obstacles to effective oversight in a derivative trading OTC, etc.

See statement above.

(12) Are there existing OTC derivatives that could be required to be traded on regulated markets, MTFs or organised trading facilities? If yes, please justify. Are there some OTC derivatives for which mandatory trading on a regulated market, MTF, or organised trading facility would be seriously damaging to investors or market participants? Please explain the reasons for your views.

See statement above

2.3. Automated trading and related issues

The developments resulting from the growth of HFT clearly have some positive aspects, such as innovation, greater liquidity and narrower spreads. Conversely, questions are being asked increasingly frequently about matters such as:

- the economic interest of the execution speeds reached with HFT;
- the usefulness of the additional liquidity it brings;
- the impact on market transparency now that the reduction in average trade size on lit markets seems to be prompting institutional investors to rely more on dark pools or crossing networks;
- the cost involved for all market participants due to market platforms which are developing more powerful systems to compete in the speed race for attraction of high frequency traders;
- the distortion of the level playing field for market players which are not able to set up the technology to follow the speed race.

There is no evident answer to these issues due to the lack on commonly admitted academic study based on accurate data. In its comments to the CESR's call for evidence on micro-structural issues of the European equity market (CESR /10-142) in April 2010, AMAFI (AMAFI / 10-22) have suggested that CESR should "*put itself in a position to gather HFT specific data, which it can then use to analyze the positive and negative effects of this form of trading and determine whether it should be regulated and, if so, how."* Unfortunately, this has not been done yet and therefore no progress has been achieved in this matter.

Besides the concerns mentioned above, HFT raised also the question of the supervision of the market by the regulators. It could be argued that regulatory bodies have to develop the "high frequency" systems of supervision in order to follow the trends. But it is not obvious that there is a need for real time supervision. An ex post sound supervision of the markets would be probably more efficient.

Having saying that, it is clear that there is a need to better control and monitor the activity of automated trading and high frequency trading.

On one side, it is necessary to reinforce the prevention of the specific risks involved by HFT by imposing sound systems of risk management and to supervise all the entities involved in HFT.

On the other side, it is useful to give regulators (ESMA) tools to monitor and constrain when necessary HFT activities. AMAFI really doubts that putting in place technical tools (such as requiring orders to rest on the order book for a minimum period of time) would be efficient. Such provisions would lead some market operators to try to take advantage of theses constraints with unforeseeable consequences on the micro structure of the market.

For AMAFI, probably one way to monitor HFT, and maybe the best one, is to adapt the thick size as a way to prevent useless HFT. We urge the Commission to conduct the necessary studies to assess this solution. If it were chosen, it shall be necessary to give ESMA the power to determine and to monitor an harmonised tick size.

(13) Is the definition of automated and high frequency trading provided above appropriate?

AMAFI considers that the definition proposed by the Commission is appropriate.

(14) What is your opinion of the suggestion that all high frequency traders over a specified minimum quantitative threshold would be required to be authorised?

AMAFI fully supports this proposition. It is crucial: all entities involved in HFT should be regulated and supervised. At this stage, there is no evidence that this activity put in danger the safety and the integrity of the markets. But there is a clear need to monitor them. At least, to be able to answer the numerous questions which exist.

(15) What is your opinion of the suggestions to require specific risk controls to be put in place by firms engaged in automated trading or by firms who allow their systems to be used by other traders?

AMAFI agrees with this proposal.

(16) What is your opinion of the suggestion for risk controls (such as circuit breakers) to be put in place by trading venues?

AMAFI agrees with this proposal.

(17) What is your opinion about co-location facilities needing to be offered on a non-discriminatory basis?

Regulators should make sure that markets which offer co-location services make these services available to any party which has an interest (members but also other markets and information routers). It must also ensure that technical conditions are identical for all entities which benefit from the co-location service (e.g. the length of cable between the server of the entity benefiting from the co-location service and the market server must be the same as that of the server which is furthest from the market server) so as to avoid any distortion of the level playing field between market players.

(18) Is it necessary that minimum tick sizes are prescribed? Please explain why.

As stated above, the setting up of the tick sizes could be done by the regulators within ESMA. ESMA could be given the necessary power to act in the matter in order to deeply analyse the situation with respect to the micro structure of the financial markets so as to determine appropriate levels of those tick sizes, closely monitor their evolution and promptly react where needed. In first analysis, if it were considered necessary, an increase in tick sizes could even be a way to control the development of HFT.

The tick size should be fixed equity by equity.

The recent initiative taken by NyseEuronext to narrow the tick sizes for the most French and Dutch liquid shares which reopen the tick size “battle” among trading venues, reinforce the need for a regulatory approach.

(19) What is your opinion of the suggestion that high frequency traders might be required to provide liquidity on an ongoing basis where they actively trade in a financial instrument under similar conditions as apply to market makers? Under what conditions should this be required?

AMAFI considers that high frequency traders (HFT) should not be assimilated to market makers, as the strategies HFT pursue does not systematically result in providing liquidity to the market as acknowledged in the consultation paper. Therefore, AMAFI does not support this proposal.

(20) What is your opinion about requiring orders to rest on the order book for a minimum period of time? How should the minimum period be prescribed? What is your opinion of the alternative, namely of introducing requirements to limit the ratio of orders to transactions executed by any given participant? What would be the impact on market efficiency of such a requirement?

As stated above, AMAFI considers that requiring orders to rest on the order book for a minimum period of time would be useless. It would lead to a changing of strategy of market participants in order to bypass the rule with unforeseeable consequences on the micro structure of the market. Besides that, AMAFI considers that alternative proposal to introduce order/transaction ratios seems unworkable.

2.4. Systematic internalisers

AMAFI's members have not put in place systematic internalisers arrangements offered by MIFID but the creation of the OTFs category could be an incentive for some market participants to fall into this category. Considering the failure of this concept, it is necessary to carry out a deep analysis on how the rules should be amended in order to have an appropriate model. The Commission should in particular verify if the reasons which had lead to the creation of the SI regime are still relevant.

(21) What is your opinion about clarifying the criteria for determining when a firm is a SI? If you are in favour of quantitative thresholds, how could these be articulated? Please explain the reasons for your views.

See statement above.

(22) What is your opinion about requiring SIs to publish two sided quotes and about establishing a minimum quote size? Please explain the reasons for your views.

See statement above.

2.5. Further alignment and reinforcement of organizational and market surveillance requirements for MTFs and regulated markets as well as organised trading facilities

(23) What is your opinion of the suggestions to further align organisational requirements for regulated markets and MTFs? Please explain the reasons for your views.

It is a tautology to say that the same activities should be regulated in the same manner as soon as the principle of proportionality is respected. AMAFI is in favor of this proposal.

But at the same time, AMAFI would like to point it out that MIFID was implemented in order to create competition within the trading venues in order to reduce costs and to provide new services for market participants. This goal has been achieved because of the new incumbents (MTFs) with a specific business model which is clearly in deficit. But, we can also observe that today, there is no actual competition between the traditional Regulated Markets. Therefore, the Commission should have in mind to maintain a regulatory framework which permits a real competition. If not, there is a risk that, due to the possible concentration between current RM and MTF, we came back to the ante MIFID situation with public monopolies.

See also General observations, § 16 *et seq.*

(24) What is your opinion of the suggestion to require regulated markets, MTFs and organised trading facilities trading the same financial instruments to cooperate in an immediate manner on market surveillance, including informing one another on trade disruptions, suspensions and conduct involving market abuse?

AMAFI strongly supports this proposition which would leave to a better constituency within the European markets.

2.6. SME markets

AMAFI strongly believes that there is a need, in order to develop the European economy, to have an adapted and specific regime for SME. In this perspective AMAFI considers that the "Small Business ACT" proposed by Mr Demarigny should be put in place rapidly.

The setting up of a specific SME market regime proposed by the Commission could be a useful tool but it is not far for being sufficient. The main issues related to the SME market are to be addressed in the Prospectus directive and the Market Abuse directive.

(25) What is your opinion of the suggestion to introduce a new definition of SME market and a tailored regime for SME markets under the framework of regulated markets and MTFs? What would be the potential benefits of creating such a regime?

See statement above.

(26) Do you consider that the criteria suggested for differentiating the SME markets (i.e. thresholds, market capitalisation) are adequate and sufficient?

See statement above.

3. PRE- AND POST-TRADE TRANSPARENCY

3.1. Equity markets

AMAFI has always considered that pre-trade transparency is a key element of a sound equity market. The current "large in scale" and "negotiated trade" waivers pre-trade transparency obligations do not raise major concerns.

The "imported price" transparency waiver could be reassessed. In particular the Commission and ESMA should carry out a study to determine if this waiver can be used by MTFs and OTFs operators only to cross transaction ad midpoint (or aggregated EBBO midpoint) or also at the bid and ask or at any given price between the bid and ask. AMAFI considers that this waiver should be maintained but the overall market structure largely depends on the crossing rules.

3.1.1. Pre-trade transparency

(27) What is your opinion of the suggested changes to the framework directive to ensure that waivers are applied more consistently?

See stament above

(28) What is your opinion about providing that actionable indications of interest would be treated as orders and required to be pre-trade transparent? Please explain the reasons for your views.

An 'actionable' or 'executable' IoI is nothing else than an order. Consequently, it should be treated as such.

(29) What is your opinion about the treatment of order stubs? Should they not benefit from the large in scale waiver? Please explain the reasons for your views.

The LIS waiver is calibrated to protect large orders from adverse market impact. As soon as the size of the "stub" is under the size of the waiver, there is no longer potential adverse market impact.

(30) What is your opinion about prohibiting embedding of fees in prices in the price reference waiver? What is your opinion about subjecting the use of the waiver to a minimum order size? If so, please explain why and how the size should be calculated.

AMAFI supports prohibiting embedding of fees in the reference price. The reference price waiver is based on the assumption that the price at which a transaction may be taking place is known in advance. This is no longer the case where the fees, which typically varies depending on whether the order is considered as providing or taking liquidity, is embedded in the price. In addition, this would potentially lead to different trading prices based on the same reference price, which would not be consistent with the underlying rationale of the reference price waiver.

AMAFI believes that there is no need to include minimum thresholds for orders submitted to reference price systems. These thresholds would prevent investment firms from providing retail clients better prices and executions costs than those of the regulated market or MTFs.

(31) What is your opinion about keeping the large in scale waiver thresholds in their current format? Please explain the reasons for your views.

For AMAFI, there is no objective reason to change the current calibration for large in scale orders. The diminution of the average trade size observed on the regulated markets in the recent years does not mean that the average size of client's orders has diminished. The development of algorithm trading and high frequency trading explains the trend in the reduction of the average trade size. As such, these kind of trading cannot justify the modification of the calibration for large in scale orders.

3.1.2. Post trade transparency

(32) What is your opinion about the suggestions for reducing delays in the publication of trade data? Please explain the reasons for your views.

AMAFI considers that it is necessary to maintain a differed publication regime in order to limit the risk taken by investment firms. The first priority should be to enforce the good application of the rule, that is to say to verify that the investment firm publishes its transaction as soon as the risk is already unwound and not at the end of the delay.

AMAFI does not have today sufficient information to assess whether the regime is well calibrated or not but would not be opposed to shorten of the delays. If the delays where reduced, it is clear that investment firms would increase the prices of the transactions involved in order to take the new market risk into account. It is necessary to find a good balance between the interest of investors and a sound post trade transparency regime.

3.2. Equity-like instruments

(33) What is your opinion about extending transparency requirements to depositary receipts, exchange traded funds and certificates issued by companies? Are there any further products (e.g. UCITS) which could be considered? Please explain the reasons for your views.

AMAFI agrees to extend transparency requirements to depositary receipts and certificates issued by companies but not to exchange traded funds for which the process of trading is completely different than the process of trading in equities.

(34) Can the transparency requirements be articulated along the same system of thresholds used for equities? If not, how could specific thresholds be defined? Can you provide criteria for the definition of these thresholds for each of the categories of instruments mentioned above?

For depositary receipts and certificates issued by companies, the thresholds could be the same than those used for equities. For others Equity like instrument there is a need (if the pre trade transparency is appropriate) to have a specific calibration.

3.3. Trade transparency regime for shares traded only on MTFs or organised trading facilities

(35) What is your opinion about reinforcing and harmonising the trade transparency requirements for shares traded only on MTFs or organized trading facilities? Please explain the reasons for your views.

