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AMF

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AMF responses to the European Commission consultation on the MiFID Review[1]

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.**

The AMF is of the view that admission to trading should remain a meaningful concept and is concerned that such concept would be watered down by being applied to organised trading facilities, including to private liquidity pools such as crossing networks or even Multilateral Trading Facilities (MTFs). Admission to trading is the unique feature that really differentiates RMs from MTFs, as reflected in MiFID and in the Prospectus and Transparency Directives. Should this feature disappear, the distinction between RM and MTF would no longer make sense and it does not flow from the rest of the Consultation that this is the aim the Commission is trying to achieve. Admission to trading on a RM means that an appropriate and harmonised level of information is provided to investors at the time of admission to trading and on going basis. Extending the concept of admission to trading to platforms other than RM would only lead to significant confusion as to the content and quality of the information, and as well the level of protection (c.f. the Take-Over Directive) to be expected by investors when trading in, or holding, equities “admitted to trading” on those platforms. .

Where MTFs offer trading in shares admitted to trading on a Regulated Market, the responsibility of the operator of the MTF should remain to ensure that the information due by the issuer based on admission to trading of its share on a RM is actually available for market participants.

Where MTFs offer trading in shares not otherwise admitted to trading on a RM, the extension of the concept of admission to trading would only have a real impact, and thus avoid confusion, together with the extension of the scope of the Prospectus and the Transparency directives. This would however be in contradiction with the aim of tailored requirements for instance for SME markets, which typically operate under the MTF framework.

Actually, any extension of the concept of admission to trading would rather be an issue to be discussed under the Prospectus and Transparency Directives. The AMF does not see a need to revisit the issue.

[1] http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/consultation_paper_en.pdf

2.2. Organised trading facilities

2.2.1. General requirements for all organised trading facilities

(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 recognised by MiFID? Please explain the reasons for your views.**

The AMF understands and supports the rationale behind the Commission's proposal for a broad category of organised trading facility (OTF), aiming at restricting the scope of unregulated OTC transactions and ensuring that trading systems with similar functionalities are subject to similar requirements. The definition should indeed exclude systems used simply to route an order to an external trading venue; it should not exclude any system used for concluding transactions.

The AMF generally agrees with the requirements for OTFs suggested in the Consultation and notes that, as opposed to the requirements applying to the specific sub-regime for organised trading facilities for OTC derivatives as described in Sections 2.2.3, there seems to be no general pre-trade transparency requirements applying to OTF under sections 2.2.2.

The AMF wishes to stress that the introduction of the OTF category should be coupled with a review of the range of trading venues currently recognised by MiFID. As explained under Questions 21 and 22, the SI regime has proved totally unsuccessful, with persistent ambiguity and confusion as to its real purpose and would definitely better belong to the category of organised trading facility the Commission suggests creating. The revised concept of trading venues should include RMs, MTFs, and other eligible OTFs for derivatives trading as needed (See answer to Question 8/9).

Although supportive of the introduction of an OTF regime, the AMF is also of the view that a clear distinction should remain between trading venues (Regulated markets and MTFs, and other eligible OTFs for derivatives trading as necessary) on the one hand and Organised Trading Facilities (OTFs) on the other hand. It would be confusing to try and align the requirements for all trading platforms and trading systems, while maintaining, or setting up different categories that indeed do reflect the variety of ways trading can be organised, or accessed. As an example, the AMF considers that the explicit consent of the client should continue to be required for trading outside a trading venue.

The AMF also stresses the need to clarify the definition of an MTF currently provided in MIFID. Such clarification is all the more needed to avoid possible confusion with the OTF.

An MTF should be defined as a non discretionary multilateral system with open access. A multilateral system can be order driven or quote driven provided it operates a competitive market making system. An MTF should be subject to appropriate governance arrangements, run as a separate legal entity from the other investment services possibly provided by the operator of the MTF, with dedicated systems, and subject to pre-and post trade transparency for every asset class. The definition of an MTF as a "multilateral system which brings together multiple third party and buying interest" should be further clarified, for instance to include competitive market

making or to exclude the possibility for an MTF to be operated by an investment firm with that investment firm being the unique member of the TF, therefore replicating the Broker crossing network model under the MTF umbrella.

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

The OTF definition should include every organised system for executing transactions outside a MR, an MTF and which does not fall within the proposed definition of an OTC transaction. The Commission suggests that OTC transactions be defined as "bilateral transactions carried out on an ad hoc basis between counterparties and not under any organised facility or system". However, experience shows that definitional issues are source of intense discussions both at domestic level and across Member States. The AMF therefore suggests that a more precise list of transactions qualifying as OTC transactions be set up, and adjusted, as needed by ESMA through binding technical standards. Such list of OTC transactions would include transactions for which participation in the overall price discovery process would not be appropriate such as, for instance, multi-leg transactions. The flagging of OTC transactions will help understand more precisely which transactions are included under the OTC acronym and ensure that OTC transactions are indeed limited to the narrowly defined scope.

(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?

The AMF supports creating a separate investment service for operating an organised trading facility, which would means that the operator of the facility provides a service to its clients (See also Section, 7.2.8). It would then however be unclear how a market operator could run such an OTF, as suggested in the consultation document. If the operation of a trading facility is a separate investment service, the AMF sees no reasons to create an exemption by not allowing the passporting of the service. The relevance of passporting the facility may depend on the OTF sub category. It would for instance appear very odd for the operator of a broker crossing network to passport any facility as the operator is expected to cross clients (or proprietary orders) already received. On the other hand, an inter-dealer broker would likely need to passport trading screens.

(5) What is your opinion about converting all alternative organised 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.

The AMF supports converting organised trading facilities into MTFs after they reach a specific threshold. The threshold should be calculated by assessing the volume of trading per facility compared to the global volume of trading. The details of the calculations should be worked out by ESMA.

The AMF considers, as an overarching principle, that all transactions in standardised and sufficiently liquid financial instruments – and all shares admitted to trading on a RM or otherwise traded on an MTF or publicly offered, would be meeting these criteria – should be required to be traded on a RM or an MTF (and/or "eligible platforms for derivatives trading"), with appropriate pre-trade transparency waivers for large transactions. This

requirement would however include limited exceptions for specific transactions that, due to their very characteristics, are not expected to participate in the price formation process (e.g. non-addressable liquidity) and other possible exceptions such as OTFs, as long as such OTFs account for a limited percentage of overall transactions. Accordingly, the AMF supports a threshold for the activity of each OTF beyond which the OTF would have to route its orders to a MR/MT or, if the threshold is structurally exceeded, have to become an MTF.

For the same reason and as a way of supporting the move towards more trading on regulated markets and MTFs, the AMF agrees with the introduction of a cap for trading activity outside such regulated markets and MTFs, which could be translated into targets (progressively increased) for trading on RMs and MTFs. The flagging of OTC transactions will help better understand which transactions, that currently take place OTC and/or on OTFs tomorrow, could potentially take place on RM/MTFs and adjust the targets accordingly.

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.**

Without prejudice to the general comment above, the AMF supports the new sub regime for crossing networks in order to introduce some granularity in the broad OTF category both for transparency and transaction reporting purposes.

The AMF also supports the creation of a sub-OTF regime for systematic internalisers, which would no longer qualify as a trading venue. In addition to the requirements under Section 2.2.1, the operator of this OTF sub category would be required to add the relevant SI identifier to post trade information and transactions reports and to publish monthly aggregate monthly data as to the transactions in which it has been acting as SI.

(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.**

The AMF fully supports the clarification under which, if more than one firm is able to enter orders into a system, it would be treated as an MTF. The fact that more than one firm may enter orders into a crossing system changes the nature of the system from a proprietary one to a more open system that much resembles an MTF by the diversity of its participants. In addition, interconnections between crossing networks would be too simple a way of circumventing the requirement for a crossing system to become an MTF above a certain market share. Conversely, it would be useful to clarify that an MTF cannot be limited to the operator of the MTF being the only participant entering orders for its own clients.

The AMF also agrees that a crossing network which executes proprietary orders against client orders should be identified as a systematic internaliser OTF sub-category. It would then be totally transparent for everyone, including for clients, that clients' orders may be executed against proprietary orders of a firm. The execution of proprietary orders in a broker crossing network is a deviation from the original purpose of a crossing network to circumvent the systematic internaliser regime.

Where a crossing network matches client orders based on an imported price, the AMF wishes to invite the Commission to give further thoughts to the possibility of limiting the reference price used to a mid point, as suggested in the answer to Question 30 for the reference price waiver. Crossing of client orders at other reference prices, such as a best bid or best offer may raise consistency issues with best execution requirement, among other things.

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

(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.

In line with the G20 statement and other international initiatives, the AMF strongly supports a requirement that derivatives eligible for clearing and sufficiently liquid be traded on regulated markets or MTFs. If it happens that, for international harmonisation and consistency purposes, a third category of eligible trading venue for derivatives trading would be needed, for instance where the MTF regime would not accommodate the characteristics, still under development, of Swap Execution Facilities in the US, the AMF would then agree that the concept of trading venues be extended, for derivatives trading only, to a another eligible trading platform satisfying, among other things, the conditions set in section 2.2.3 .

Many benefits can be expected from trading of sufficiently liquid derivatives on regulated markets and MTFs and, where needed, other "eligible" OTFs for derivatives trading, including:

- Transparency: Pre-and post trade transparency reduces information asymmetry. Price transparency contributes to efficient price discovery and pricing of assets, allows for comparability, reduces search costs for market participants and strengthens risk management in allowing for a better understanding of products.
- Price formation: One of the most important benefits is the increased efficiency in the price formation and discovery process that results from bringing together the interests of multiple buyers and sellers.
- Liquidity: Trading on eligible platforms involves a large number of market participants expressing interest to effect transactions and can result in enhanced liquidity around these venues, while increased competition among participants puts pressure on trading costs. Trading venues also have the potential of attracting new participants on these venues.
- Operational efficiency: Trading venues offer a higher and more uniform level of operational efficiency and resilience.
- Market surveillance: Trading venues facilitate efficient oversight of derivatives trading by enabling market operators and regulators to more easily have a comprehensive and accurate view of market activity and identify potential market abuses.