AMAFI considers that for shares that are not admitted to a regulated market (ie shares only traded on MTFs or OTFs) the transparency regime should be calibrated by the MTF or OTF operator.

(36) What is your opinion about introducing a calibrated approach for SME markets? What should be the specific conditions attached to SME markets?

The issue could be to put in place specific post trade transparency waivers if the general regime does not fit the liquidity of SME markets.

3.4. Non equity markets

AMAFI is in favor of greater transparency in principle but rules must be specific to each asset class and there must be safeguards to protect liquidity. Where the number of market participants is relatively small and the transaction sizes relatively large, greater price and trade transparency creates incentives for 'gaming of orders', front running and pushing the market to create a squeeze on the player holding the significant risk. This will become a damper to growing additional liquidity.

Regulators should consider the following:

- Each asset class needs to be reviewed separately to determine correct approach.
- Any transparency regime needs to take liquidity into account.
- The current equity framework is not necessarily appropriate for other instruments.
- In many cases, execution prices are negotiated bilaterally due to constraints in supply and ability to liquidate inventory. Too much Price discovery/transparency in these instruments could be detrimental to liquidity.

3.4.1. Pre-trade transparency

3.4.2. Post-trade transparency

(37) What is your opinion on the suggested modification to the MiFID framework directive in terms of scope of instruments and content of overarching transparency requirements? Please explain the reasons for your views.

See statement above.

(38) What is your opinion about the precise pre-trade information that regulated markets, MTFs and organised trading facilities as per section 2.2.3 above would have to publish on non-equity instruments traded on their system? Please be specific in terms of asset-class and nature of the trading system (e.g. order or quote driven).

See statement above.

(39) What is your opinion about applying requirements to investment firms executing trades OTC to ensure that their quotes are accessible to a large number of investors, reflect a price which is not too far from market value for comparable or identical instrument traded on organised venues, and are binding below a certain transaction size? Please indicate what transaction size would be appropriate for the various asset classes.

This proposal would surprisingly impose more requirements for this type of financial instruments than for shares. It could be meaningful only in the situation where there is a retail market for a type of instrument.

Besides that, this proposal seems incoherent with the proposal to impose liquid OTC products to be traded only on RMs, MTFs or OTFs

(40) In view of calibrating the exact post-trade transparency obligations for each asset class and type, what is your opinion of the suggested parameters, namely that the regime be transaction-based, and predicated on a set of thresholds by transaction size? Please explain the reasons for your views.

See statement above.

(41) What is your opinion about factoring in another measure besides transaction size to account for liquidity? What is your opinion about whether a specific additional factor (e.g. issuance size, frequency of trading) could be considered for determining when the regime or a threshold applies? Please justify.

See statement above.

3.5. Over the counter trading

(42) Could further identification and flagging of OTC trades be useful? Please explain the reasons.

As stated above there is a need to improve the flag of OTC trades. AMAFI very much supports further identification and flagging of OTC trades in order for market participants and regulators to better understand the precise nature and characteristics those trades actually cover. This work should be carried out by CESR together with industry participants.

4. DATA CONSOLIDATION

Data consolidation is a key issue for all market participants and regulatory bodies. There is a need, for various purposes (assessing best execution, supervision of the market, information for issuers …), to put in place a sound and reliable data base where all the transactions are recorded in a regular manner.

It can be observed that, despite what it was anticipated, the market forces have not succeeded in providing till today such a data consolidated data base.

Therefore, AMAFI generally welcomes the Commission proposals.

4.1. Improving the quality of raw data and ensuring it is provided in a consistent format

(43) What is your opinion of the suggestions regarding reporting to be through approved publication arrangements (APAs)? Please explain the reasons for your views.

AMAFI very supports this proposal in order to improve the quality of the data published and prevent some markets participants to publish on their website.

(44) What is your opinion of the criteria identified for an APA to be approved by competent authorities? Please explain the reasons for your views.

We strongly believe that APAs should be approved by competent authorities.

(45) What is your opinion of the suggestions for improving the quality and format of post trade reports? Please explain the reasons for your views.

This is a key element to achieve an European consolidated tape. Improved quality of data is a prerequisite for meaningful post trade transparency and a meaningful consolidated tape.

(46) What is your opinion about applying these suggestions to non-equity markets? Please explain the reasons for your views.

These suggestions could also be put in place for depositary receipts, certificates issued by companies and fixed income. For other financial instruments, the answer needs further assessment.

4.2. Reducing the cost of post trade data for investors

(47) What is your opinion of the suggestions for reducing the cost of trade data? Please explain the reasons for your views.

While possibly helpful in development of a post-trade consolidated tape, unbundling of pre- and post-trade data is unlikely to lead to reduction in costs. Given market participant need to access to all data, primary exchanges will retain pricing power. Indeed, evidence suggests that venues have actually increased prices post-unbundling.

(48) In your view, how far data would need to be disaggregated? Please explain the reasons for your views.

Based on its approach regarding the European Consolidate Tape, AMAFI does not see a need for further disaggregation at trading venue level for equity beyond pre ad post-trade transparency data. Further disaggregation at trading venue level, which would allow participants to buy data for only a small subset of securities, may overly affect trading venues' revenues coming from data sales.

(49) In your view, what would constitute a "reasonable" cost for the selling or dissemination of data? Please provide the rationale/criteria for such a cost.

Data is a public good/utility and should ideally be provided at cost. However, we recognize need for cost structure that incentivizes continual improvements in service delivered and so accept cost plus a reasonable return. We emphasize that drive towards transparency (which is need by investors, market participants to provide best execution etc…) is being frustrated by cost of market data.

(50) What is your opinion about applying any of these suggestions to non-equity markets? Please explain the reasons for your views.

We consider that consolidation of transparency information in equity markets should receive first and exclusive attention. Going forward and, on the basis of experience, an adequately customised solution might be considered for the most liquid instruments in the non equity markets.

4.3. A European Consolidated tape

(51) What is your opinion of the suggestion for the introduction of a European Consolidated Tape for post-trade transparency? Please explain the reasons for your views, including the advantages and disadvantages you see in introducing a consolidated tape.

We strongly support the introduction of a European Consolidated Tape (ECT) for post-trade transparency. The comprehensive consolidation of all trades on a single consolidated tape will offer market users, be they sell-side or buy-side firms, investors or issuers, an effective and efficient access to post trade information helping to overcome market fragmentation. The European Consolidated Tape will also represent a significant step towards a more integrated pan-European market.

(52) If a post-trade consolidated tape was to be introduced which option (A, B or C) do you consider most appropriate regarding how a consolidated tape should be operated and who should operate it? Please explain the reasons for your view

AMAFI would privilege option B in order to be sure that the consolidated tape will be delivered (which the industry has yet failed to deliver) and to avoid the technical and political complexity of solution A. But we are today at the beginning of a long regulatory process and the situation could be different at the end of this process, when the directive modified will be adopted.

(53) If you prefer option A please outline which entity you believe would be best placed to operate the consolidated tape (e.g. public authority, new entity or an industry body)?

See statement above.

(54) On Options A and B, what would be the conditions to make sure that such an entity would be commercially viable? In order to make operating a European consolidated tape commercially viable and thus attaining the regulatory goal of improving quality and supply of post-trade data, should market participants be obliged to acquire data from the European single entity as it is the case with the US regime?

(55) On Option B, which of the two sub-options discussed for revenue distribution for the data appears more appropriate and would ensure that the single entity described would be commercially viable?

To facilitate commercial viability of Option B, we recommend 'cost plus reasonable return'. We note that according to our understanding of US regime, market participants are not obliged to acquire data from a single entity (i.e. the CTA) but are free to purchase data from other competing non-authorized entities. We consider this competitive aspect of Option B to be critical to its success.

(56) Are there any additional factors that need to be taken into account in deciding who should operate the consolidated tape (e.g. latency, expertise, independence, experience, competition)?

Under option B, business continuity in the event of a change of provider of the consolidated tape service is crucial for information users. Selected entities through the tender process should, therefore, ensure that trade data dissemination is compatible with existing market standards.

(57) Which timeframe do you envisage as appropriate for establishing a consolidated tape under each of the three options described?

We are unable to estimate an appropriate time frame for completing this work. The important factors concerning standard-setting, RFP process and build will all have associated time frames and the main issue concerns the work being done to an adequate standard.

(58) Do you have any views on a consolidated tape for pre-trade transparency data?

Without any consolidation of clearing and settlement in Europe, there is no need for a consolidated tape for pre trade transparency data.

(59) What is your opinion about the introduction of a consolidated tape for non-equity trades? Please explain the reasons for your views.

While this option should not be ruled in the longer term, AMAFI recommends making and assessing progress first on a consolidated tape for equity trades.

5. MEASURES SPECIFIC TO COMMODITY DERIVATIVES MARKETS

See also General observations, § 21 *et seq.*

5.1. Specific requirements for commodity derivative exchanges

(60) What is your opinion about requiring organised trading venues which admit commodity derivatives to trading to make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity? Please explain the reasons for your views.

Regarding the aggregate reporting of positions traded on derivative commodities, AMAFI supports the proposal subject to two conditions:

- Reporting would apply only to commodity derivatives which fall within the definition of financial instruments ;
- Reporting would be assumed regardless of the trading platform on which positions have been executed via i.e. a regulated market (RM), or a multilateral facilities (MTF) or an alternative trading facilities (ATF)

For this last condition, definition of alternative trading venues must be precisely appreciated in order to get a complete and relevant view of the information collected.

(61) What is your opinion about the categorisation of traders by type of regulated entity? Could the different categories of traders be defined in another way (e.g. by trading activity based on the definition of hedge accounting under international accounting standards, other)? Please explain the reasons for your views.

Traders' categorization as currently set up by the US CFTC would be considered by AMAFI as a necessity toward a better knowledge of the market participants acting on the various commodity segments.

By the way, this position has been developed by the Association in a paper[1] prepared for the French presidency of the G20. Nonetheless, the categorization must be structured based on precise definition which will allow to classify unequivocally the reported activities.

In that respect, a particular attention should be given to the various activities that a same company can have, whether it concerns a regulated entities such as financial institutions or a non regulated entities such as trading companies or certain industrial groups.

A classification that would apply on purely hedge accounting criteria versus speculative trades could impact negatively the global market conditions by forcing part of the trading (liquidity) away of the central markets towards the OTC markets. A large number of participants manages its risk exposure through a dynamic hedge of the aggregate position without covering on a trade per trade basis (swaps or physical stocks, …). Those participants often use a delta neutral risk management of their outstanding. This implies a permanent adjustment of their positions based on the evolution of their exposures (new trades, maturing trades).

[1] See « *Quels axes de réflexion pour une meilleure régulation au plan international des marchés de matières premières ? Contribution des professionnels de marché à la réflexion que mène le G20* » : www.amafi.fr.

Based on the above considerations, AMAFI recommends a cautious and graduated implementation of the categorization process. A certain degree of flexibility should be accepted in developing the mechanism to facilitate the necessary adjustment to fit the regulators' needs.

(62) What is your opinion about extending the disclosure of harmonized position information by type of regulated entity to all OTC commodity derivatives? Please explain the reasons for your views.

AMAFI is in favor of this proposal that would contribute to a better knowledge of the weight of the main institutions active on the commodity markets as well as the associated risk.

Although the quality and usefulness of such information will be directly related to a categorization that will cover the full range of market participants and take into account the different nature of the operations they trade, especially for those who can trade all together speculative operations as well as hedging operations.

A particular cautiousness must be exercise when defining the criteria and the scope of their application. Attention should be given to the impact of non regulated entities which are active participants of the commodity markets. They can operate in the enlarged European zone without having to fulfill constraints and requirements applied to the financial regulated entities.

(63) What is your opinion about requiring organised commodity derivative trading venues to design contracts in a way that ensures convergence between futures and spot prices? What is your opinion about other possible requirements for such venues, including introducing limits to how much prices can vary in given timeframe? Please explain the reasons for your views.

This question would necessitate to be clarified. The principle of a convergence between the spot price and its future price is a necessity. Conditions for a trading venue to develop a successfull and long-lasting derivative contract on which the convergence would not operate do not appear. The absence of convergence would refrain operators from trading on such a contract, being an imperfect hedge tool.