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

If the creation of a third category of trading venue, in addition to MRs and MTFs proves indeed necessary for derivatives trading, the AMF would generally agree with the conditions set out by the Commission in 2.2.3, and

supplementing those provided in 2.2.2 for an organised trading facility to become an eligible trading venue for derivatives trading. The AMF would however like to stress that the multilateral criteria should apply no only to access but also to trading, be it under an order driven/limit order book system, an order driven system with competitive dealers or through a hybrid system which could include request for quotes where the answer to the quotes would be publicly displayed.

In addition, the platform should be authorized by, and not just be notified to, the relevant authorities and operated as a separate legal entity from other activities of the investment firm. Like access rules, trading rules should be transparent and non discriminatory.

For the avoidance of doubts and as commonly understood under MiFID, pre-trade transparency requirements should extend beyond participants in the platforms to the general public.

The concept of such a specific sub-, or rather supra- OTF regime for derivatives trading should be seen in the wider context of a clear distinction between "eligible" trading venues, for which requirements (governance/organisation, multilaterality, pre-trade transparency etc..) should be very demanding, and "regular" OTFs, primarily aimed at trading in less liquid financial instruments.

(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.

The AMF agrees with the Commission that, given the technicalities of the exercise, it should be for ESMA, in consultation with the industry and other stakeholders (e.g. ESRB), to assess and decide on the criteria by which a derivative would be considered as sufficiently liquid to be traded on a Regulated Market, an MTF or another eligible platform, where needed, as described 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.

It is unclear how the additional parameters suggested by the Commission would combine with the liquidity test. A high concentration of dealers in a rather illiquid derivative may not necessarily call for trading a RM/MTF/other eligible platform while a dispersion of dealers in liquid ones would nonetheless call for such move. The AMF supports straightforward criteria based on liquidity and turnover. Taking into account the characteristics of a derivatives contract, such as its standardisation and the volume traded, a judgment will have to be made as to whether such contract could, and should, be traded on an "eligible platform". A contract may qualify as sufficiently liquid for trading on such platform independently from the number of OTC market makers and the assessment should be made in a forward looking manner, having in mind the "potential" liquidity that could be attained if traded on eligible platforms.

(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.

Index CDS, interest rate swaps are some examples of OTC derivatives that could be required to be traded on regulated markets, MTFs or, as needed, other eligible platforms, as being sufficiently standardised and liquid.
The AMF sees no OTC derivatives for which mandatory clearing on a regulated market, MTF or, as needed, other eligible organised trading facility would seriously damage investors or market participants as, by definition, trading on such eligible platforms will be mandated only for OTC derivatives that are sufficiently standardised and liquid to avoid the potential drawbacks alluded to. In addition, waivers from pre-trade transparency for block trading and limited exceptions for specific transactions will accommodate circumstances where trading on eligible platform may potentially raise issues. There is no reason to *a priori* exclude any class of OTC derivatives from such a move when they pass the standardisation and liquidity test.

2.3 Automated trading and related issues

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

Yes, the definition is appropriate, as it encompasses both execution and investment decision algorithms.

(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?

The AMF supports the proposal to require any high frequency trader to be authorised as investment firm over a specified activity threshold as it would allow to better prevent, anticipate and manage systemic risks related to the most important actors in that field.

(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?

The AMF can only support the requirement to have specific risks controls be put in place. Obviously, it may not be sufficient to require such controls from authorised firms only (i.e. the ones over a specific threshold) since in case control is lost over algorithms, even small firms may suddenly crowd the market with orders. For that reason, depending on the case, risk controls should be performed, either at the level of the firm itself (for authorised firms), or at the level of broker firms offering DMA or “sponsored access” to automated, non authorised firms. Beyond that, operators of trading venues should implement their own risk controls.
Besides the AMF welcomes the requirement to report the algorithm(s) used by any automated trading actor, whether authorised or not, to the competent authority of the venue it is operating on. However, further thoughts may be given to a potential distinction, to be made through ESMA technical standards between algorithms that trigger investment decision, which would be covered by the reporting requirements, and algorithms used for optimizing execution. A threshold activity could also be possibly considered. For achieving convergence and to find the right balance in the level of required details, the information to be notified should be determined by

technical standards at ESMA level, if not reported to ESMA itself.

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

To ensure a level playing field, all trading venues should be subject to similar risk controls. With respect to circuit breakers as a way to mitigate disorderly trading in particular when resulting potentially from automated trading activity, the AMF supports the harmonisation by ESMA of their types and levels across European trading venues, taking into account the market model of the venues but provided that they are similar in effect. It should be avoided that trading continues on one venue while it has stopped on another.

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

The AMF supports the proposal that co-location facilities are offered on a non-discriminatory basis provided though the fees component is taken into account.

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

Prescribing minimum tick size across Europe is considered by the AMF as an important tool to have leverage so as to ensure the efficiency of the price formation mechanism by giving back a central role to the principle of time priority of orders. When tick sizes are too small, orders are scattered on a large range of price limits, so that there is no incentive for sophisticated traders to unveil their intentions and interests in due time. Indeed, there is often a price limit with a high degree of priority in the order book at which it is possible to enter orders at any time and take advantage of any new opportunity in the order book. Price formation is not as efficient as it should be then.
ESMA should 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, 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.

(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?

In the AMF view, high frequency traders (HFT) should not be assimilated to market makers, as the strategies HFT pursue do not systematically result in providing liquidity to the market as acknowledged in the consultation paper.
The AMF would rather support an approach whereby all operators of trading platforms should ensure that any incentive (including on fees) they grant to trading strategies supposed to provide liquidity are balanced with commitments and requirements for the concerned members to ensure that provision of liquidity, and, assessed accordingly.
In addition, the AMF would support steps towards a better definition of market makers and harmonisation across market places of their status (commitments and incentives granted) so as to limit risk of unfair competition between venues.

(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?

The AMF is of the opinion that general principles should be set in the amended level 1 directive. Such principles should refer to ensuring fair access and a level playing field between different types of market participants, preserving the markets' social utility, and providing the best possible trading conditions for all investors as well as meaningful transparency. In particular, the activities of high frequency traders should not undermine fair competition or impair the efficiency and security of the market.

These general principles should then be rolled out in appropriate implementing measures. There are indeed many technical ways to make sure that participants pay the right price for order book priority, and do not crowd the order book with orders only to blur the picture for other participants. Indeed, the AMF is concerned by participants sending orders that are cancelled or modified within a timeframe that cannot have possibly allowed receiving, sending and handling any new information. All these options (e.g. tick sizes, minimum compulsory period of presence in the order book, order-transaction ratio, changing the fee structure for example to charge a fee for every order entry or modification or cancellation) should be deeply and carefully analysed, each one having specific advantages and drawbacks, taking into account the possible threshold effects as well as risks of circumvention. The AMF would support ESMA to be granted the role to determine the most appropriate options to be implemented in terms of market micro-structure, in continuation with the workstream already initiated by CESR.

Imposing a minimum period for the orders to rest in the order book would limit the prevalence of "vanishing liquidity" and "quote-stuffing" but may be easily circumvented through the introduction of other orders and thus potentially creating further interference.

The alternative solution of limiting the order-transaction ratio by participant should be further explored. It may limit certain strategies based on introducing massive number of orders, ultimately not executed or massively cancelled, or close to manipulation (e.g. quote-stuffing) though the specificity of market-makers that when truly providing liquidity need to reposition constantly their orders to manage their risk needs to be taken into account as well as the potential complexity for operators of trading venues to implement such requirements per trading participant.

The upcoming review of the Market Abuse Directive should be an opportunity to ensure that the definition of potential types of market abuse keeps pace with trading developments, including IT developments.

2.4. Systematic internalisers

(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.

The AMF is of the view that SI should become a subcategory of organised trading facilities and no longer be a trading venue. The SI regime failed to deliver its expected benefit, including due to its very weak transparency requirements and the uncertainties as to the precise scope of the definition. The AMF recalls in particular that the SI regime was initially aimed at retail service providers (RSPs) and notes that most of them are currently not registered as SIs. The AMF welcomes quantitative thresholds to avoid inconsistent interpretation, although it is expected that, should pre-trade transparency requirements disappear for this sub OTF category, definition issues will become less controversial.

(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.

The suggestion made by the Commission to require SI to publish two sided quotes up to 10% of the SMS i.e. up to 650 Euros for 90% of the "liquid shares" would be a good step forward but would clearly not be such a significant improvement to pre- trade transparency that it would justify the efforts trying fixing the SI regime. The AMF rather supports limiting the market share of an SI as an OTF sub-category and clarifying the definition.

2.5. Further alignment and reinforcement of organisational and market surveillance requirements for MTFs and regulated markets as well 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 unclear from the consultation document whether the Commission suggests further aligning organisational requirements for regulated markets and MTFs, as suggested in Question 23, or for OTFs as well, as suggested in the explanatory text.

The AMF supports further alignment of organisational requirements for trading venues, i.e. MR, MTFs, and, if necessary, eligible derivatives OTFs. However, for this alignment to be effective, organisational requirements in the framework directive should be supplemented by implementing measures and ESMA binding technical standards. The AMF wishes to stress that a critical aspect of this need for further alignments of organizational requirements for MRs and MTFs are the human, financial and IT resources that should be made available by RMs and MTFs to meet their market surveillance obligations as set forth in MiFID Article 43 and Article 26 respectively.

The AMF does not believe it would be appropriate to align organisational requirements for trading venues and OTFs as the latter will have a very limited market share and are not expected to play the same key role in the organisation of trading. See also answer to Question 24.

(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?