5.2. MiFID exemptions for commodity firms

(64) What is your opinion on the three suggested modifications to the exemptions? Please explain the reasons for your views.

Exemptions, as provided in the current MiFID need to be revisited to deliver adequate and equal level playing field to market participants to comply with the delivery of high standard services and protection to clients.

Considering the 3 options suggested by the Commission, AMAFI would definitely not support the A) which would not address the issue developed above.

The B) proposal generates constraints which look inappropriate in the fact that it could be hard to manage adequately activities having to comply with the suggested qualitative (human resources) and quantitative (% of ancillary business vs main activity) criteria. AMAFI would be considering at criteria alike those considered in the EMIR proposals. It is very important, should this option be retained by the Commission, to establish mandatory and precise criteria. There should be no possibility for commodity firms or other non regulated entities to arbitrage their business based on the local transposition of the criteria.

The full deletion of the exemption suggested in the C) option appears brutal and excessive in the fact that some firms need to access the markets without having to fulfill the necessary constraint required for the regulated financial institutions. This is particularly true for agricultural cooperatives or similar actors in other businesses.

AMAFI would suggest to withdraw from the core MiFID all related exemption criteria. But considering the necessity to provide exemption on certain cases, ESMA would allow discretionary exemption based on a individual demand filed by a company. This could compare to the current process of the US CFTC and would have the advantage to avoid interpretation of the rules when translating them within the local jurisdictions.

5.3. Definition of other derivative financial instrument

(65) What is your opinion about removing the criterion of whether the contract is cleared by a CCP or subject to margining from the definition of other derivative financial instrument in the framework directive and implementing regulation? Please explain the reasons for your views.

Considering the importance of an efficient regulation of the derivatives markets, the criterion above should be reconsidered on the basis of the efficiency of the markets and the alternative solutions that could result if this criterion was kept unchanged.

Proposed evolution for more transparency and reporting could lead if the above criterion was maintained as such to a potential migration of transactions from a very liquid existing market towards a non regulated market or OTC markets.

It will be necessary to reconsider the full spectrum of existing instruments (derivative futures and options, swaps, CDS, forwards) to work on a common definition of financial instrument applicable to each of these supports.

5.4. Emission allowances

(66) What is your opinion on whether to classify emission allowances as financial instruments? Please explain the reasons for your views.

AMAFI does not support the classification of emission allowances as financial instruments (FI). It could be particularly detrimental for this “emerging” market especially looking at the spot market. The implication that would result in registering as FI such asset classes would undermined the activities of the non financial actors by adding direct or indirect constraints (reporting, additional costs).

AMAFI is favorable to the withdrawal of the emission allowances instruments (CO2 in a wide definition) from the MiFID. This is a totally different asset classes from the equity or bond markets.

The emission allowances mechanism is an “administrative decision” imposed by States to specific industrial companies which are not subject to any financial regulation. But they have to comply with periodic reporting obligations which cannot be managed properly from the standard MiFID rules.

Thus, as recommended above for the commodity segment, AMAFI support the implementation of a specific regulation for the CO2 activities. When possible, MiFID regulation could be replicated. The “one size fit all” concept could not extend to the CO2 segment.

6. TRANSACTION REPORTING

As stated in part 1, AMAFI fully supports initiatives that allow regulators to have a sound understanding of market participants and financial transaction in order to prevent systemic risks and detect prohibited behaviors. But AMAFI would like to stress the following points.

The current reporting system is far from being satisfactory. The transaction reporting process is fragmented and inconsistent and significant national reporting differences exist. For example, there are still diverging interpretations on the reporting of branches' transactions but also on the notion of where a transaction is executed.

As a result, duplicative transaction reporting still exists despite the CESR Level 3 Guidelines on MiFID Transaction reporting of May 2007 ("CESR/07-301"). Therefore the first priority, before extending the scope of reportable instruments, should be to address the current situation which creates significant costs for investment firms and also for regulators. We need maximum harmonization of the reporting process to regulators. Given that, the creation of a single reporting system would be particularly welcome. It would lead to significant economies of scale for both market participants and regulators (developing and maintaining one single system instead of 27 systems).

Various European regulatory initiatives (e.g. EMIR but also short selling) are also concerned with reporting provisions. It is crucial to achieve a consistent framework across the various requirements.

Finally, the transaction reporting system should match the scope of the Market Abuse Directive, i.e. the revision of MiFID in this respect should be synchronized with the changes that will be made to the MAD. For certain matters, like the ones related to commodities, reporting obligations may not be best placed within MiFID but rather in specific legislation that will be drawn for them.

AMAFI would like to stress the importance of adopting a phased approach to the extension of the scope. Such extension will create costly and complex developments and firms should have time to plan and adapt for them for the reporting to be useful to regulators.

Also, a mechanism should exist for competent authorities or the Commission to report to the market on the use that they have made of the data collected and the success they have achieved in terms of fighting market abuse or mitigating systemic risk. An example of such feedback exists in the area of money laundering (see reports provided by national financial intelligence units).

6.1. Scope

(67) What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

We support extending the scope of transaction reporting obligations to securities (i.e. equities and fixed income) and securities derivatives markets solely traded on EEA regulated trading venues, including the new OTFs category. Yet, for forex and interested rate derivatives, position reporting could be a better tool to monitor possible market manipulation.

One should not, as already mentioned in AMAFI's answers to CESR's consultations on transaction reporting that firms are currently not in a position to determine whether the underlying of a derivative transaction is admitted to trading on a regulated market or on an MTF of the EU (versus elsewhere in the world) because no list exists at the EU level. As a result, it is common market practice to over declare

transactions, a practice that will be even more visible with the extension of the reporting scope to OTC derivatives. This list of instruments admitted to trading on a regulated market or an MTF of the EU is absolutely necessary.

(68) What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments the value of which correlates with the value of financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

AMAFI supports the extension of the transaction reporting regime to financial instruments that are derived from or mirror financial instruments admitted to trading on regulated markets and on MTFs. This would include, for example, the reporting of depository receipts. In our view, the loose definition provided by the Commission's services in section 6.1.b) of the consultation (i.e., all financial instruments the value of which correlates with the value of financial instruments traded on a regulated market, MTF or organized trading facility) is too broad and vague. The term "correlates" could in theory apply to many different instruments that are in fact unrelated for the purpose of market abuse (for e.g. two financial stocks like BNPP and Société Générale could be seen as correlated) and that firms would not be able to identify in their instruments databases. This could result in reporting that will be unusable for competent authorities because too unfocused (especially since the category of "other derivatives" contemplated by CESR will be extremely large).

In addition, the extension of the reporting scope should only happen once duplication issues are resolved and in any case, should be implemented in a phased approach, product by product, to allow both firms and authorities to plan for costly IT developments and bed down their reporting systems before moving on to a new type of derivatives (priorities should be defined – for e.g. derivatives on FX, interest rates, volatility do not pose the same threat in the terms of market abuse as derivatives on bonds and stocks).

(69) What is your opinion on the extension of the transaction reporting regime to transactions in depositary receipts that are related to financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

We would not oppose that transactions on depositary receipts become reportable although it should be noted that those listed on a regulated market are already reported.

(70) What is your opinion on the extension of the transaction reporting regime to transactions in all commodity derivatives? Please explain the reasons for your views.

While AMAFI supports measures that will lead to higher transparency and reduction of risks on a global basis, by having a detailed reporting for commodity derivatives transactions, the collected data should not translate automatically to an equivalent disclosure statement to the market even though those information will be given on an anymous basis.

For example, counterparty can initiate a position the size of which could destabilize the market conditions (i.e. an offer for a tender by a country to supply its expected annual needs on maize). The size of the contract could exceed the standard size of the derivative market. Thus the regulation for reporting transactions should elaborate on whether the counterparty may have a limited exemption for reporting the trades until full completion of the hedge or whether all transactions will be reported immediately but will be "flaged" to be excluded from the disclosure statement as long as the full trade is not achieved By delivering this information following the standard reporting timing would expose the counterparty to market adverse conditions for the remaining yet uncovered part of its exposure if the disclosure is not filtered in a such case

(71) Do you consider that the extension of transaction reporting to all correlated instruments and to all commodity derivatives captures all relevant OTC trading? Please explain the reasons for your views.

It is difficult to answer this question because the objective of the Commission is uncertain with regards the use of the term "correlates". If the objective is to capture hedging transactions, then a position reporting will provide a better view than a transaction reporting.

Generally, extension of the transaction reporting should focus on the areas that create the biggest concerns in terms of market abuse and that will bring results in terms of enforcement actions. Hence AMAFI does not think that all OTC derivatives should necessarily be captured. At least, a cost / benefit analysis for each product type should be made prior to extending the scope (the 80/20 rule should certainly apply here).

It is important since overflowing competent authorities with data is not synonymous of efficiency and better enforcement. This notion of efficiency should not be overlooked, as setting up and running surveillance systems require major investments in systems and human resources that not all competent authorities are able to commit. Requesting them to monitor all financial instruments is possible but it is not realistic to think that it would result in all financial instruments being monitored properly. The EU should aim at efficiency in its surveillance by focusing its resources on these areas where the risks of market abuse are the highest.

(72) What is your opinion of an obligation for regulated markets, MTFs and other alternative trading venues to report the transactions of non authorised members or participants under MiFID? Please explain the reasons for your views.

If such obligation enhances the ability of supervisory competent authorities to monitor abuses under the Market Abuse Directive, AMAFI would not disapprove of it. However, it should be noted that the costs, likely to be high, associated with the development of reporting systems should not be passed on intermediaries and investors.

(73) What is your opinion on the introduction of an obligation to store order data? Please explain the reasons for your views.

AMAFI does not understand what is behind this question. Investment firms are already required to store order data and they are available to regulators on request.

If the Commission is proposing an harmonization of the format of stored data, investment firms will incur significant costs and AMAFI does not support such a change without a detailed cost/benefit analysis being undertaken.

(74) What is your opinion on requiring greater harmonisation of the storage of order data? Please explain the reasons for your views.

See question (73) above

6.2. Content of reporting

(75) What is your opinion on the suggested specification of what constitutes a transaction for reporting purposes? Please explain the reasons for your views.

The proposed specification in section 6.2 a) of the consultation appears to us to lack precision and we would urge the Commission services to clarify its meaning and align this definition with the definition of a transaction reportable to a Trade Repository under EMIR. In our view, the proposal that "a transaction

refers to any agreement concluded with a counterparty to buy or sell one or more financial instruments" is based on cash products.

OTC derivatives are subject to lifecycle events (increase / partial termination / exercise or expiry) that are not buy / sell, but have the same economic impact.

(76) How do you consider that the use of client identifiers may best be further harmonised? Please explain the reasons for your views.

We consider that such identification is currently not practicable for two reasons:

- Harmonisation of client identifiers. There is currently no unique way to identify clients (and citizens for the same token) across the EU. The identification of non-EU client would also present major complications.
- Confidentiality of the information. Even if a common EU client identifier is created, developing new systems to take orders and secure data is likely to result in very high costs, not accessible to all securities firms. Even then, as client data are eventually spread throughout the chain of intermediaries, the risk of data leak is increased.

The first stage should be the creation of a fully harmonized identifier system. We expect the Commission to propose common EU identifiers for clients: aligned with the USA and aligned with client identifiers fed to Trade Repositories under EMIR and to MIFID transaction reporting. Client identifiers should be easily and freely accessible. It is a long-term project at the EU level.

(77) What is your opinion on the introduction of an obligation to transmit required details of orders when not subject to a reporting obligation? Please explain the reasons for your views.

In principle, AMAFI considers that the monitoring of client activity for market abuse purpose is the remit of investment firms – they have obligations in this respect that, if not met, lead to sanctions. In turn, competent authorities should focus on monitoring investment firms' activities and consider transaction details (and details of client orders in particular) only when an issue is detected.

Moreover, AMAFI considers that the introduction of an obligation for the receiver and transmitter of an order to transmit certain details of that order to the executing broker would be difficult to implement for the following reasons:

- reluctance of private bankers to disclose information on the underlying clients to the bank / broker to whom orders are transmitted for execution; and
- the existence of aggregated orders for multiple clients.