While supporting a regulatory framework being introduced for organised trading facilities as described in 2.2.2, the

AMF, as explained earlier, sees merits in continuing to make a distinction, for some requirements between trading venues on one hand (MR, MTFs, or, as needed, other eligible derivatives trading venues), and OTFs on the other hand.

The AMF supports the suggested first step towards more coordination between trading platforms as suggested by the Commission but believes that for it to be effective and efficient, such coordination requirements should focus on trading venues, consistent with their responsibilities to identify disorderly trading conditions or conduct that may involve market abuse. Implementing measures and ESMA binding technical standards will be necessary to further define the information that trading venues trading in the same financial instrument would have to share for that purpose.

However, this real time information on potential disorderly market conditions or market abuse would require strong follow up action. It is uncertain that competing trading venues will be willing to conduct joint analysis of potentially suspicious orders and trades and jointly decide whether or not to report a suspicious trade to their relevant competent authority. Cooperation between relevant authorities for cross border market surveillance will remain of critical importance.

As regard circuit breakers, the AMF is of the view that their implementation and triggering should not be left at the discretion of each trading venue but that ESMA should ensure that effective coordination of circuit breakers is in place across trading venues trading in the same financial instrument.

2.6. SME markets

(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?**

The AMF fully agrees with the statement made by the Commission on the SMEs' contribution to economic growth, employment, innovation and social integration and the need to promote SME markets.

However, it is unclear whether the MiFID review is the best means to that end. Although trading venues for less liquid shares may operate under a trading model different from the one used for the most liquid shares, there seems to be no obvious reason why the operator of an SME MTF should be subject, under the framework directive, to organisational and system requirements different from the ones applying to an MTF with a similar trading volume. For instance, requirements f) to i) are relevant for all trading venues, whatever the equity traded.

Eligibility conditions for an issuer to be traded on an SME and the content of the admission document are just two examples of the SME market specificities that need to be addressed. However, such issues are currently not dealt with in MiFiD and, for the sake of clarity and consistency, the AMF considers that those very valid points that should be dealt with, as already mentioned, through amendments to the Prospectus and Transparency Directives. Those amendments should aim primarily at setting a credible ceiling (i.e. sufficiently high) for the definition of SMEs.

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

The AMF is of the view that the objective should not be to try and define what an SME market is but to define the criteria under which an issuer would qualify as an SME. In that context, the AMF considers that the market capitalisation for issuers eligible to such an SME status should not be set as an absolute number but as a percentage of the average market capitalisation of the local on the trading venues of the Home member state of the issuer. Such approach better takes into account local market specificities and avoids threshold effect.

3. PRE-AND POST-TRADE TRANSPARENCY

3.1. Equity markets

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?

The waiver which currently gives rise to the largest spectrum of interpretation is the reference price waiver. The AMF is very much concerned on how the use of the waiver has evolved over time, including as regards the “price” used as a reference, and recommends the deletion of this waiver in the framework directive. The “large in scale” waiver appears appropriate and sufficient to deal with genuine concerns related to the potential market impact of a large transaction.

(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.

The AMF is of the view that actionable indications of interests should indeed be treated as orders and required to be made pre-trade transparent. Actionable IOIs have exactly the same characteristics as orders and should be treated accordingly. Where prevented to accept “dark” IOIs on their systems, operators of trading venues/trading facilities should not be allowed to circumvent such prohibition by operating systems that connect trading participants outside the trading venues allowing them to use IOIs.

(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 AMF agrees with the suggestion that order stubs, when below the large in scale threshold, should not be eligible to the large in scale (LIS) waiver. The purpose of the LIS waiver is to protect market participants from the potential market impact that might otherwise result from the disclosure of their order. Given the purpose of the waiver, there is no rationale for considering that orders of equal size, with the same potential market impact should benefit from a waiver depending on whether or not they are the residual portion, and possibly, the very last

residual portion of a partly executed large order.

(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.

The AMF is of the view that the reference price waiver should be deleted altogether and relevant concerns about potential market impact of pre-trade transparency dealt with under the Large in scale waiver.

However, should the reference price waiver be ultimately retained, the AMF 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 vary 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.

Should the reference price waiver be ultimately retained, the AMF also supports the introduction of a minimum order size that should be material. The potential benefit for a retail client to cross the spread for his order in a liquid share is negligible compared to the fees that the intermediary actually charges for the execution of the order, so the AMF believes such retail order should have contributed to the efficiency of price formation on a pre-trade transparent market.

The minimum order size for the waiver should take into account the volumes available at the best limit. Different minimum order sizes could be contemplated based on the liquidity/turnover of the share. A minimum size equal to, at a minimum, 50 000 Euros for the most liquid shares could be contemplated.

However, the AMF wishes to stress the same minimum order size should be introduced for the negotiated trade waiver in order to avoid the reference price waiver restriction being circumvented by the use of the negotiated trade one.

Although this may belong to implementing measures rather than the framework directive, the AMF also wishes to stress that the reference price waiver should be limited to the mid-point. Any other reference price is indeed directional, and as such in contradiction with the “passive” trading the reference price waiver is supposed to reflect. In addition, bids and asks that contribute to the calculation of the mid point should only be taken into account when representing a sufficient volume compared to the order to be executed (e.g. a bid/ask for 10 shares should not be taken into account for the calculation of the mid point for the execution of an order of 10 000 shares).

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

The AMF supports keeping the large in scale waiver thresholds in their current format and notes that the reduction in trade or order size is not in itself a sufficient rationale for amending the LIS thresholds. As explained earlier, the purpose of the LIS waiver is to protect large orders from undue market impact. Although the execution of large

orders may possibly be more complex today due to the reduction in trade size and the ability to trade on multiple venues, it has not been demonstrated that the execution of such orders, possibly across multiple venues, would ultimately have a larger impact today. Decreasing the LIS threshold would unnecessarily promote further dark trading to the detriment of the efficiency of the price formation mechanism.

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

The AMF strongly supports the suggestions made by the Commission for reducing delays in the publication of data, both as regards the deadline for reporting in real time and deferred publication of large transactions where the transaction is between an investment firm dealing on own account and a client of that firm. Together with pre-trade transparency, post trade transparency is critical to efficient markets; however post-trade transparency is only valuable for market participants and for efficient markets if made available as soon as possible. The AMF notes that the shorter delays suggested for deferred publication of large transactions will be more in line with the delays that actually existed before the implementation of MiFID and welcomes this move.

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.

The AMF supports extending transparency requirements to equity-like instruments, i.e. to depository receipts, ETFs and certificates (i.e. shares without voting rights) that are admitted to trading on a regulated market as those instruments are very close to a share from an economic perspective. With the same reasoning in mind, the AMF would invite the Commission to further extend those transparency requirements to UCITS and Alternative Investment Funds (AIFs) that are admitted to trading on a regulated market.

(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?

As a preliminary analysis, the same system of thresholds as for equities could be used for certificates and depository receipts. Further work should be conducted by ESMA to assess the relevance of those thresholds, and to suggest alternative ones as appropriate, for UCITS and AIF.

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 organised trading facilities? Please explain the reasons for your views.

The AMF supports implementing and harmonising pre and post trade transparency requirements for shares

traded only on MTFs, where trading takes place on an MTF. There is actually little justification to have a distinct treatment for two sets of shares which are equally traded publicly. Whether or not the share is traded on an MTF only or admitted to trading on a RM as well, pre and post trade transparency are needed to support the efficiency of the overall price formation process and assist the effective operation of best execution obligations by enabling investors or market participants to assess at any time the terms of a transaction they are considering and to verify afterwards the conditions in which it was carried out.

For the limited circumstances where trading in an "MTF-only share" would be taking place outside an MTF, the AMF considers that harmonised post-trade transparency would be sufficient.

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

The AMF is of the view that deferred publications and thresholds for shares should continue to be based on a combination of transaction size and turnover and that the amendments suggested for the deferred publication regime for large transactions accommodate transactions in SMEs, with no need for a revised calibration.

3.4. Non equity markets

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.

The AMF supports a modification of the MiFID framework directive to include a wider set of instruments including bonds, structured products and derivatives but wishes to make the following comments on the more precise proposals made in section 3.4., first on pre-trade, and then on post-trade transparency.

As explained above, the AMF strongly believes that, under MIFID, all standardised and sufficiently liquid instruments be should be traded on trading venues (i.e. RMs, MTFs or, where needed, other eligible venue for derivatives trading) with adequate pre–trade transparency. Where those instruments are not sufficiently liquid to be traded on such traded venue, the AMF does not consider that imposing pre-trade transparency requirements would be a thoughtful way forward.

ESMA should be entrusted with the definition of the criteria for assessing when a specific asset class or class of instruments is deemed to be sufficiently liquid to be traded on a trading venue. As a preliminary analysis however, the AMF is of the view that an OTC derivative subject to mandatory clearing is not *per se* necessarily sufficiently liquid to be traded on a trading venue. It is even less so for OTC derivatives that are just reported to a TR.

A similar analysis would apply to bonds and structured finance products regarding pre-trade transparency. However, the AMF does not support extending the sub OTF regime described in 2.2.3 beyond derivatives trading, as the creation of such category would only answer a potential need for international coordination for derivative trading. Accordingly, pre-trade transparency for bonds and structured products would be limited to RMs and

MTFs.

As regards post-trade transparency, the AMF agrees with the scope of instruments suggested by the Commission for bonds and structured products, i.e. all bonds and structured financed products which have been admitted to trading on a RM or traded on an MTF, or with a prospectus. Introducing post trade transparency requirements to every derivatives contract reported to a TR, which would actually cover all derivatives contracts to which an investment firm is party, would mean covering a far broader scope of instruments than for bonds or structured products. For the sake of consistency and in order to avoid watering down transparency requirements to include customised and quite complex derivatives, the AMF suggests, as a first step, limiting post trade transparency requirements to derivatives that are centrally cleared or identified by ESMA as eligible for clearing obligations.

(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).