Therefore it is necessary to give firms that receive and transmit or otherwise handle orders the choice of either transmitting certain details of that order to the executing broker or making a transaction report to the competent authority.

(78) What is your opinion on the introduction of a separate trader ID? Please explain the reasons for your views.

A trader ID is available upon request to the regulatory authorities. In our view, to bring this information into the MiFID reporting chain:

- is not really relevant (there is a difference between proprietary trading and client execution), and
- will be costly as a common trader identifier should be found and inserted in investment firms systems (today, trader IDs differ depending on the execution venue considered); otherwise the information put through would not be of any use.

Also, in principle, the monitoring of a trader's activity is the responsibility of the investment firm on one hand, and the venue on the other hand. If issues have been identified in this respect they should be dealt with by ensuring these responsibilities are taken seriously and proper control systems are implemented.

(79) What is your opinion on introducing implementing acts on a common European transaction reporting format and content? Please explain the reasons for your views.

We strongly support the idea of a fully harmonized, common European transaction reporting format and content, as this is in line with our goal of reducing the duplicate reporting and will allow competent authorities to detect cross-border market abuses.

6.3. Reporting channels

(80) What is your opinion on the possibility of transaction reporting directly to a reporting mechanism at EU level? Please explain the reasons for your views.

We strongly support the idea of having a unique reporting location (at least a single regulator per investment firm or, better, a unique regulator for all the reporting, i.e. ESMA). We would strongly support any initiative to revisit the passport concerning the reporting requirements. The TREM system (with the addition of new instruments if necessary), with a single contact point for each investment firm should allow for a proper monitoring of each domestic market by its regulator and access to other EU market's data by each regulator.

Implementation of a single reporting system should be a pre-requisite to extending the scope of the reporting.

(81) What is your opinion on clarifying that third parties reporting on behalf of investment firms need to be approved by the supervisor as an Approved Reporting Mechanism? Please explain the reasons for your views.

The definition of an Approved Reporting Mechanism is quite vague and this proposal could have unintended consequences. For example, larger firms already report on behalf of smaller firms or asset managers and brokers may have commercial arrangements to report on behalf of asset managers: if they are required to become an Approved Reporting Mechanism, this would certainly imply a cost and could result in some investment firms refusing to report on behalf of third parties (the existing bilateral agreement would be replaced by a contractual agreement and the need for the investment firm to be approved as an ARM).

(82) What is your opinion on waiving the MiFID reporting obligation on an investment firm which has already reported an OTC contract to a trade repository or competent authority under EMIR? Please explain the reasons for your views.

We fully endorse this suggestion as it is aligned with our goal of avoiding or reducing duplicate reporting.

(83) What is your opinion on requiring trade repositories under EMIR to be approved as an ARM under MiFID? Please explain the reasons for your views.

See our answer to question (81) above.

7. INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES

- ***General observation: the proposals are geared towards the retail market yet could apply indistinctively to the wholesale market***

Most of the questions of the consultation paper seem to be designed with the retail client in mind. The proposals that are made do not seem therefore to consider the variety of investment activities that are within the scope of MiFID. Yet, a proposal that one can consider as well suited to the retail market could be inappropriate for the wholesale markets or may, at the minimum, need to be modified (see for example the proposals around independent investment advice and longer term suitability services in questions 91 to 94). The imposition of retail client-oriented conduct of business standards on wholesale markets is likely to harm the attractiveness of EU markets for issuers and investors both within the EU and the rest of the world.

Current MiFID rules have not distinguished between retail and wholesale markets, discriminating only on the basis of the client categorisation. This has resulted in significant differences in the way some of these rules, and more specifically the ones related to the provision of investment advice, have been interpreted by various authorities when applied to the wholesale markets. Practices that have developed since MiFID implementation have however provided an answer to these ambiguities. AMAFI therefore considers that a number of the Commission's proposals regarding investment advice are not applicable to the wholesale markets.

Similarly, many of the proposed new requirements (see questions 93, 95, 97, 98) involve the ability for the firm to have knowledge, after the point of sale, of the client's holdings, whereas the firm providing the investment service to the client may often not have this knowledge. This is especially true in wholesale markets, where firms are often not custodians nor account keepers and clients deal with a large number of different firms on an instant and ad-hoc basis, with no expectation in terms of after-sale service for most of the financial instruments traded.

- ***General observation: Current conduct of business rules have generally not proved inadequate – any change to these rules has significant cost and client implication and should be weighted against its expected benefits***

As mentioned in the general observations, client protection rules have proved their robustness during the financial crisis and no major market failure has been witnessed in Europe in this respect. Most of the mis-selling cases identified since MiFID was implemented are due to a poor interpretation or implementation of the rules rather than a weakness or poor design of the rules themselves. If there are a few cases where the rules could be made clearer to ensure some of the mis-selling situations identified will not re-occur, there is no case for a large overhaul of the principles upon which the rules were designed, as is contemplated in questions 94 and 104 to 106 on after sale advice and client categorisation.

One cannot help notice that the MiFID rules in many States have not been tested yet, i.e. enforcement cases are still few. Still, efficiency of the rules depends also on the quality of their enforcement. The focus should hence be on enforcing existing business of conduct rules and sanctioning breaches when applicable. It should also be on making sure enforcement and interpretation do not differ amongst member States. Investments and efforts from firms in implementing new rules cannot be alone a substitute to Member States' investments and efforts in controls and enforcement.

Implementation of MiFID in respect of conduct of business rules has required significant investment from firms and has had an administrative impact on client relationships, as the involvement of clients has been necessary to read, accept and provide information for (re)documentation purpose. In addition, in a few

areas, implementation is still very recent (see for e.g. CESR's document on good and poor practices as regards Inducements that were only very recently published) or, in some cases, still on-going.

We therefore urge the Commission to consider carefully the cost/benefit of any proposal that would require a review of the processes put in place and would generate further documentation mailing and returns with clients. Specifically, the principles of better regulation should be considered carefully to ensure these proposals do not result in costs that are necessary neither for the industry nor for enhanced client protection.

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

AMAFI agrees with the Commission's proposal to impose on the Member States the obligation to have in their national legislation certain requirements to which the entities concerned by the optional exemption of Article 3 of MiFID would mandatorily be subject. Indeed, to the extent that such entities may provide certain investment services (reception transmission of order and investment advice) which may also be provided by investment firms subject to MiFID, it is very important that similar rules - regarding the relationship with clients - apply in both cases.

This is important from the standpoint of investor protection, as the client does not necessarily know and cannot be expected to know precisely the status of the professionals which whom he deals and the consequences for him of one status compared to the other. In both cases, the protection he must be afforded by law must be the same. Furthermore, any difference between those statuses when it comes to client protection would affect the level playing field that must exist between professionals providing the same service.

AMAFI is therefore clearly in favor of the EC proposal in that respect. It notes however that question n° 84 appears to be more restrictive than the proposal set out in the paragraph above the question itself. Indeed the question as such refers to *"conduct of business rules for the provision of investment advice and fit and proper criteria*" whereas the proposal referred to above lists six different areas which cover a broader field. This point should therefore be clarified.

AMAFI believes that the six areas mentioned, to the extent they all relate to the relationship with clients, are appropriate to provide an adequate investor protection and level playing field. Rules along what is being proposed are already in effect in France.

7.1.2. Application of MiFID to structured deposits

(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.

AMAFI agrees with the proposal even though it leads to the extension of the scope of MiFID beyond financial instruments - as structured deposits are not strictly speaking financial instruments - and providing the notion of « structured deposits » is precisely defined. For this matter, the definition that is proposed in the context of the consultation on the PRIPS Directive leaves open some questions as to which products would fit this definition. Standard interest bearing deposit accounts should be excluded

from the scope of the structured deposits, which should be defined as those deposits whose performance is linked to an underlying financial instrument or index.

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.

AMAFI is of the opinion that MiFID applies to the sale by institutions of the financial instruments they issue, even when no investment advice is provided, and as far as the French market is concerned, AMAFI does not believe that a differing view has ever been taken.

The characterisation of the investment service that is provided does not seem necessary though, especially since the Commission's proposal of characterising it as the service of execution of orders is questionable to the extent that the source of liquidity is not the market but the issuer of the security and the concept of best execution has no meaning in this context.

The issue at stake here relates to primary markets, which do not operate like secondary markets. Like on secondary markets, there are very different participants in these markets but one specific feature is that for the most part, the participants are not retail clients. For these participants, the question does not exist as to the role or the service the firm provides or plays in relation to the service of underwriting and placing it provides to the issuer, which does not mean that the firm does not act honestly and fairly with the investor.

Where there is a questioning with regards to the service of underwriting and placing is:

- Where the objective of the new issue is not to finance the issuer, but rather to deliver investment products to the market (i.e. structured products); or
- More generally, where the target is the retail market, where clients do not necessarily understand the role that the firm plays with respect to the issuer.

In these two situations, there may be some reasons to consider the best interest of the clients and apply the rules of conduct to the investor "leg" of the service of placement.

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.

AMAFI does not see the need to modify at this point, save, maybe, with respect to some minor points, the rules that have been established by MiFID Level 1 and 2 and by the guidelines provided by CESR in this Q&A of November 2009, following extensive consultation of the industry. The implementation of such rules has required some heavy investment on the part of the firms which, in a lot of cases, has only just been completed. AMAFI is of the view that there is not obvious need to modify the rules now in place, or if so, only marginally.

(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.

In practice there is a variety of situations in which a firm may provide a credit or loan to carry out a transaction in one or more financial instruments and at the same time be involved in the said transaction. The most important point is that the client who is granted a loan to acquire, for instance, some shares understand perfectly the risk involved in such purchase. But if he does, which implies that the firm has given him sufficient explanation and warning in this respect, why should he be prevented from acquiring shares through the execution only process?

AMAFI feels therefore that rather than excluding the execution-only regime in that case, it would be more appropriate to ensure that the client is well informed of the risks involved in taking out a loan for the purpose of acquiring a financial instrument. Furthermore, the client may elect to deal with two different firms for the loan and for the acquisition of the shares, in which case, he is not protected at all. AMAFI feels that it is much preferable to encourage him to deal with the same firm (or at least not discourage him to do so) for as long as the firm is required in that case to give him appropriate information and warning.

(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.

AMAFI is not in favour of excluding certain UCITS from the list of non complex instruments. As explained further below, the application of the “execution-only” regime is subject to a number of conditions which in the end are quite protective of the client. There is no need to add additional complexity to the system.

Having said that, AMAFI considers as a minimum that funds with traditional investment strategies, *ETF*s *and* capital protected funds which are structured as UCITS should automatically be non-complex. In that case, other units in collective investment undertakings could be assessed against the criteria of Art. 38 of MiFID Level 2.

(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.

No, the execution-only regime should not be abolished. It serves a useful purpose and after all the discussions to which it has given rise in the past few years and all the investments made by the firms to adapt their systems to the evolution of the matter, it would be great pity to abolish this regime. Furthermore, it should be recalled that, beyond the definition of the instruments to which such regime may apply (which often tends to concentrate all the attention on this matter), there are other conditions to be fulfilled for this regime to apply. Two of them (the service must be provided at the initiative of the client and the client must be informed beforehand that he does not benefit from the same protection as that afforded by the conduct of business rules) are particularly protective of the client which reduces significantly the need to modify the notion of non complex instruments.

7.2.2. Investment 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 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.

The Commission's proposal seems to infer that independent advice is fair in principle (and therefore advice that is not independent is not). This is not acceptable, considering the meaning that the Commission gives to the term "independent".

Independent advice and advice seen as being not independent are both a source of conflicts of interest that can have consequences on the fairness of advice: the former can lead to excessive churning to generate fees, the latter can create a bias in the selection of financial instruments towards the most lucrative.

Hence, the requirement should be for firms to inform clients of the range of products they consider and assess rather than represent whether their advice is independent or not.

(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.

The requirements set by MiFID for the provision of investment advice already call for firms to be able to formally justify the suitability and/or appropriateness of their advice. These requirements already result in written communications to clients and confirmations from their part, which clients often find burdensome. For example, clients often complain that they receive too many documents that they do not read – one of the observations that have lead recently to the development of the Key Information Document.

The true point of such a requirement would not be to give clients helpful information but rather to provide easier grounds for client dispute. Yet, a discontent client can already base its claims on the current requirements of suitability, appropriateness and information to clients, which are all subject to a record requirement by firms.

Conversely, the proposal would be very burdensome and costly to implement and would have poor informative value for clients, as implementing it would require a mass treatment that by definition does not allow a customized approach and results in standardized information.

AMAFI is therefore very skeptical of the cost/benefit of this proposal and would like to stress again that it is not suited to the wholesale markets and their instantaneous nature.

(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.

Again, this requirement is not suited to the wholesale markets for the reasons mentioned in the general observations and also, due to the number of transactions operated in these markets and the nature of its participants.

This service is better provided at the client's request on a tailor-made basis. A general requirement for ongoing advice would generate an unmanageable extra workload and enormous costs which would

eventually be passed on to clients or would create a shift towards investment funds rather than direct investments.

Such additional service could be relevant for example for complex or tailored products and only to the extent that the « relevant modifications » are further defined as those that have a definitive consequence on the expected performance of the financial instrument (e.g. barrier activation). For example, firms should not be expected to alert their clients who have bought shares of a drop in the stock market, i.e. this requirement should not apply to general market situations and in particular to :

- market making activities
- instruments with daily public valuation
- instruments admitted to a regulated market (and an OTF?)

If these requirements were to apply to the wholesale markets, they would have to be limited to OTC transactions and financial instruments of which the firm is an issuer, and that have a certain time horizon.

More generally, this requirement would require manufacturers of products and distributors to agree on the responsibilities of each. The distributor, which faces the client, would be the one bound by the obligation, but would need to rely on the manufacturer's knowledge of its product. Hence, the latter should define ex-ante which events constitute "*relevant modifications*".

(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.

The proposal extends the investment advice service after the point of sale. In AMAFI's opinion, this must constitute a separate investment service that should not be seen as part of investment advice and should be limited to retail clients. It should be the choice of each firm to decide as to whether it wishes to offer this service and of the client to decide whether he or she is ready to pay for it or not.

This is especially so that firstly, this service may not be required nor useful for all clients to whom investment advice is provided, and secondly, the firm advising the client may not be the one offering the safekeeping of its assets – two observations that are true for the retail markets and even more so for the wholesale markets. Incidentally, one should note that such a proposal would pose an inherent difficulty in articulating the obligations of the adviser and the ones of the safe keeper.

Such a proposal can ultimately force investment advisers to act as if they were providing a portfolio management service, blurring the differences between the two, which is not advisable.

In addition, requiring firms to request clients to update their personal circumstances regularly is likely to be perceived as bureaucratic and burdensome rather than useful.

AMAFI does no think that the focus should be on longer term investments. To the extent that a firm decides to offer this service, it should be free to propose it for any product as agreed contractually with the client

Again, this proposal is at odds with the wholesale markets' model for the reasons mentioned in the general observations.

As for the removal of the exemption based on distribution channels, AMAFI agrees that the communication channel used to communicate information to clients cannot determine alone that this

information is not a personal recommendation. However, the terms "distribution channels" are not used in article 52 of the Directive to refer only to a communication channel.

Actually, this notion is first used in MiFID in relation to investment research in article 24-1 of MiFID Level 2 : "*For the purposes of Article 25, 'investment research' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public (…)*"

Recital (28) of MiFID Level II indicates that investment research is a sub-category of the type of information defined as a recommendation in Commission Directive 2003/125/EC, which in turns defines distribution channels in its article 1(7) as "*a channel through which information is, or is likely to become, publicly available. 'Likely to become publicly available information' shall mean information to which a large number of persons have access*".

Hence, the terms "distribution channels" is not only a means of communication (like the Internet): it also involves the targeting of a large number of persons. In other terms, the current exemption cannot result in scoping out of investment advice a recommendation that is sent via the Internet and is based on the consideration of the personal circumstances of the targeted client(s) (even when it is sent to a number of clients). Similarly, the use of this exemption does not mean that further discussions that could result form the initial communication via a distribution channel could not fall within the definition of a personal recommendation.

For the purpose of defining a personal recommendation, the onus should be put on whether or not the communication is based on the analysis of an individual's (or a group of individuals') investment needs.

If not, the consequence is that the difference between personal recommendation, other type of recommendation (like investment advice), information and advertising is blurred to the expense of legal and regulatory security. This would also imply that the service of investment advice could be provided incidentally, with no intention, and the service becomes then more akin to a general duty of advice to clients.

AMAFI therefore suggests that either the definition of "distribution channels" be added to MiFID, using the definition set in Directive 2003/125/EC, or that a mention be added at the end of the exemption such as: "A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public, **and is not based on consideration of the criteria used to assess suitability**".

Also, such deletion could have a knock-on effect on investment research, because it is defined as a recommendation that is intended to distribution channels and therefore falls rightly out of scope of investment advice thanks to the current exemption. Removing the exemption would create concerns that investment research could then be considered as a personal recommendation, whereas the current exemption makes it clear that it is not.

If the proposal to delete the exemption is maintained, then AMAFI suggests that it should be added that "A recommendation is not a personal recommendation if it is issued exclusively to the public **or if it is investment research as defined in article 24-1**".

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.

AMAFI supports the proposal providing that, as proposed, it is properly calibrated i.e. that the category of complex products considered is well defined For this purpose, we understand that the notion of complex products that would apply here is not the same as the one considered in the context of execution-only (see questions 87 to 90) – this should be made clear in the text of the Directive. Also, the notion of complexity should not be defined without consideration of the risks attached to the product. Complexity can be necessary to provide protection and, in these instances, should not be regarded as an essential determinant of suitability and product information requirements. What matters is whether the investor understands the risks and returns profile of the product, not its structuring.

Further, the requirement should be fully aligned, and consistent, with the proposals being discussed in the context of the PRIPS legislation and should be strictly limited to retail clients only.

If it is not so and the notion of complex products is the same as the one used for execution only, AMAFI does not support the proposal.

(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?

AMAFI agrees with this proposal with the same provisions as above in question (95) and the additional one that the information is provided at the client's request and for instruments that have no market price readily available on a daily basis (bid and ask, quoted price or NAV). Again, this obligation requires the adviser and the product manufacturer (or the counterparty to the trade for OTC products) to define their respective obligations.

In addition, the concept of independence should not hinge solely upon the use of a third-party with no link with the intermediary, but also on internal organisations that ensure valuation departments of the intermediary are independent from its sales and structuring departments and use their own valuation tools and techniques that in turn are properly verified and audited. It is indeed important for intermediaries to not have to rely on third-parties for valuation purposes, since they often commit to buy back, on client's request the financial instruments they issued, committing their own capital for this purpose. They are therefore better placed to provide a valuation than an external party that does not support the consequences of its valuation.

The principles governing these internal organisations could be part of a firms' conflict of interest policy.

(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.

To the extent that firms would have to report quarterly valuations of structured finance products, the purpose of an additional reporting on the underlying assets is not clear, as the most important information for the client is the value at which its position can be unwound.

Moreover, information relating only to the underlying of a product is not always meaningful and can even be misleading, as the relation between the value of the underlying and the value of the product itself is generally not linear (due precisely to the structured nature of the product), not always positive, or even

not simple enough for a client to assess precisely which impact a change in the value of the underlying can have on the product.

(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

AMAFI disapproves of a mandatory obligation in this respect and considers it must be subject to a freely agreed contractualisation between the producer and the distributor.

See also our answer to question 93.

(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.

The Commission's concern may be legitimate as regards certain types of professional clients who are not classified properly. Having obtained an authorization to provide some investment services is not synonymous of being knowledgeable on all financial instruments and therefore some of the protection that professional or retail investors enjoy may be of interest to some eligible counterparties with respect to some financial instruments.

However, this observation does not call for a solution, as proposed, that would remove these counterparties' accountability and would create confusion on the entire category of eligible counterparties. Counterparties that are in such a position should be expected to be able to identify those situations where they are lacking knowledge and make an informed decision in this respect to opt out of the eligible category for a more protective client category. This is a governance issue on their part, and an assessment of their effectiveness in this respect should also be part of the authorization process by competent authorities.

MiFID already provides for the ability to opt down from the eligible counterparty category and this possibility is used in practice so that the category of eligible counterparties does include only true eligible counterparties. The focus of regulators should be to make sure that the requests of those firms for an opt down are effectively met by intermediaries. Downgrading the entire category of eligible counterparty should not be the solution to the incorrect application of the rules.

(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?

AMAFI does not see why these products should have a specific treatment in MiFID. As well as there are information requirements in MiFID to make sure clients understand the product they are investing in, these requirements should apply to ethical or socially oriented investments.

7.2.4. Inducements

As a general comment, we observe that inducements rules are some of the most debated requirements of MiFID and that CESR's expectations in this matter have, still only recently, been detailed in a "Good and poor practices" document. Considering that practices are still bedding down in this respect, we do not believe that rules should be changed unless if it were to make them clearer.

Conversely, we believe that the focus should be on controlling practices, and sanctioning the ones that are inadequate.

We do believe that transparency and conflicts of interest rules are paramount in this matter and do not think that the enhancement criterion embedded in the rules, and that is so difficult to interpret both by the industry and the competent authorities, is a necessary feature.

(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.

AMAFI is not is not supportive of this proposal. It cannot help noticing that clients have shown very low interest in this information and that, generally speaking, synthetic and comprehensible information is better than detailed and too complicated information. AMAFI is therefore sceptical that clients will see a benefit in receiving full details.

Because situations vary a lot within a firm and among firms, depending on the activity and the type of client concerned, firms should be free to decide the detail of their disclosure forms. Templates for disclosure will not cater for these differences and are likely to be inappropriate in many instances. The focus should be on enforcement and making sure controls are carried out to ascertain the adequacy of the disclosures made by firms.

Also, it is most important on this matter that disclosure should be fair, clear and not misleading, but less important to consider the medium under which this disclosure should be made, on which firms should have flexibility. As an example, marketing documentation, although rarely, is sometimes used as a medium of disclosure.

(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.

We are not opposed to providing an ex-post disclosure to clients when the ex-ante disclosure has been limited to the methods of calculating inducements provided it is on an annual basis. This could complement the fees report sent to clients annually (*Directive 2006/73/EC, art. 33*).

(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.

One should note that the term “inducements” in article 26 of the implementing Directive refers both to remuneration paid or provided directly to or by the client and to remuneration paid or provided to or by a third party.

We assume here that the proposal is intended at banning third party payments. However, the mere fact that the terms used by the Commission are defined differently in the Directive, i.e. more broadly than the common understanding of what is an inducement, is revealing to the difficulty these obligations pose in terms of interpretation, leading to inconsistent applications across Europe. In this respect, it would help to clarify the definition of inducements in the Directive.

In both situations where a third party payment is involved and where a client pays directly a fee, potential conflicts of interest may arise:

- in the first instance, the intermediary providing financial advice may be tempted to drive its client towards the most lucrative financial instruments;
- in the second instance, the intermediary may have an incentive to propose an excessive churning to the client.

As a result, AMAFI is of the opinion that neither of those types of remuneration should be banned or either privileged in the case of independent advice because both embed a potential for conflict of interest. In addition, the term "independent" should not only apply to intermediaries who do not receive third party payments.

Accordingly, AMAFI does not believe that third party payments should be banned for all investment services. The use of third party payments, when considered collectively, can be beneficial to a number of clients as they generally allow for volume rebates which make the financial instruments cheaper on an individual basis. It is a way to pool and share costs among different types of clients; it is also a way to make acceptable to the client the price of a service, whose access may be out of reach otherwise. Some may consider that these reasons are not justified: there is however a practical truth attached to it and this issue, important and complex, in AMAFI's opinion, should be considered carefully by the Commission.

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.

The client classification regime rules aim at tailoring client protection to the client's ability to make his own investment decision and understand the risks involved. AMAFI believes that, in general, the client classification rules provide an appropriate level of protection to the three categories of clients: retail, professionals and eligible counterparties (ECPs). This is particularly true with the safeguards provided by MiFID Level II (*art. 28*) against incorrect per se categorization, notably with the possibility given to ECPs and to professional clients, when they consider that their knowledge is insufficient, to opt down for a more protective category. This is a very important safety feature embedded in MiFID that should not be forgotten in designing changes to the classification rules. This means that a classification is never definitive and a client, under MiFID, can always benefit from a higher level of protection if he chooses so.