Regulated markets, MTFs and, where needed, other eligible venues for derivatives trading as per section 2.2.3 would have to publish the same pre- trade transparency on non-equity as currently required for equity markets. See MiFD Implementing Regulation, Annex II Table 1, with the additional publication of quotes (i.e. firm quotes) provided by a participant not on an ongoing basis but as an answer to a request for quote received from another participant.

(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.

Taking into account the experience of systematic internalisers in shares, the AMF does not support the introduction of a “Systematic internaliser- like” regime for non equity OTC trades. An investment firm executing trades OTC in an organised way would quality as an OTF. That OTF would be required to become a RM, MTF, or another eligible platform for derivatives, above a certain market share.

The AMF is of the view that standardised and sufficiently liquid OTC derivatives should be required to be traded on a RM/MTF or an organised trading facility as described under 2.2.3. Pre-trade transparency would not appear appropriate for the less liquid derivatives that would remain traded outside this set of “eligible” trading venues. The same reasoning applies to bonds and structured products. The sufficiently liquid ones would be required to be traded on a RM or MTF, with adequate pre-trade transparency. For the less liquid ones, traded outside those venues, post trade transparency would be appropriate.

(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.

The AMF generally supports a post trade transparency regime that would be transaction based and predicated on a set of thresholds by transaction size.

(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.

Besides transaction size, the AMF suggests that, at least for bonds and structured products, the issuance size be used to account for liquidity and determine when the regime or a threshold applies. Although it may be considered as a somewhat rough proxy, it has the benefit of simplicity. Given the number of instruments covered, the sophisticated calculations done each year for shares based on frequency of trading, as displayed in the CESR MIFID database do not appear as a reasonable or viable way forward.

3.5. Over the counter trading

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

The AMF 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. Such flagging would also help appreciate whether those transactions are actually bilateral ad hoc ones or whether they would rather belong to the organised trading facilities, or possibly trading venues, arena and could also be usefully incorporated in transaction reporting, as appropriate.

The AMF notes and understands that the scope of such OTC trades would be much narrower than today as some of those trades might not longer qualify as ad hoc transactions and as trading in shares and other sufficiently liquid instruments moves towards trading venues.

The AMF suggests that further identification and flagging of trades also extend to trades taking place on organised trading facilities.

4. DATA CONSOLIDATION*

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.

The AMF very much supports the publication of transactions through approved publication arrangements under the conditions set out in the Communication so as to improve the quality of the data published.

(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.

The AMF generally supports the criteria identified for APAs. The responsibilities given to APAs in identifying potentially erroneous trade reports should however not be interpreted as relaxing the responsibilities on investment firms for ensuring the accuracy of the trade reports sent to APAs.

(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.

The AMF supports the Commission's suggestions for improving the quality of data. Improved quality of data is a prerequisite for meaningful post trade transparency and a meaningful consolidated tape. Further harmonisation of post-trade transparency publication format across trading venues, organised facilities and OTC will facilitate the consolidation of data.

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

The AMF strongly supports applying those suggestions to non equity markets as well and sees no reason why equity and non equity markets should ultimately be treated differently as regards the quality of data published and consistency of format. Transparency does not deliver its expected benefit if not supported by the quality of the data published. A harmonised format facilitates comparison and consolidation.

4.2. Reducing the cost of post trade date for investors

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

The AMF agrees with the suggestions made to reduce the cost of trade data through unbundling of pre and post trade transparency by entities that disseminate the data (i.e. APAs) or resell them. The AMF also supports ensuring that APAs and trading venues data are made available free of charge after 15 minutes.

(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 Consolidated Tape, the AMF does not see a need for further disaggregation at trading venue level for equities beyond pre and 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. The operator of the European Consolidated Tape could be requested to provide further level of disaggregation, including to accommodate issuers' needs.

(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.

The AMF recommends that this issue be dealt with by ESMA.

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

The AMF would see strong merits in applying these suggestions to non-equity markets as the underlying rationale, i.e. ensuring the quality and accessibility of post trade information, is similar.

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.

The AMF strongly supports the introduction of a European Consolidated Tape (ECT) for post-trade transparency, which the industry failed to deliver over the last three years. 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. The AMF can only see benefits in the setting up of such a Consolidated Tape.

(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

As a first choice, the AMF supports Option A, i.e. a formal consolidated tape operated by a single, non-profit seeking entity, established and appointed by a legal act. This appears the most appropriate way forward given the public-good nature of such a consolidated tape and the potential link with the European reporting mechanism. The AMF also wishes to stress that, for cost end efficiency reasons, some synergy should be created in due

course between the consolidated tape and the European centralised reporting mechanism/database referred to in Section 6.3. In this context, the most consistent option is Option A as well.

As a compromise solution, the AMF could agree with Option B under which the single entity operating the consolidated tape would be a commercial undertaking appointed following a public tender offer. The AMF is however of the view that, in this scenario, ESMA would be best placed to assess the merits of the bids and monitor ongoing compliance with the requirements set out in the call for tender.

(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).

A new entity would be best placed to operate the consolidate tape. There are no obvious candidates among existing industry bodies to operate that tape. An industry body may also be potentially faced with conflict of interests as some of their members may not have an interest in maintaining an efficient consolidated tape.

(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?

In order to make operating the European consolidate tape viable, and based on the assumption that the operator of the consolidated tape would purchase the data from APAs, RMs and MTFs, under Option A, the tape could either be made available for free in real time and funded by a tax paid by the industry, or made available for free after 15 minutes and funded by the subscribers.

Under Option B, the tape would be funded through the sale of data by the consolidated tape. It is assumed that, should the data be sold by APAs, RMs and MTFs on a reasonable commercial basis, the number of subscribers would be sufficient to make the single tape a viable economic model.

(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?

The sub-option under which trading venues and APAs would make their data available to the single entity on a reasonable commercial basis and where the single entity would then make the consolidated stream available to the market on a reasonable commercial basis appears the most sensible one.

(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)?

Latency should be a critical factor in the operation of the consolidated tape. Although its is not expected that the European consolidated tape would be a “tradable one” for some market participants such as High Frequency Traders that would continue to co-locate at MRs/MTF in order to get nano second trade information, other

participants such as buy-side firms may still use the consolidated tape as a tradable one, provided consolidation does not entail undue latency.

The governance of consolidated tape should be such as to ensure that the operator of the consolidated tape will not be using the information consolidated for its own purpose in any way. In case Option A, would not prevail, the consolidated tape should be run through a separate legal entity.

The operator of the consolidate tape would need to demonstrate expertise in data dissemination area.

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

A 6 to 9 month period after the legal framework and the requirements for the operator of the European consolidate tape have been set out appears realistic.

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

The AMF agrees with the comments made by the Commission. The first and key objective must be to Consolidated Tape for post trade transparency. A European consolidated tape for pre-trade transparency would raise another set of significant challenges, including in terms of latency, that appear less critical to address at this stage**.**

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

The AMF strongly supports the introduction of a European consolidate tape for non equity trades to support the regulatory of fully achieving the benefit of post trade transparency through the completeness, exhaustivity and comparability of post trade data. However, and from a pragmatic perspective, it may be worth considering a two step approach, starting first with equities, and no later than a year after, non equities.

5. MEASURES SPECIFIC TO COMMODITY DERIVATIVES MARKETS

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.

The AMF agrees that regulators should receive detailed information on large/significant positions in commodity derivatives and that aggregate information on such positions should be made available to the public. Such information should be harmonised and consistent to facilitate its interpretation.

A position reporting requirement could be implemented by trading venues but this would only apply to members of the venue. It may be difficult for trading venues to require members to report the positions of their clients (or of the clients of their clients), especially if OTC positions are included. It is therefore likely that such a requirement will have to be implemented by the competent authorities.

It will of course be necessary to define the persons subject to such a reporting requirement, and all such persons will not necessarily be "regulated entities" despite the proposed narrowing of the exemption for commodity derivatives players.

If OTC positions are not included, such exclusion should be limited to uncleared OTC transactions.

Once trade repositories have begun operating for all relevant commodity derivative classes, position information will of course be made available through them. *Per memoriam*, the AMF totally supports the principle of mandatory transaction reporting obligation through organised trade repositories, especially regarding derivatives on commodities.

(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.

First, the AMF would encourage the European Commission to seek as much international consistency as possible in this area, in particular with the categories used by the US CFTC. Second, although the type of entity (financial, non financial, etc.) and the type of trade (for hedging purposes or not) are two distinct methods of categorisation which may often overlap (a commercial entity will typically hedge, whereas a hedge fund will typically take a "speculative" position), reality is more complex and it will be necessary to consider thoroughly the different options for designing such a regime.

The AMF tends to think that classifying by type of strategy (hedge versus speculation) would be too difficult and would suggest a classification based on type of entity.

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

Pending the development of one or more trade repositories for OTC commodity derivatives capable of calculating positions by type of entity (and/or type of trade) in all relevant contracts, it appears necessary to require the reporting of positions in both exchange-traded and OTC commodity derivatives.

(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 a given timeframe? Please explain the reasons for your views.

1) The AMF agrees that commodity derivative contracts should be designed in way that seeks to ensure to the greatest possible extent, convergence between futures and spot prices.

2) As in other markets such as equity markets, it appears necessary to seek to limit short-term volatility in commodity derivatives through the introduction of short-term trading halts designed to allow the replenishment of liquidity and the rebalancing of supply and demand when current trading conditions would lead to an excessively sharp price movement compared to an appropriate price reference. Such short trading halts should not however be used in an attempt to influence legitimate market pricing of the contracts.

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.

The AMF supports the Commission's objective to narrow considerably the scope of the exemptions for commodity firms. We believe that all firms that materially either provide liquidity to the derivatives market (market makers in a broad sense), or hold net derivatives positions (other than for hedging against risks in the physical underlying), or interact with clients (professional or retail) in derivatives should be subject to financial regulation and supervision.

The AMF agrees with the Commission that it is necessary both to maintain an exemption for certain "ancillary" activities in Article 2(1)(i) and to clarify the allowed scope of such activities in new implementing measures.

The AMF also agrees with the Commission that it is necessary to delete the broad exemption in Article 2(1)(k) for dealing in own account in commodities and commodity derivatives as a "main business". The dealing on own account exemption in Article 2(1)(d), amended as proposed by the Commission in order to exclude dealing on own account with clients (section 7.2.8), should apply to commodities derivatives in the same way as it applies to other financial instruments.

As a related issue, the AMF notes that market makers, who cannot benefit from the Article 2(1)(d) exemption, are too narrowly defined in Article 4(8) as a person « who holds himself out…on a continuous basis as being willing to deal » which is far too restrictive in terms of presence/role in the market. Therefore, the AMF suggests that this definition should be broadened to avoid gaps (on a regular or continuous basis, major/material sources of liquidity) and lessen ambiguity ("holds himself out…willing to deal").

The AMF also agrees with the Commission proposal with respect to amending Article 2(1)(i) but wishes to clarify its understanding of the proposal. First, the AMF understands that the exemption will continue to apply only to non financial groups. Second, the AMF understands that the exemption for ancillary activities will continue to apply only to investment services in commodity (or "exotic") derivatives provided to clients of the main business of the firm or its group. Third, the AMF understands that the exemption will no longer cover any dealing on own account in commodity (or "exotic") derivatives where this involves "dealing on own account with clients" (i.e. execution of transactions with clients/execution of client orders), but it is not clear whether such dealing would be exempted where it is an ancillary activity to the main business of the firm or its group. It is assumed that under the Commission proposal such activity (in fact the provision of an investment service) would be allowed where it is ancillary, and the AMF will support such an exemption provided that "ancillary" is defined in a narrow way, so that

(as stated above) all firms that materially provide liquidity, hold material exposures or interact with clients in more than a marginal way, regardless of the respective proportions of "main" and "ancillary" activities, would be required to be authorised as investment firms[2].

5.3. Definition of other financial instruments

(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 in the implementing regulation? Please explain the reasons for your views.

The AMF agrees with the Commission that derivative contracts on commodities that are subject neither to central clearing nor to margining should be considered financial instruments in appropriate cases. Indeed, the AMF would go one step further and suggest that the criterion relating to standardisation is equally superfluous because any contract traded on a regulated market or MTF is necessarily standardised. This deletion, as well as the deletion suggested by the Commission, would be logical but would be likely to have, in practice, little or no effect on the scope of financial instruments as defined by MiFID.

More generally, the AMF considers that it is necessary to clarify, and indeed expand, the definition of financial instruments.

Article 38 of the implementing regulation has taken a narrow view, primarily for reasons of legal certainty, but the distinction between spot contracts and non spot contracts is very difficult to apprehend in many cases. Although it is legitimate to refer to the standard delivery period in order to distinguish spot contracts from derivative contracts, in fact there is no such standard period for commodities. For example, Brent crude can be delivered to a number of different locations in Europe and elsewhere. Legal certainty requires binding technical standards in this area.

It will also be necessary to rethink the criteria that non spot contracts must meet in order to be deemed financial instrument.

The AMF would point out that, under current MiFID definitions, only contracts that are « expressly stated to be equivalent to a contract traded on a regulated market, MTF or such third country trading facility » (article 38(1)(a)(iii) of the MiFID implementing regulation) will be subject to the clearing obligation, and that such restrictive language ("expressly stated to be equivalent") is a recipe for facilitating loopholes. The AMF would suggest referring to "economically equivalent" contracts. This would be an effective anti-avoidance provision.

Such rethinking should also take stock of the ongoing work on standardisation, clearing and exchange trading. One might suggest that any commodity derivative cleared by a registered CCP should be considered a financial instrument, irrespective of whether it is traded on a regulated market or MTF, but EMIR will require clearing only of financial instruments within the meaning of MiFID. It is therefore necessary to amend MiFID in order to ensure that a sufficiently high percentage of standardised derivatives are centrally cleared. The AMF suggests that a number of liquid, standardised commodity derivatives, including liquid OTC physical forward contracts, could be

2 As suggested by the Commission, it may be necessary to define « ancillary » activity using both quantitative criteria (in relative terms by reference to the main business and in absolute terms such as size of positions or number of clients) and qualitative criteria (no dedicated resources).

considered to be financial instruments. In practice, only a very small portion of such contracts are physically settled. On this point also, it will be necessary to adopt binding technical standards to ensure clarity and convergence cross-border.

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.**

Although emission allowances are in several respects quite similar to financial instruments, they present certain significant technical differences (absence of an issuer within the usual meaning of the word, a unique registry system for holding them…) and therefore require an ad hoc approach. Accordingly, they should not be classified as financial instruments.

6. TRANSACTION REPORTING

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.**

The AMF broadly agrees with the proposal, with the caveat that any extension of the scope of transaction reporting should at least be considered with respect to the scope of the Market Abuse directive (and extension of that scope as foreseen in the current review of that directive), taking into account though the market of local interest for small/medium size issuers.

Besides, the AMF fully support the EC proposal to expand the scope of the transaction reporting obligation to all financial instruments that are related to the credit risk of a single issuer.

(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.**

The AMF fully supports such an extension as it brings into the scope transactions on OTC derivatives. The reference to correlation with the underlying is appropriate in order to capture any interesting transaction from the point of view of market abuse monitoring; however, to provide certainty to the reporting entities, the ESMA should define the categories of financial instruments subject to reporting through technical standards.

(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.

The AMF supports such proposal as it is in line with the CESR advice in the matter.

(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.

The AMF supports such an extension to all transactions in all commodity derivatives, whether executed on a trading platform or OTC, in order to improve the overall monitoring of commodities markets through the monitoring of commodities derivatives markets. Implementing or additional legislation may be necessary to specify which competent authority transactions have to be reported and how supervisors can build a comprehensive picture of transactions on related commodity derivatives.

(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.

Extension to all correlated instruments and to all commodity derivatives, supplemented by the EC proposal to expand the scope of transaction reporting obligation to all financial instruments that are related to the credit risk of a single issuer, seems to capture all relevant OTC trading.

(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.

The AMF can only support such a requirement for all trading platforms to report the transactions of non authorised firms.
Though the AMF considers that such a reporting requirement to regulators by for platforms should be extended to include all the transactions executed on those platforms, as it would allow regulators on one hand to conduct the proper assessment on the compliance with the reporting obligation of firms, and on the other to quickly improve the overall reliability and quality of the transaction data reported to them.

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

This is only a first but necessary step.
Order data should not only be stored as recommended by ESMA but, on a regular and systematic basis (not only upon request), be made available to the regulators in a EU-wide standardised way for automatic screening in the search of manipulation patterns. Not imposing an order data collecting requirement at a European wide level would result in acknowledging that a cross market surveillance monitoring cannot be organised and that that

fragmented financial markets would not be properly monitored, in particular against market abuses conducted across European trading platforms.

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

Under the current situation, cross-platform market manipulation is impossible to monitor because of the lack of easily cross-reference able order book data. Therefore, harmonisation of the order data to be stored is the second necessary step to ensure a consolidated supervision of European markets, provided that European competent authorities can easily access and exchange this data.

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 definition ("*any agreement concluded with a counterparty to buy or sell one or more financial instrument*") seems appropriate.

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

So as to derive maximum benefits of the compulsory use of the client identifiers in terms of efficiency of the market monitoring and even of costs of implementation in the long run, European text should impose a standardisation of the client identification code at European level, and if not at least at national level, as suggested by CESR. Setting a standard at the level of the investment firm would not be appropriate in terms of granularity for supervision purposes. Letting national divergent regimes for the collection of client ID (at firm level in one member State, at national level in another) coexist would also dramatically reduce the overall efficiency of the measure. It is feared that implementing legislation cannot be left to ESMA in that field as a full consensus does not seem to be within reach.

(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.

The AMF notes that this proposal is slightly different from the one formulated by ESMA which left open two possibilities for transaction reporting by entities passing on the order to another brokerage firm : either transmitting the required details of orders (client ID), or reporting directly to the competent authority. The AMF would like to underline that this proposal was made to accommodate the fact that some providers of the service of RTO may not want to disclose the identity of their client for commercial reasons. The scheme suggested by the Commission is easier to manage and reduces the difficulty in understanding the reportings for supervisors but would have to cope with that commercial issue, especially where client ID is defined at a national level.

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

The AMF supports this proposal that will provide regulators with a higher level of granularity for their market monitoring activities and will allow easy and immediate identification of strategies implemented by a single trader within a trading desk, as well as automated trading, including high frequency trading;

(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?

Full harmonisation of transaction reporting format and content is the best and only way to ensure the highest efficiency of the use of transaction report information by and their exchange between regulators for both market monitoring and firm supervision purposes. This can only be achieved through implementing acts - ESMA standards - imposing the same requirements all over Europe.

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.

The AMF fully support such a single and centralised mechanism as economies of scale could be achieved both for reporting entities and regulators provided though that eventually local direct reporting mechanism will no longer be operating and all the waivers currently in force under MiFID will still apply. Such a centralised mechanism should be organised if not operated by ESMA.

(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.

For sake of reliability, the AMF supports the principle of applying to any third party reporting on behalf of investment firm the ARM approval process though based on experience that may imply in practice a rather heavy workload on the regulator to undertake the necessary assessment over those entities already operating in such a way.

(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.

So as to avoid duplication of transaction reporting and in line with the CESR advice, the AMF supports such a waiver provided that the required information under the transaction reporting obligation is obtained.

(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.

To ensure efficiency (avoiding double reporting) and reliability of transaction reporting, trade repositories under EMIR should be approved as ARM, though in practice it may just be a mere formality for them.
Furthermore, higher level of harmonisation in transaction reporting would be achieved if ESMA is involved in defining the appropriate reporting standards if not in charge of the approval process for trade repositories to.

7. INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES

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?

The AMF agrees with the Commission's proposal.

The optional exemptions should be maintained but the exempted entities should be subject to certain MiFiD based requirements as proposed by the Commission.