It should be added that the implementation of this system has required considerable financial and human investment by the firms. In most cases, at least in France, such implementation has been carried out with great professionalism. Therefore it is not appropriate, such a short time after the entry into force of MiFID, to change this system significantly.

(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

AMAFI obviously supports the principle that investment firms should act honestly, fairly and professionally in their commercial dealings with all of their clients, irrespective of their classification. This includes providing the client with clear information which is not misleading.

However, this obligation, as regards dealing with ECPs, should not be confused with the obligation to act in the client's best interests. This obligation does not apply – and it should be said clearly that this will remain the case - when the client is an ECP simply because ECPs have sufficient experience and knowledge to look after their own interests and understand the risks involved in the decisions they take. For the same reason, they do not benefit from the best execution obligation to which the two other categories of clients, including professional clients, are entitled.

This differentiation between the three categories of clients is one of the main features of MiFID. AMAFI does not see any reason to modify this classification, particularly for a category, the ECPs, which is only available under strict circumstances and in which no client may be forced to remain, having the possibility to opt out and down in favor of a more protective category.

(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 nonstandard OTC derivatives); and/or

Save with respect to the local public authorities/municipalities (see paragraph c) below), AMAFI does not think that the client categorization rules should be changed to exclude certain entities and/or certain products such as OTC derivatives or asset backed securities. More generally, it does not believe that client categorization should be based on products.

This would create different types of eligible counterparties and professional clients depending on the underlying products, requiring different approaches. From an organizational standpoint, it would be extremely difficult to handle this complexity properly, requiring sales staff, for a same client, to provide different information depending on the product/client category concerned. As already mentioned, investment firms should be able to draw up procedures that are understandable and workable for their staff and their clients, which will be very difficult to achieve if this proposal were implemented, increasing the firms' regulatory risk.

Finally, if professional clients and even more so ECPs cannot be expected to know everything in the financial markets, at least, they are expected to know when their experience and knowledge are insufficient: "*professional clients should, subject to limited exceptions, be able to identify for themselves the information that is necessary for them to make an informed decision, and to ask the investment firm to provide that information*" (*Level II Directive, Recital 44*). This capacity is the essence of the definition of professional clients in MiFID and cannot be altered without changing the philosophy of the client categorization rules. There is no reason to transfer on investment firms their clients' responsibility to know when they don't know and are under the obligation to request more information.

(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.

As local public authorities (i.e. municipalities and other local authorities) can manage public debt, they could indeed be classified as per se professional clients, but it is true that they do not always have the necessary level of knowledge and experience. AMAFI therefore agrees with the proposal to exclude them from the category of per se ECPs or professional clients. However, these entities should still have the possibility to opt up for the professional category if they whish so based on their knowledge and experience of the market.

More generally, it would be useful to have a clear definition of what is a local authority, as this may encompass very different entities depending on the Member States. Without it, this category of entities will always trigger ambiguity as to its interpretation.

(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.

Yes. AMAFI believes that the current presumption covering the professional clients' knowledge and experience should be retained. AMAFI considers that there should be no doubt that entities listed as per se professionals are truly professionals, which anyway is not irreversible, as any such client can change category in general or for a particular transaction if he or she wishes so.

It is true that per se professional clients is a broad category that includes different entities but, their common feature is precisely that they all are deemed to possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that they incur. It this

presumption does not hold anymore, then the meaning of the professional clients category becomes unclear.

In addition, testing professional clients for knowledge and expertise raises practical issues: if one could argue that an entity's expertise could be tested looking at its past transactions, what about its knowledge? Should the test be performed on individual(s), and if so on whom? If so, would the test be valid for the entity or would it be attached to the individual himself (with the resulting issues linked to staff turnover, etc.)? Such a testing process would be very onerous for firms for little benefit considering that as for now, it does not seem that there have been major issues of client's misclassification. It is also likely that the administrative process involved will irritate clients who are already classified and have complained of the administrative burden MiFID has represented for them when it was implemented.

Even though AMAFI does not support this solution, it believes that if the EC wants to limit the list of *per se* professional clients, it should do so on the basis of objective criteria. *Per se* professional clients would then only be those for whom there is no doubt that they have the necessary experience and knowledge. If we put aside the situation of the locals (see question 105 (c) above) and given that authorized or regulated entities should naturally meet this requirement, the concern should only relate to large undertakings (point I. 2. of Annex II). If this concern is real, maybe it could then be envisaged to raise the current criteria of size to ensure that only truly large undertakings are within the scope.

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.

Ensuring an equal level of investor protection in the EU is an objective that AMAFI does certainly support. However, it wonders if this requires the introduction in MiFID of a principle of civil liability applicable to investment firms which will inevitably refer back to the legal systems of the EU members in which there are probably certain differences. It would be useful to have a better view of those differences.

In France, a civil liability regime already exists and is applicable to investment firms - including banks - in cases where the infringement of a MiFID provision causes harm to a client which may then request damages. This requires that both the breach and the resulting financial loss be proven which is not necessarily easy. But as this depends often on the facts of the matter, such proof would not be facilitated by the introduction of a general principle civil liability. For France, the EC proposal is therefore rather neutral and might be beneficial if applied to other Member States who do not already have a similar system.

It is assumed the EC does not envisage an automatic liability regime in the case of breach of conduct of business rules, which AMAFI would consider as totally inappropriate.

(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

This list which covers the conduct of business rules seems appropriate.

7.2.7. Execution quality and best execution

(109) What is your opinion about requesting execution venues to publish data on execution quality concerning financial instruments they trade? What kind of information would be useful for firms executing client orders in order to facilitate compliance with best execution obligations? Please explain the reasons for your views.

Such a requirement could be useful to facilitate access to data and their comparability. However the set of data that execution venues will be required to publish should not restrict firms' flexibility in determining which criteria are important to them in their best execution policy. Each firm should remain free to select and sort the criteria it considers necessary to assess its best execution, which may not include all the criteria listed, because some may be of little importance (and others, not mentioned, of greater importance) depending on the clients and services of the firm. Hence, the list of criteria set by the directive should not become of mandatory use by firms

(110) What is your opinion of the requirements concerning the content of execution policies and usability of information given to clients should be strengthened? Please explain the reasons for your views.

AMAFI does not think that a template for best execution policy is adequate considering the different existing types of investment firms and business models.

A way forward to promote greater exhaustiveness and clarity of execution policies could be to provide level 3 guidelines on the main aspects that should be dealt with (for e.g. the policy on OTC products). Setting a standard content would on the contrary result in administrative behaviors and tick the box approach that would result in poorer information to clients in many cases.

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

There is undoubtedly a need to clarify the definition of "dealing on own account" which under the present definition of MiFID refers only to the fact that the firm trades against its proprietary capital. The difficulty comes from the fact that there is a variety of situations in which a firm may trade against its own capital: in some cases, it may execute or be deemed to execute a client's order whereas in other situations, there may not be any client order. The consequences to be derived from one situation or from the other are naturally quite different, notably as regards the application or not of the best execution obligations of article 21 of MiFID.

In view of the need in that respect, the proposed "clarification" is very disappointing. Stating that "firms dealing on own account by executing client orders would continue to be authorized for the execution of orders on behalf of clients and to be subject to the corresponding obligations towards clients (for instance best execution)" is simply the confirmation of a well established principle. It does not answer the most difficult question which is to determine in which case a firm executes or may be deemed to execute a client's order.

This question has been addressed in 2007 in the Commission's answers to CESR (Working document ESC-07-2007). In the context of the revision of MiFID, it would be appropriate and useful to confirm and introduce in the revised directive some of the principles set out in such document, notably those explaining the criteria to be taken into consideration to decide whether the execution of a client's order can be seen as truly done on behalf of the client.

(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

The clarification that is proposed in relation to this question is very unclear. In its working document of 2007 mentioned above, the European Commission had already mentioned among the "*examples of cases where a firm executes an order on behalf of a client and therefore best execution applies*" the situation in which a client order is executed "*by dealing as a riskless principal on behalf of clients, including cases where the client is charged a spread on the transaction".*

It would be helpful to clarify what is being proposed. Is it just an addition to what the European Commission had stated in its 2007 working document, as mentioned above? And if so, what is the consequence of the fact that dealing on a matched principal basis should also be treated as involving the activity of dealing on own account? In the absence of such clarification, AMAFI considers that it is impossible to respond adequately to the question raised.

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.

AMAFI is not against this proposal in principle but the responsibility that would be given to competent authorities should not run against the prerogatives of the firm's shareholders.

Also, this matter is part of the issues examined by the Commission and the EU Parliament in relation to its green paper on corporate governance in financial institutions, and should not be dealt with in the context of the MiFID revision.

In addition, the criteria against which the members of the board would be assessed would need to be harmonised among Member States to ensure effectiveness of this new measure. Considering that this assessment necessarily includes a subjective appreciation, this will be difficult.

7.3.2. Compliance, risk management and internal audit function

(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.

AMAFI agrees with the proposal to strengthen the link between the board of directors and the control functions. One should note though that the Board should be informed priori of the removal of the officers responsible for one of these functions but should not approve it, as the responsibility for appointing these officers lies with the executive management.

Regarding complaints, one should keep in mind that this is firstly the client facing function's role to receive and deal with clients' requests. Only "true" clients' complaints should be escalated to the compliance department. Hence a precise definition of client complaints will need to be devised to ensure that the divide between commercial enquiries and requests involving a compliance matter is clear. To this purpose, only written complaints (email or paper) should be escalated to compliance.

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.

AMAFI agrees that further provisions could be added to the directive to deal with new products and activities.

This has already been implemented in France following the financial crisis.

(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?

AMAFI does not agree that the reporting on new products and activities to senior management and regulators should be under the responsibility of the compliance function, i.e. firms should be able to decide which function should report to senior management and regulators in this respect.

Compliance should indeed be involved, as one of the functions providing a sign-off in the process, but the ultimate ownership of the process should be the one of the business. If compliance was to report to senior management and regulators in this respect, it is likely to create conflicts with its duty of independence.

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.

AMAFI does not have a specific view on this issue.

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?

The consultation refers specifically to the remuneration of sales forces and the structure of incentives for the distribution of financial products. The implementing measures proposed seem to refer to the recent FSA Retail Distribution Review which focused specifically on retail structured products. As a result, it is not clear if the Commission is proposing specific conflicts provisions with regards to remuneration or whether these will be generic provisions.

Providing that the answer is the latter, AMAFI supports the proposal to empower ESMA to issue technical standards in this area in order to get a more uniform application of the conflicts of interest requirements across the EEA.

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.

In general, title transfer collateral arrangements, i.e., repo, stock lending and collateralised OTC derivatives, are offered to retail clients via the private banking or wealth management divisions of credit institutions. In our view, it would be preferable to introduce disclosure and education requirements

regarding title transfer collateral ("TTC") over retail client assets, rather than introducing a legislative prohibition on retail TTC. An obligation of "*clear, full and accurate*" information as proposed in the consultation document would appear to be a better solution. The same approach could also be considered in respect of security arrangements where rehypothecation/re-use rights arise.

Any prohibition or restriction on TTC or security arrangements with rehypothecation/re-use rights, with retail customers, is likely to increase costs and/or decrease availability of products to retail clients, because credit institutions will hedge risk with market counterparties under arrangements requiring collateral to be provided either under TTC or security arrangements; the credit institutions will have to fund such collateral requirements if they are unable to use collateral received from retail customers for this purpose.

(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.

AMAFI does not support granting Member States the option to extend the prohibition on title transfer collateral arrangements to non-retail clients. Such a move would limit investment firms' options for managing and mitigating their credit risk to non-retail clients and is likely to lead to an increase in the cost of credit provided to such clients. In particular, collateral transferred in this way is often used by the investment firms to lower the cost of funding obtained in support of client activities. Any such change would amount to a fetter on the ability of professional clients to negotiate their assets and liabilities as they see appropriate and (in treating professional clients in the same manner as retail clients) would be inconsistent with the current tiered system of client classification set out in MiFID.

(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.

We would support the introduction of a requirement for financial institutions to produce clear, fair and not misleading documentation for retail clients in the case of securities financing arrangements (which we understand to mean primarily repo and stock lending transactions) involving retail client assets. Securities financing arrangements entered over retail client assets are entered into, on the whole, with eligible counterparties and are title transfer collateral arrangements; credit risk mitigation techniques (and best market practice) result in highly liquid "eligible" collateral being received from borrowers, marked-to-market and monitored on a regular basis.