The AMF supports this proposal.which would lead to a more uniform investor protection regime and to mitigate the risk of distortion of competition between intermediaries. Such an approach already exists 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?

1) The AMF supports this proposal, and more generally the work dedicated to ensuring harmonised regulation for PRIPs. Although the AMF is not aware of structured deposits - i.e. deposits whose yield or reimbursement value is linked to a stock market index for example - having been distributed in France, it agrees that any such products should be subject to appropriate conduct of business requirements.

The AMF believes that for these (and similar) products, the investor protection regime should be strengthened by implementing a specific MiFID framework in addition to the applicable banking regulations. For instance, relevant information on the risks incurred by the client during the life of the product and the financial consequences of a withdrawal should be clearly and precisely disclosed to the client, and MiFID-based rules on the marketing of such products should be introduced.

2) Yes. A variety of products have emerged that blur the distinction between financial instruments and similar but legally distinct products.

The AMF recently urged greater caution with respect to forex transactions in particular through contracts for difference (CfDs) and forward sales (FX forwards). Aggressive marketing campaigns for these products have

been supported by methods such as email and cold calling. Since these products are highly leveraged, the AMF believes they should be intended for sophisticated investors, and should only be sold to investors classified as retail clients who understand the risks involved.

More generally, the borderline between spot forex products (especially leveraged spot forex products such as rolling spot) and financial instruments having forex as an underlying must be more precisely defined under the MiFID to ensure that the scope of investor protection corresponds to the need for protection. A similar issue arises with respect to the distinction between “commercial” forex forward contracts and “derivative contracts” (term used in the framework directive but undefined) that fall under the MiFID definition of financial instruments.

In addition to structured deposits and certain forex contracts, a host of other products that are not financial instruments raise similar issues of investor protection, as shown by the Commission’s continuing work on PRIPs.

7.1.3 Direct sales by investment firms and credit institutions

(86) What is your opinion about applying MiFID rules to credit institutions and investment firms when, in the issuance phase, they sell financial instruments they issue, even when advice is not provided? What is your opinion on whether, to this end, the definition of the service of execution of orders would include direct sales of financial instruments by banks and investment firms? Please explain the reasons for your views.

The AMF considers that it is necessary to clarify that the MiFID rules apply in such case.

First, qualifying this activity with duties to the investor equivalent to those required for the execution of orders under MiFID, will help to clarify a situation where primary market activities are poorly apprehended by the wording of MiFID and the current definition of « acting on own account » only takes into account the position of the firm, not of the client. Second, this situation entails inevitable conflicts of interest and information asymmetries, and therefore requires a strong compliance organisation in order to protect the interests of both professional and retail clients. Third, such a clarification will help converging interpretation and application of MiFID across Europe.

A related question arises when an investment firm does not sell its own securities but acts on behalf of an issuer. In these circumstances, the MiFID investor protection regime should clearly apply but it is awkward to characterise the service provided to the investor either as RTO, since the investment firm does not necessarily transmit the order to another investment firm, or as order execution because the source of liquidity is not the market but the issuer of the security. This should be clarified in MiFID, perhaps through a recital.

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

The AMF is of the opinion that the criteria enabling a clear distinction between complex and non complex products should be sharpened. In this regard, the AMF supports the Option A.

The MiFID appropriateness requirements aim to prevent complex products being sold on an execution only basis to retail clients who do not have the experience or knowledge to understand the risks of such products. Fine tuning appears necessary in order to get a clear view and a better understanding of what is to be considered as a complex product.

(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.

The AMF is of the view that granting a credit or a loan to a client when he is carrying out a financial transaction drastically increases the client's leverage and risk exposure.
For that reason, the "execution only regime" does not seem appropriate in such cases.

The AMF fully supports the proposal of the Commission to exclude this type of transaction from the "execution only" regime. Regardless of whether the financial instrument concerned is complex or non-complex, the firm offering this ancillary service in conjunction with the execution of orders, should be required to establish whether the client has the necessary knowledge and experience to understand the risks associated.

(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.

The treatment of the UCITS category for the purposes of the execution-only regime reveals that the nature of the underlying investments is not correctly reflected under the current MiFID framework.

UCITS should not continue to be treated as automatically non complex instruments.

For instance, some hedge funds recently obtained the UCITS label enabling them to distribute complex UCITS products in the EU. In addition, recent supervisory experiences highlight that a number of UCITS are too sophisticated (complex formula funds) to be easily understood by retail clients. Clearly, such highly complex products should not be recommended to retail clients. Should a retail client spontaneously wish to purchase such a product, the firm should act in the best interests of the client and, at the very least, provide the client with a clear and strong warning before agreeing to conclude the transaction.
As a result, the AMF believes that there is a strong case for treating structured UCITS (as defined in the implementing regulation on the KID) as complex financial instruments but considers that a further analysis should be conducted by ESMA to more precisely define appropriate criteria as some structured UCITS may not ultimately call for such classification. UCITS which employ complex portfolio management techniques should also be treated as complex financial instruments for the purposes of the appropriateness test unless they offer a minimum capital guarantee through out the life of the instrument.

ESMA could be empowered to define binding criteria on this basis.

(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.

Since the AMF supports Option A (question 87), it considers that the execution only regime should not be abolished.

When the client is the party taking the initiative of the transaction on a non complex MiFID instrument or financial product, the execution only regime seems appropriate (especially when order execution service is provided through the Internet).

It would be useful to develop technical standards defining a standardised warning about the lack of any appropriateness or suitability test for execution-only business that clients are capable of understanding. It would also be helpful to clarify that this is a transaction-by-transaction warning (or the circumstances in which it is allowed to provide a single warning for example at the beginning of the firm-client relationship).

Two other suggestions may be offered with respect to the execution-only regime. First, the condition that “the firm complies with its obligations under Article 18” has caused confusion, since several other provisions such as the requirement to provide information on risk also apply, and should be either deleted or replaced by a reference to all relevant obligations.
Second, the condition that “the service is provided at the initiative of the client” also needs clarification (despite recital 30).

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 AMF believes that it is essential for the quality of the advice that the intermediary offers a range of products large enough to respond to the various types of needs that may be expressed by the investor. This panel must for example include products with different maturities and different risk profiles so that the firm can recommend suitable products to all its clients. When the panel of products is potentially too limited to cover the needs of the relevant clients, the firm should obtain written acknowledgement from the client that he understands these limitations.

Nevertheless, both distribution networks belonging to a group and independent asset managers (for example small UCITS management companies that manage only three UCITS having different risk and reward profiles) have developed a business model based on promoting only products they or their group originate. It does not seem necessary to require the intermediary to offer products from its competitors, provided that those supplied meet customer needs and the client is fully informed of and acknowledges the bias inherent in the products which make up the panel and accepts the limitations of the investment advice to be provided. Similar issues arise for the provision of portfolio management services (where it is not uncommon that predominantly group products are purchased on behalf of the client), and the AMF believes the same approach should be adopted.

(92) What is your opinion about obliging intermediaries that 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 AMF agrees that an investment firm should explain to the client "the basis on which advice is provided" i.e. why the products it recommends are deemed suitable for the client given the information provided to the firm about the client's knowledge, experience, financial situation and investment objectives. This will require the firm to think more carefully about suitability and help to avoid misunderstandings between the firm and the client. The reasons given to the client should be recorded by the firm.

The AMF believes that obliging the intermediary to inform its client of the elements on which it relied when formulating its advice allows the clarification of the respective responsibilities of the client and of the intermediary. Indeed, when providing an advice, the intermediary is dependent on information supplied by its client and on the preciseness of the objectives exposed by this client.

The AMF does not believe, however, that advice (and its motivation) should necessarily be provided to all clients in writing in a systematic fashion. Although the appropriate means for complying with MiFID's record-keeping requirement need to be clarified, MiFID already requires firms to keep a record of all services provided to clients and this includes the provision of advice as well as the basis on which advice is provided. Beyond clarification and harmonisation of the practical means for complying with this requirement with respect to all clients (which might include maintaining records of emails or taping of the relevant telephone conservations for example), the AMF would support the introduction of an additional obligation on firms to provide the advice as well as the reasons for the advice in writing, to retail clients in certain key circumstances to be defined (advice on portfolio allocation, advice to purchase a product followed by the decision of the client to follow the advice, etc.).

(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.

The AMF believes that the appropriateness of such an additional requirement should be assessed having regard to the nature and the frequency of the relationship between the intermediary and its client. Indeed, if the latter asks for a one-time service (e.g. advice about an IPO or advice based on patrimonial analysis in light of an inheritance), it seems appropriate that the intermediary doesn't have to continuously monitor the advice given on such an occasion.

Conversely, in the context of an advised account generating recurrent advisory fees received by the intermediary, it seems necessary that the intermediary provides monitoring of its advice as long as the same contractual relationship keeps on going.

In this regard, the AMF recommends that the written formalization of the relationship referred to above should explicitly state whether advice is provided in a context of a long-term relationship involving monitoring by the intermediary or not.

The proposal suggested by the Commission obviously implies to be able to define through technical standards precisely what a “relevant modification” should be, and which types of products would be involved.

Last but not least, the AMF believes that any such additional obligation on firms should only apply with respect to retail clients.

(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.

As mentioned above, the AMF considers that the obligations relative to the monitoring of the investment by the intermediary depend on the contractual framework established between the firm and the client.
Assuming a long-term relationship, the recommendations made by the Commission appear to be justified and proportionate.

Whether the investment has long or short maturity does not appear to condition its monitoring by the intermediary. Indeed, even in the context of a short-term investment, an intermediary who has a long-term advising contract with a client should advise the latter as regards the re-use of funds.

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.

The AMF considers essential that the intermediary provides the client with a risk/gain profile in different market conditions and with a valuation profile of OTC derivatives and other complex or tailor-made products.