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

In certain circumstances, it may be appropriate to extend ongoing disclosure requirements concerning the use of client financial instruments to certain categories of professional clients (see e.g. the UK FSA's recent initiative on enhanced reporting to prime brokerage clients in the aftermath of the collapse of LBI(E)). However, it is important to remember that the granting of rights of use in respect of charged assets is very different from a legal and accounting perspective to the use of TTC. As a general principle, it would not be appropriate to extend ongoing disclosure requirements to TTC, since the status of TTC (which involves an unrestricted outright or "true" sale transfer of assets to an institution) means that ongoing reporting would not provide any more useful information to clients. The principal obligation on the institution in cases of TTC is to contractually redeliver equivalent assets in accordance with the relevant terms of business. This obligation is unaltered by the use of TTC in the course of an institution's business.

In addition, we do not believe that it would be appropriate to extend ongoing reporting requirements to eligible counterparties. Eligible counterparties are free to negotiate enhanced asset disclosures as part of their mandate, which may have an impact on the costs of the relevant services. The degree of sophistication of eligible counterparties and the doctrine of caveat emptor precludes such disclosures

from being hardwired into the regulatory regime. The level of protection and disclosure demanded by eligible counterparties is not comparable to retail clients.

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

AMAFI has always considered that the requirement to impose an external segregation obligation (especially into accounts open with credit institution) for client funds was not safer than the principal of an internal segregation obligation. Indeed there is no reason (and it was proved during the crisis in 2008) to consider that credit institutions, even the "biggest ones" are note exposed to a collapse.

AMAFI considers that imposing more due diligence obligation would be useless because nobody can imagine that an investment firm is better equipped to assess bank solvency better than Credit Agencies or big banks credit rating teams.

AMAFI also considers that diversification requirement would be 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.

AMAFI believes that there is no need to regulate further the provision of underwriting and placing. Firms involved in corporate finance business are already subject to numerous rules – whether those rules result from various European directives (mainly MiFID, MAD and Transparency), from national rules (notably rules laid down by the national market regulators) or from professional practices. Underwriting is almost invariably undertaken by professional market participants represented by professional advisors who are experts in the practice and regulation surrounding this activity. The supporting documentation follows clear market standards and is carefully reviewed by the involved parties and in particular their legal representatives.

The framework in which those services are rendered is generally documented at all stages: preparatory meetings (minutes of meetings), preliminary contacts (marketing pitches), market soundings, book building, records of activities carried out by investment firms etc. Procedures do exist and can be examined by regulators in the event of an inquiry.

- Concerning the syndicate. We fail to understand the fear expressed by the Commission. If the idea is to prevent the risk of a particular investment firm imposing its choice of members of the bank syndicate, the Commission may be reassured on this point: it is the issuer who controls the constitution of the syndicate of banks (selection of the global co-ordinator, of lead managers and associated book runners) and the global co-ordinator itself, if there is one, does not have the means to impose a particular bank within the bank syndicate on the client.

- The allocation process is also controlled by both internal and rules issued by the market regulator. Should the need for harmonization be felt necessary, one should start from the existing rules and not try and create new ones. Allocation criteria are by definition subjective (they can vary from one type of client, or one type of operation, to another) and they evolve with time. Among these, examples include not only the degree of interest expressed by investors, but also the volume of assets under management (when investors are hedge funds or IFAs), transaction size, possible participation of existing shareholders, etc. Filing of the various documents is naturally guaranteed, if only to comply with general internal control rules. One should add that in France, the allocation procedure is always carried out in consultation with the issuer (this is an

AMF requirement), even though the beneficiaries of these allocations are clients of the investment firms and not the issuer. Therefore, allocations cannot be set by the firms in a completely unbalanced manner. Regarding allocations, one should also mention another important criteria: investor quality. To be more precise, investors are classified into several categories according to their investment strategy (long-term or short-term holding). As a general rule, investors wishing to invest long term are better "served" than investors classified as "short only".

- Concerning the pricing of securities issued, here again this is controlled by strict procedures (discussions with the client, market soundings) and everything is documented through term sheets which shall have been previously discussed with the issuer and whose contents take into account various parameters (market conditions, investors' appetite demonstrated by market soundings, market prices, interest rates…).

Finally, we feel that as far as conflicts of interests are concerned, it is neither useful nor desirable to provide for additional rules specific to this activity. The current MiFID rules, both level 1 and level 2, already set out a clear framework that each investment firm must adapt to its own organisation and type of activities. Here again, it would seem preferable to us that the regulators carry out controls and/or inquiries to ensure that existing rules are duly respected.

Finally, it is important to stress out that there are today and there will be in future years more and more cross-border transactions which go beyond the borders of the European Union. More likely a lot of transactions will in future years take place outside the European Union while they will still involve European investors and European firms. So far, professionals have been able to adapt themselves to the needs of these transactions. Therefore it would seem counterproductive for the EU to adopt strict rules which might affect the capacity of European firms to remain involved significantly in these international transactions.

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

8.1. Options and discretions

8.1.1. Tied agents

(125) What is your opinion of Member States retaining the option not to allow the use of tied agents?
(126) What is your opinion in relation to the prohibition for tied agents to handle clients' 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

AMAFI has in the past pointed out certain difficulties resulting from the fact that the use of tied agents is not authorised in all member States. The main difficulty resulting from such a situation relates to the fulfilment of the publicity obligations and the access to information on the use of tied agents for the clients. Therefore it welcomes the Commission's proposals which aim at harmonizing further the rules on the use of tied agents.

More specifically, it welcomes the clarification that would be brought to article 32(2), second paragraph, of MiFID regarding the treatment of tied agents as a branch in order to allow appropriate and consistent supervision across Europe.

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.

AMAFI considers that there should be a harmonized recording requirement in the EEA and that it should be of maximum harmonization while providing flexibility at firms' level, as the current various requirements across EEA is a source of confusion for firms, clients and regulators.

As the requirement is an organisational rule in MiFID, the recording duration for a branch is the one of its parent's home state's rules, which may differ from the ones of the Member State in which the branch is established. In such a situation, the local regulator is sometimes of the opinion that the home state's duration requirement is inadequate and insists on the branch applying local rules, leading to compromises which are difficult to reach and to organisational inconsistencies within groups.

As regards subsidiaries, they are subject to the rules of the local competent authority, which can be different from the ones of the parent company's, here again leading to organisational inconsistencies within groups.

These differing requirements are also a source of questions from clients who do not understand why a firm (that happens to be a branch of another Member State's firm) applies a recording duration that is different to other local firms (who are subject to the local recording requirements).

Hence, for the sake of simplicity and level playing field, all competent authorities should impose the same requirement as far as record duration is concerned.

(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.

There is no doubt that staff in trading rooms involved in the activities listed by the European Commission should have their conversations recorded. This is because they are at the forefront of the fight against market abuse and they deal with transactions that can be significant from a market point of view.

On the opposite, the proposal is questionable regarding staff outside of trading rooms who are only involved in reception and transmission of orders from retail clients. Such recording would be very onerous considering the number of lines that could have to be recorded and the small size of some of the firms impacted.

Considering that the harmonisation of communication recording would serve the fight against market abuse, an analysis of the benefits of the proposal as regard market abuse would be welcome, distinguishing between trading rooms and other "locations" where the activities in scope take place. It seems unlikely that many additional cases of market abuses pertaining to the activities listed by the Commission that are conducted outside of trading rooms could be detected and followed-up upon thanks alone to this new requirement, let alone high-profile cases of market abuses. This statement is further reinforced by the observation that in high street branches, many conversations related to investments do not take place over the phone or electronically. AMAFI is therefore not supportive of requiring the recording of reception of orders outside of trading rooms because it would not generate benefits commensurate with the costs involved.

Having said that, firms who operate mainly over the phone or the Internet with retail clients should have the choice to record reception and transmission of orders as it serves as an audit trail.

Finally, one possible way to make the change less onerous for a number of firms is to authorise contractual reliance on the recording made by other firms they are dealing with, be it for transmission of orders or for execution. This would not work as an exemption but could significantly lower the costs involved in implementing the new measure.

(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.

AMAFI believes that firms should record any means of communication that they use for the activities in scope of the recording requirement. But they should not be required to record equipment that are not to be used for such purpose, providing firms have policies in place to ensure this equipment is not used, the term equipment covering the means of communication provided by the firm and the personal ones of employees.

To the extent that firms are properly organised to make sure non recorded equipment is not used to carry out the activities falling in scope of the recording requirement, there is no advantage in requiring from them that they record this equipment. An employee who deliberately wants to have a conversation on a non recorded means of communication will always find a way with today's technology. A wide ranging recording requirement would almost certainly create issue with protecting the employees' rights to privacy and not meet the objective at stake whereas policies, training, controls and sanctions, i.e. a firm's own organisation, can.

It follows that mobile phones or other electronic devices provided to employees should not be automatically recorded unless they are authorised by the firm to be used for the activities in scope of the recording requirement.

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

The perfect recording duration is difficult to set because it meets different needs and is dependent on a firm's organisation and risk assessment:

- Firms are subject to various statutes of limitations (tax, civil, commercial, etc.): it is ambitious to harmonise a recording duration without harmonising first these.
- Communication recording serves as an element of proof in client's disputes and to answer supervisory requests from regulators, tax authorities, etc.; they also serve in the fight against fraud and market abuse. These various utilisations do not necessarily converge towards a single recording timeframe.
- Firms balance the usefulness and cost of communication recording against the use of other records they have of an order received, transmitted or executed, i.e. issues (especially litigations) are not generally resolved thanks to communication recording, there are other proofs, often of lot more valuable, that can be used (termsheets, written orders, trade advices and confirmations, etc.
- Depending on their assessment of their businesses' risks and their complaints history, firms make a trade-off between the legal risk of not keeping the tapes over a given period of time and the probability of a query received after that. The result of this trade-off varies among firms since they have different businesss cycles): some keep phone conversations longer (5 years) than others (the minimum is 6 months in France).
- The extraction of data from records is time and resource consuming and difficult to achieve when the data is spanned across a long period of time. Firms need to have in place a good archiving process with indexation to be able to find the information needed among several years of data[2]. There exist tools that some regulators use that can help search for some specific words – these tools are not used by firms today.
- Phone conversations may contain personal information (from clients and employees) and may not relate exclusively to the transaction at stake; there are therefore some privacy issues to consider in keeping them for a long period. Firms are under the strict obligation to be able to justify their recording durations to the authority enforcing data privacy laws (in France, CNIL); any recording duration above a minimum set by law would have to be thoroughly justified by a purpose that is not excessive and arbitrary but is adequate, legitimate and explicit.
- As for requests received from competent authorities for market surveillance, they generally take place within 6 months of the trade and competent authorities can request that the data be recorded indefinitely.

Considering these various aspects, the need for harmonization across the EEA and the fact that the value of the records declines quickly as transactions are also recorded on paper documents within a short timeframe (confirmations, statements, trade advices, etc.), AMAFI's view is that the recording retention should be set at 6 months with the possibility for firms to extend it to three years depending on their business model and risk assessment.

This would allow firms with activities of a shorter life-cycle or that are rarely exposed to client disputes to rely on a recording duration of six months, while enabling other firms with a longer business life-cycle (for e.g. structured financing) or that are more exposed to client disputes to set the duration at three years. Firms could also retain a record, initially planned to be kept for six months, three years if warranted (by an outstanding client dispute for e.g.).

[2] It is questionable whether all firms subject to a three year recording requirement would have such organisation in place, and therefore whether their records would be usable.

This requirement should be worded in such a way though that firms who would decide to keep records for three years could not be subject to sanctions by data privacy authorities who could have a different interpretation of the legitimacy of the purpose of the recording.

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

AMAFI is strongly opposed to the abolition of Article 4 of MiFID implementing directive.

AMAFI believes that the goal pursued by the European Commission through MiFID and the other directives adopted in the financial sector since the Financial Services Action Plan of 1999 requires as much harmonization as possible. This implies that, as a rule, Member States are not allowed to retain or impose requirements additional to those in the Directive unless they can justify, in exceptional cases, that such requirements are objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are not adequately addressed in MiFID (provided also that the other conditions set out in article 4 of the implementing directive be met).