Indeed, insofar as it seems natural that the intermediary has conducted for its own account this quantitative analysis *before* offering the product to the client, professional or not, the AMF considers legitimate and proportionate to oblige the intermediary to make available this analysis to its client.

Such disclosure should enable the client to better measure the characteristics of the product and to assess the risks attached thereto.

(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?

This obligation must be coherent with the nature of the relationship existing between the intermediary and its client. As part of a long term agreement concluded between them, including a recurrent remuneration of the intermediary for the monitoring of its advice to its client, such valuations seem essential.

The AMF supports the principle of an independent valuation and will assist the Commission in defining what "independence" should mean for valuation purposes.

An effective way to ensure this independence could be to offer to the client the possibility of unwinding his initial investment at a price consistent with the evaluation provided.

(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.

Any intermediary should be obliged to respond to reasonable and proportional requests for information arising from professional or retail clients about the evolution of the underlying assets of ABS, OTC derivatives and other complex products. This would be a natural enhancement of the right of a professional client to ask for information about complex products, recognized by Recital 44 of the MiFID.
Since this quarterly reporting on the evolution of the underlying assets seems also relevant in respect with complex managed portfolios, the AMF considers that there is a case for strengthening the investor's right (professional or not) to request information in this area as well.

This enhancement is interesting but its consistency should be further discussed. Indeed, if the rules are clearly defined at the beginning of the commercial relation, the information about the underlying does not seem crucial, as the key point for the client is ultimately the amount resulting from the unwinding of its position.
Moreover, given the complexity of certain products, the issuance of information relating only to underlying of the product can sometimes be misleading or meaningless, as the relation between the value of the underlying and the value of the product itself may be very complicated.

(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.

Provided that criteria can be proposed to identify the so called "material modification", the AMF supports the principle of this new general obligation that complements the current obligation to send to clients a statement of their assets.

In this respect, the "material modification" could be defined in general terms, perhaps in line with the internal rules chosen for the stress tests to be prepared by the intermediary (see 7.3.3, d°; proposals about specific organisational requirements related to the launch of new services or products).

In any event, the option to inform clients about the results of ex ante stress tests would also appear useful for two reasons.

First such ex ante information would more efficiently contribute to the understanding of the product than *ex post* information about the recent (but past) material modification.

Second, informing ex ante a client about the way a complex investment may perform in a range of market environments and how this investment could be affected seems more consistent from a market efficiency perspective. Indeed, informing clients every time a material modification has occurred may be counterproductive and hazardous. It may negatively affect an individual investment decision but also make vulnerable the entire market of a class of product. Massively disclosed, alarming information (e.g. material modification) may exacerbate the lack of liquidity and eventually, may jeopardise the integrity of the market.

(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.

Insofar as i) the AMF supports the application of the essential principles of good conduct to eligible counterparties (see question 105) and ii) this information requirement depends on the nature of the advice requested by the investor and the nature of the relationship with the firm, it does not seem a priori necessary to extend these obligations to eligible counterparties.

In addition, it seems unlikely for an eligible counterparty to request such a long-term advisory service for a specific product without requesting a more protective status when dealing with this kind of product.

(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?

The AMF believes that if such social and ethical criteria are presented as marketing elements in order to motivate an investment decision, it is important that such information is presented in a clear, fair and not misleading way. Since these criteria are now willingly put forward by intermediaries and provide a necessarily positive label, a specific requirement to inform clients would be less relevant than seeking to ensure clear, fair, not misleading and hopefully comparable information in this area.

7.2.4. Inducements

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

The AMF agrees with the Commission's comments regarding the concerns in distinguishing between summary and detailed disclosures, the almost systematic lack of ex-post disclosure and the wide disparities in implementation of measures relating to such disclosures by intermediaries in the absence of any binding technical standards in this area.

The AMF considers that the information provided to customers generally does not enable them to estimate the amount of inducements received or paid by/to the intermediary, nor their purpose. Enhancement of the quality of the service attached to these inducements is rarely apparent and even more rarely explained to the client.

In this context, the AMF supports the Commission's proposal to eliminate the possibility for the firm to provide a summary disclosure regarding inducements, as i) it is too often used as the only format disclosure, ii) it does not allow the client to benefit from the transparency required by the Directive.

(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.

Enhanced disclosure requirements appear to be an effective tool in combating conflicts of interest arising from inducements, including payments received from product providers.

As indicated above, the information provided *ex-ante* to the client does not generally allow him to know the amount of inducements paid or received. Indeed the improvement of service permitted by such payments is not disclosed to him, nor the identity of those providing or benefiting from such inducements.

The AMF recommends that this information be provided, as precisely as possible, before the provision of investment services. French supervisory experience (on financial instruments offering special tax benefits) highlighted that inducements may not be transparent enough for investors and that fees may be significantly increased by the level of commissions given to distributors, who do not always provide a level of advice proportionate to the amount of the fees received.

In some cases, however, the amount of such inducements is not calculable before the performance of the service (e.g. where the rate of the inducement depends on the annual turnover achieved by the intermediary).

The AMF recommends that this detailed information be provided ex-post to the customer, for example on an annual basis, summarizing the amount of all the inducements received and paid by the intermediary, the identity of those responsible for these payments or benefiting from them, as well as the nature of the services paid by these fees.

(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.

1) The AMF believes that the receipt of inducements by an investment management firm may lead it to ignore the primacy of the client's interest all the more easily as investment decisions are taken without client consent. The receipt of inducements in the provision of advice may also undermine the independence of the advice but in the end, it is the client who decides whether or not to follow through with the investment recommendation.

Thus, the AMF believes that inducements – in particular rebates from product originators - should be banned in the case of portfolio management. This prohibition already exists regarding French funds of funds.

2) Regarding the receipt of inducements by intermediaries providing financial advice, “independent” or not, the AMF would like point out that it is generally assumed that advice financed by other means than inducements should be preferred to advice paid with inducements.

Nevertheless, in both hypotheses, potential conflicts of interest may arise. In the first case, the structure of the remuneration may constitute a strong incentive for proposing an excessive churning strategy to a client. In the second case, the intermediary providing financial advice may be tempted to drive its client towards the financial instruments implying the highest fees for the firm.

As a result, the AMF believes that regarding advice neither of those types of remuneration should be banned or either privileged because of the conflicts of interest potentially embedded in both of them.
However, the AMF wishes to stress that the receipt of inducements on a recurrent basis by intermediaries providing financial advice can only be justified where the intermediaries keep the situation of clients and financial instruments under review in order to confirm the continued suitability of the investments

In addition, the AMF suggests that the term “independent” should not only be granted to intermediaries that do not receive any inducements.

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 AMF considers that the general framework of client classification under MiFID provides -generally speaking- a sufficient, effective and satisfactory system. The vast majority of French intermediaries consider it appropriate. In addition, the implementation of such a system required considerable financial and human investment and has been carried out with professionalism. As a result, it does not appear appropriate to the AMF to change the entire system.

Nevertheless the AMF also considers that more accurate classification criteria should be envisaged in order to more precisely take into account the understanding by the client of each product or services he may be provided with.

Indeed, recent events show that presumably sophisticated clients do not always understand the risks involved in OTC derivatives and other complex or tailored instruments. Therefore, the AMF believes knowledge and experience of a client about a complex product should be systematically checked and assessed when the intermediary proposes for the first time to advert a new type of sophisticated product, including to a professional client.

(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;

As previously mentioned on point 99 above, the AMF strongly supports the idea of introducing for eligible counterparties a high level principle for the intermediaries to act honestly, fairly and professionally together with the obligation to be fair, clear and not misleading when informing the client.

The AMF underlines the fact that the current rules only apply to professional and retail clients. As a result, some intermediaries may consider that the MiFID rules are not intended to benefit eligible counterparties. The AMF is convinced that the current provisions of the Directive should be amended in order to clearly mention this principle as applicable to any eligible counterparty.

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

The AMF considers that the investment firm dealing for the first time in a new type of highly complex instruments (for instance ABS and non standard OTC derivatives) with an eligible counterparty should inform such counterparty of the relevant risks according to MiFID Level 2 art. 31-2.

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.

The AMF believes that the definitions of professional clients *per se* and eligible counterparties should be modified to make clear that local public authorities/municipalities should be classified as retail clients *per se* allowed to opt up for the professional clients' status.

(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, this presumption should be retained and the classification should remain unchanged. The AMF considers that regardless of the presumption covering the client's knowledge and experience, the intermediaries should focus on the particular disclosures needed by the client regarding complex products (see 7.2.3. (informing clients on complex products), in addition to the information on risk due in application of art. 31-2 the Level 2 Directive).

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.

The AMF would be able to support the introduction of a principle of civil liability in MiFID only if a number of conditions are fully satisfied. At present, there are far too many unknowns.

First of all, such an amendment must not in any way weaken the protection already afforded to clients under French law. For example, the AMF considers very strongly that there must be no limitation on the amount of damages potentially awarded to a client.

Second, it would be necessary to be able to assess the likely impact of the introduction of such a principle on French investment firms. Under current French law, these firms (including banks) are already subject to civil litigation for damages in the event of a breach of a MiFID rule that results in harm to the client. Would the MiFID principle entail additional litigation risk for investment firms?

Third, what would be the impact of the introduction of such a principle on non French investment firms, in particular those that provide services to French clients? It will clearly be necessary to assess the impact on the competitive position of investment firms throughout the European Union, including whether non French investment firms are already subject to civil responsibility litigation, both in theory and in practice.

Fourth, will such a principle ensure greater investor protection in Europe, and a higher degree of harmonisation with respect to civil responsibility en Europe? It will be necessary to answer these questions, but they raise many complex issues including evidence (breach and damages), the cost of civil suits and the ability of civil courts to assess whether a breach of MiFID has occurred.

(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.

As explained above, the AMF considers appropriate the implementation of such a liability regime but suggests discussing further the implementing details.
As explained above, there are several fundamental questions to be answered at this stage, before examining the details of any regime.

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.