This is precisely the purpose of Article 4 of the implementing directive which forces the Member States to limit the "gold plating" provisions in their national law to what is strictly necessary and can be justified in compliance with the principles set out in the said article 4.

At first sight, it looks like what is being proposed, i.e. to replace article 4 by a mere reference to "*the general principles on the transposition of directives"* is not significantly different since according to footnote n° 265 of the consultation document, "*this would entail that Member States should fulfill the objectives of MiFID and could adopt additional measures only where these measures do no contravene the letter or spirit of MiFID or of EU law in general*". But if this were the case, why would it be necessary to abolish article 4 which has the merit of being clearer and more precise?

Unfortunately, AMAFI believes that what is being proposed is significantly different in the sense that it alleviates considerably the obligation imposed on Member States to implement the maximum harmonization objective of MiFID. This interpretation is confirmed by the fact that it is proposed to introduce an on-going obligation for Member States simply to communicate to the Commission any addition or modification in the text of the national provisions in the field covered by MiFID.

In short, it is proposed to replace a prohibition to adopt gold plating provisions subject only to specific and well defined exceptions by a mere obligation of information referring simply to very general principles !

AMAFI considers that this is contrary to the objectives of MiFID and of the Financial Services Action Plan and that this proposal constitutes a significant setback which is not properly justified by the European Commission. The fact that Member States have made relatively little use of this option to date is certainly not a valid argument. Nor is it sufficient to ascertain, without proper justification, that article 4 *"has proven difficult to apply".*

AMAFI therefore strongly believes that it is important to maintain article 4 of the implementing directive.

8.2. Supervisory powers and sanctions

8.2.1. Powers of Competent Authorities

8.2.2. Sanctions (definition, amounts, publication)

First of all, AMAFI would like to express its strong surprise at the fact that this consultation does not make any reference to another consultation initiated on the same day, by the same organization (the European Commission) on the same subject! Indeed, on 8 December 2010, the EC has launched a public consultation on a communication whose purpose is to reinforce sanctioning regimes in the financial services sector (the Communication)[3].

AMAFI welcomes this consultation on the Communication and more generally the EC's concern regarding the sanctioning regimes in effect throughout the EU and the need to harmonize the systems in place in order to create an equal level playing field. Indeed, AMAFI believes that in order to construct a single market for financial services, it is also extremely important to have efficient and sufficiently convergent sanctioning regimes throughout the EU, which based on the facts mentioned in the Communication, is far from being the case at the moment.

Therefore, AMAFI will respond thoroughly to the consultation on the Communication (whose deadline is 19 February 2011) and trusts that, on this particular question, the services of the EC in charge of the revision of MiFID will discuss this matter and exchange their views and the views of the participants in this consultation with the services in charge of the consultation on the Communication – and vice versa! At this stage, AMAFI will therefore respond in broad terms to the very general questions raised by the EC in this consultation and invites the services to refer in due course to the response that it will make to the consultation on the Communication.

(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.

AMAFI considers that indeed all Member States should adopt administrative measures or sanctions that are effective, proportionate and dissuasive. Such administrative measures should have at least the effect of putting an end to the breach of provisions of the national measures implementing MiFID and/or eliminating its effect. As regards the administrative sanctions, they should have the effect of acting as deterrent against the breach of the provisions of the national measures implementing MiFID.

(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.

In principle (subject however to what might be proposed in due time by the Commission) AMAFI is not opposed to having the most serious infringements punished throughout the EU by effective, proportionate and dissuasive criminal sanctions. Those serious infringements should certainly include those which fall under the definition of a market abuse.

[3] This Consultation paper on MiFID mentions in section 8.2.2 that the Commission's work-programme includes the adoption of a communication on sanctions in the fields of securities, the banking sector and the insurance sector by the end of the year. It refers to a 2009 report by CESR but makes no reference to the public consultation of 8 December 2010 on the proposed Communication.

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

On the question of whether appropriate whistleblowing mechanisms should be established, AMAFI is more reluctant. It supports the introduction throughout the EU of mechanisms encouraging persons who are aware of potential violations to report those violations within the financial institution concerned, provided of course that those persons be adequately protected against any risk of being dismissed or penalized one way or another within his/her firm for having reported the violations in question. Conversely, they should also be some safeguards to ensure that such reporting is not done lightly and that any unfounded reporting would be sanctioned.

On the other hand, AMAFI is not favorable to the mechanisms encouraging the direct reporting to the authorities as this is somewhat contradictory with the mechanisms which organize the reporting within the financial institution, within the framework of the compliance obligations.

AMAFI has no objection to the introduction of mechanisms encouraging persons involved in the violation of some provision of MiFID to report those violations to the competent authorities.

Having said that, in due course, naturally, AMAFI will express its views on any specific and detailed proposal the EC would like to make on this subject.

(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.

AMAFI believes that imposing the publication of sanctions is a positive element, mainly because it contributes to the education of the market participants. Indeed, having access to the decisions rendered by their authority enables them to understand better the rules applicable to them. It is important however to have the possibility to make the publication in an anonymous way, as proposed in the context of the consultation on the Communication. This possibility of an anonymous publication should exist in two sets of circumstances: when disclosing the names of the persons concerned could jeopardize the financial market but also, and this is very important, when the publication of the names would be likely to harm the persons concerned in a disproportionate way given the seriousness of the infringement that has been committed.

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?

AMAFI agrees with the Commission's view that it is necessary to develop at EU level a workable regime for the access of third country investment firms and market operators to EU financial markets in order to create a real level playing field for all financial services actors in the EU territory. This regime could indeed consist in a system of exemptive relief for investment firms and market operators based in jurisdictions with equivalent regulatory regimes applicable to markets in financial instruments. Such equivalence should be assessed in the areas covered in the EU by the main directives, i.e. as a minimum by MiFID, MAD, the Prospectus and the Transparency Directives.

A workable regime along these lines would certainly require the definition of precise criteria and parameters which a third country regime would have to fulfil in order to be considered equivalent. Criteria based on reciprocity should also be taken into consideration.

Clearly this is a very important subject which, as mentioned by the Commission itself, has a broader scope than MiFID as it necessarily concerns also at least the three other directives mentioned above. Therefore, this is a subject that should be dealt with separately and not simply as a MiFID issue.

Appropriate mandate should be given to the Commission and to ESMA to work on this matter and more specifically, (1) define the criteria and specify the process through which the assessment of equivalence of each individual third country jurisdiction would be made and (2) ensure proper implementation of these rules.

As a first stage, subject to a more thorough review of this matter, AMAFI would think that it is reasonable to apply the access mechanism only for non retail investors.

9. REINFORCEMENT OF SUPERVISORY POWERS IN KEY AREAS

9.1. Ban on specific activities, products or practices

(142) What is your opinion on the possibility to ban products, practices or operations that raise significant investor protection concerns, generate market disorder or create serious systemic risk? Please explain the reasons for your views.

AMAFI is skeptical about the effectiveness of bans on products, practices or operations imposed by a competent authority. Recent history has shown that it creates important issues in terms of application and that it distorts the level playing field (see for example the ban on short selling or the AMF and ACP's positions on structured products in France).

As far as market disorder is concerned, it generally results from improper behaviors rather than from a specific product in itself. Products are suited to some clients and not to others; they can not be condemned per se. The focus should therefore be on practices rather than products.

In addition, a ban should not be a substitute for effective control and enforcement, especially since its consequences are wide ranging and harm indiscriminately law abiding intermediaries as well as infringing ones. Concerns about particular products should first be addressed as part of ongoing supervision of firms and enforcement process.

The possibility for a competent authority to apply a ban could create significant market discrepancies within the EEA, which runs against the objective of harmonisation embedded in MiFID. In AMAFI's view, the possibility of a ban should be exclusively in the hands of ESMA (a power that it has already according to article 9.5 of ESMA regulation) if we are to maintain harmonized financial markets in the EEA. An efficient escalation process would need to be defined to ensure a competent authority can call up ESMA quickly on a matter of market disorder or systemic risk and ESMA can examine it rapidly, according to precise and clear criteria.

(143) For example, could trading in OTC derivatives which competent authorities determine should be cleared on systemic risk grounds, but which no CCP offers to clear, be banned pending a CCP offering clearing in the instrument? Please explain the reasons for your views.

The ban of OTC derivatives which are not cleared by a CCP is not adequate as:

- such instruments do not necessarily exacerbate systemic risk which can be properly managed through appropriate collateralisation arrangements;
- it would undermine the purpose of the proposed exemption from CCP clearing afforded to non-financial end-users.

(144) Are there other specific products which could face greater regulatory scrutiny? Please explain the reasons for your views.

See our answer to question (142) above.

9.2. Stronger oversight of positions in derivatives, including commodity Derivatives

(145) If regulators are given harmonised and effective powers to intervene during the life of any derivative contract in the MiFID framework directive do you consider that they could be given the powers to adopt hard position limits for some or all types of derivative contracts whether they are traded on exchange or OTC? Please explain the reasons for your views.

Regulators should be given powers to adopt hard position limits subject to that criteria regarding categorization developped in the question 61 above and extension of the data collected and supervision of the trades by authorities are precisely defined and measured (cf. question 62), regardless if trades are executed on an exchange or OTC.

AMAFI emphazises that the set up of limits or restrictions that would cover only part of the participants or activities or that would apply only to certain type of markets or instruments could lead to a disequilibrium of market liquidity and the quality of the price signal.

Furthermore, measures such as position limits should be regarded with a bias towards internationalization of the markets and products.

Such a type of measures should be organized on the basis of international standards approved by all the major countries.

(146) What is your opinion of using position limits as an efficient tool for some or all types of derivative contracts in view of any or all of the following objectives:
(i) to combat market manipulation;
(ii) to reduce systemic risk;
(iii) to prevent disorderly markets and developments detrimental to investors;
(iv) to safeguard the stability and delivery and settlement arrangements of physical commodity markets.

AMAFI considers that positions limits should be designed to maintain market integrity and prevent excessive turbulence on the markets.

(a) Looking at the objectives presented by the Commission, AMAFI is not convinced that position limits would prevent adequately market manipulations unless authorities have an appropriate view of the full components of a position on a specific product for the main actors, i.e. knowledge of the outstanding simultaneously of the physical underlying position, all derivatives commitments (swaps, forwards, bilateral and reported OTC).
(b) Likewise for the reduction of systemic risk, financial regulated institutions have to comply with ratios that should prevent from these risks. For non regulated institutions, limits should be fixed taking into account the comments on (a) above and only when positions exceed specific thresholds.
(c) Position limits would be adapted to prevent disorderly markets by preventing excessive speculation
(d) Similarly, position limits to safeguard the stability and delivery and settlement process of physical commodity markets are acceptable. Those limits are already adopted for a number of derivative contracts based on trading and/or clearing exchange rules.

(147) Are there some types of derivatives or market conditions which are more prone to market manipulation and/or disorderly markets? If yes, please justify and provide evidence to support your argument.

As pointed out in the AMAFI's paper on commodity issues prepared for the French presidency of the G20, market manipulations in the commodity products tend to reflect an inadequate level of information by markets participants of the conditions prevailing on the physical underlying products (level of production, disponibility of storage facility or grinding, transportation, …).

(148) How could the above position limits be applied by regulators:
(a) To certain categories of market participants (e.g. some or all types of financial participants or investment vehicles)?
(b) To some types of activities (e.g. hedging versus non-hedging)?
(c) To the aggregate open interest/notional amount of a market?

Taking into account all recommendations developed in the various questions above about the necessary cautiousness to the definition of market participants' categorization and the implementation of position limits, AMAFI would be in favor of keeping at the level of authorities only a limitation at minima to control excessive speculation (i.e. point © in question 146 above). This view is based on the high necessity to maintain orderly markets for the confidence of investors. Such limits should apply only to some activities that would fall under "speculative activity". Authorities are the only ones that have access to the full range of disaggregated information. They should be given the necessary authority to access directly to the final client (holder of the position) to get more detailed information (this is already the case for some regulators).

The utility of position limits managed by authorities would required to be efficient to be largely knowned and predictable by all market participants. Ignoring that fundamental rule could be disastrous for the commodity markets covered by such limitation system.