1) According to the AMF, such a requirement would be useful to facilitate compliance by intermediaries with their best execution obligation, and would also help to reduce the information asymmetry between investment firms and their clients with regard to execution quality.

In the context of the fragmentation of trading venues, the strengthening of pre- and post-trade transparency requirements should be combined with the publication by execution venues of comparable and accurate data on execution quality to enable the intermediaries to compare the execution venues on a standardised basis and to make an effective selection of such execution venues for the purpose of their execution policies.

2) The AMF proposes to require from regulated markets and MTFs quarterly reports on prices (with respect to the European best bid and offer), spreads (costs), volumes, market shares, likelihood and speed of execution on a harmonised basis. For share trading, this is particularly important for multitraded shares in the short term.

In the future, the scope of the reports could be enlarged to cover all financial instruments traded on different types of venues, especially non equities that are traded on more than one venue. A cost-benefit analysis (by ESMA) of an obligation on execution venues to produce reports on execution quality regarding other instruments than multi-traded shares would appear necessary at this stage.

(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.

In respect of the trading of shares, the AMF considers that execution policies produced by only a limited number of firms are clear and precise enough to provide the client with sufficient information about how orders are executed. It is therefore necessary to clarify exactly what information should be provided in order to promote best practices. Regarding other financial instruments, it appears even more essential to require more precise execution policies.

It also appears necessary to require that firms dealing on own account with clients should be subject to the best execution regime (cf. the answer to question 111 below).

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.

The AMF considers that it should be clarified (preferably in Level 1) that dealing on own account does not rule out the provision of the service of execution of orders on behalf of clients (entailing the application of MiFID including best execution provisions), which may be termed “dealing on own account with clients”.

The exemption attached to the definition of “dealing on own account” should remain limited to persons who do not provide any investment services or activities other than dealing on own account. The exemptions should not however apply to persons “dealing on own account with clients” (by executing client orders), or to persons who are market makers (defined more broadly as suggested earlier).

More globally, the MiFID scope of application has to be clarified in order to ensure uniformity of the investor protection regime and to avoid regulatory loopholes that may cause serious enforcement difficulties due to misinterpretation of the MiFID provisions.

In this respect, unclear definitions of "execution of orders" and "clients" currently given by the directive may regrettably lead to exclude the application of MiFID outside of traditional broker markets such as equity markets. The AMF considers that once an intermediary deals with an identified counterparty and not directly through the market, it should be clarified that the relevant client protection regime (retail client, professional client, ECP) benefits this counterparty.

(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.

1) The AMF considers that in such a situation the firm should be regarded as both dealing on own account and providing a service of order execution in order to fully capture the nature of the transactions.

From an investor protection standpoint, there are two main reasons for this view. First, given the potential conflicts of interest embedded in this type of "two leg" transaction, the firm acting as principal should be subject to MiFID obligations towards both clients. Second, a fair disclosure of the transaction would contain information about the spread earned by the firm.[3]

Moreover, the AMF believes that clients should be systematically informed that the firm is acting on own account, and would support the extension of article 40(4) on reporting obligations to all clients including professional clients.

2) As recalled in footnote 213 of the consultation paper, article 5 of the CAD provides for Member State discretion to allow investment firms to hold initial capital of only €50 000 where a firm is "not authorised to hold clients' money or securities, to deal for its own account, or to underwrite issues on a firm commitment basis". It also states that a firm "may" (again, Member State discretion) be deemed not to hold client assets and also, implicitly, deemed not to deal for its own account where it executes investors' orders for financial instruments and consequently holds the relevant instruments for its own account and such positions "arise only as a result of the firm's failure to match investors' orders precisely", are small (the total market value of such positions must not exceed 15% of the firm's initial capital), "incidental and provisional in nature and strictly limited to the time required to carry out the transaction in question."

The AMF considers that treating matched principal trades as both execution of client orders and dealing on own account should, in the medium-term at least, lead to amending article 5 of the CAD, because it is necessary to harmonise such capital adequacy treatment, and sufficient capital should be held for this type of business.

[3] The AMF believes that remuneration in the form of a spread is justified only when the firm takes a risk, in particular a risk resulting from a significant timing difference between the two legs. In other cases (cross), the firm should normally be remunerated through a fee.

3) If an intermediary acting on a matched principal basis with respect to shares fulfils the conditions to be characterised as a systematic internaliser (who necessarily deals on own account, at least technically and temporarily), it should be subject to this specific regime.

Per memorian (see above Section 2), the AMF suggests to remove the concept of systematic internaliser as a trading venue and to classify systematic internaliser as a sub-OTF category.

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.

The AMF supports the idea to widen the scope of application for fit and proper criteria so that all members of the board of directors (and not only the persons who effectively direct the business) would have to comply with the MiFID requirements.

The AMF would point out that French intermediaries regulated by the AMF already themselves ensure that all members of their board are and continue to be of sufficiently good repute and sufficiently experienced. However, an explicit requirement on competent authorities, taking into account the governance structure of the firm, may be desirable in order to reach a more harmonised application of MiFID.

In this respect, ESMA technical standards appear as useful tools to clarify the respective roles of directors of the firm and regulators/supervisors in checking on-going fitness and propriety.

7.3.2. Compliance, risk management and internal audit functions

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

The AMF fully supports the idea to reinforce the operational links between these three functions and between the board of directors and the regulator/supervisor.

It must be underlined that the scheme proposed by the Commission is already effective in France (regarding the entities regulated by the AMF) where those functions report “directly” to the board of directors and where the removal of the internal control officer must be approved by the board and notified to the supervisor.

In addition, with respect to the issue of complaints handling mentioned by the Commission, client complaints should be reviewed by the compliance function on a regular basis; furthermore, the results of such reviews should

be summarized in the periodic written reports prepared by the compliance or internal control function and which contain recommendations to address any compliance deficiencies.

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.

The AMF considers that compliance policies and procedures should be strengthened in order to promote a more effective role of the compliance function at an operational level, especially regarding new products and services.

The AMF therefore agrees that firms to be required to elaborate specific policies and procedures in order to ensure that “new products, operations and services” (new for the market or for the individual firm itself) duly comply with all applicable rules including those relating to disclosure, suitability/appropriateness and the proper management of conflicts of interest. The AMF also supports the additional requirements proposed by the Commission, in particular regarding the expertise of staff that advise clients on products, the periodic review of distribution and performance of products and services, and senior management/board control over new products and services.

Such systematic compliance controls around financial innovation should help to protect both retail and professional clients more effectively.

(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?

According to the AMF, the general high-level organisational requirements are globally satisfactory. Nonetheless, as stated above, the detailed requirements proposed by the Commission (§ “a” to “g”) should be introduced for new products and services.

It should be underlined that most French financial institutions have already implemented “new products committees” that provide ex-ante assessment.

ESMA technical standards should contribute to ensuring appropriate methods of compliance assessments and thus promote good practices across the Union.

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

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

The firm should inform its client on the various chosen strategies and especially as well as ensure that they fit the profile of the investor over the life of the mandate.

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?

In order to get a more uniform application of the conflicts of interest requirements across the EU, the AMF totally supports the idea to empower the ESMA to propose technical standards in this area.

The AMF has noticed that the identification of the conflicts of interest significantly diverges between regulated firms. For instance, “conflicts check registers” do not follow the same criteria. In addition, the procedures designed to identify conflicts of interest (when they exist) do not always have a satisfactory level of performance.

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.

The AMF considers that if recital 27 of MiFID has enabled firms to unfairly refuse the application of investor protection rules to their clients it should be deleted or amended. The AMF does not consider it necessary however to prohibit all title transfer collateral arrangements involving retail clients' assets.

Any such title transfer should be specifically and formally approved by the client on the basis of clear information and a fair remuneration, and the amount of transferred securities (or other assets) should not exceed the amount of the debt due by the client to the firm (increased by an appropriate haircut).

(120) What is your opinion about Member States being 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.

See above the AMF suggestion that could also apply to the assets of professional clients although it would likely be necessary to adjust more often the amount of collateral transferred.

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

In addition to strong information requirements (*ex ante* information about risk and remuneration and ex post written reports), the AMF would support a requirement that the securities of a retail client that are lent out should be appropriately collateralised by the borrower, and suggests that the same requirement should also be considered for professional clients.

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

Yes, the AMF considers that information requirements concerning the use of client financial instruments should be extended to professional clients and eligible counterparties, whose loaned securities may reflect/directly be linked to the assets held on behalf of their own 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?

The AMF strongly supports strict due diligence obligations in this respect. In the light of recent events, it appears especially important that any entity entrusted with client assets (securities or cash) is carefully selected and that its prerogatives are precisely defined. The AMF suggests to empower ESMA to specify binding technical standards about the due diligence process.

Regarding the deposit of client funds with group entities, it may be disproportionate to require diversification. Clients should however be clearly informed of the benefits and risks of non diversification.

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.

Yes.

The financial services of underwriting and placing raise numerous issues about the application of the framework of EU securities legislation as a whole. The stabilisation aspects are covered by the implementing regulation of the Market Abuse Directive. Some allotment aspects regarding disclosure have been picked up in the Prospectus Directive. Finally, MiFID applies to the relationship between intermediaries and issuers.

Under this general framework, intermediaries must already act in the best interests of the issuers and communicate with them in a way that is fair and not misleading (even towards an issuer categorised as a professional client) and allocations and pricing are, at least in principle, governed by conflicts of interest rules.

Nonetheless, the AMF considers that the following areas require a specific MiFID regulatory framework in order to organise the conduct of business rules applicable to primary markets across the Union more efficiently :

- The compliance function should play a direct and active role during the issuance phase, and should report ex post to the firm's senior management (and to regulators on request) on the services provided to the issuer (quality of information, conflicts of interests, handling of inside information).

- The methods[4] used by the underwriters to mitigate the underwriting exposure should be disclosed to the issuer.

- When pre-sounding (or pre-marketing) is envisaged, the syndicate members involved in a new issue should determine together with the issuer client (i) the sensitivity of the information to be disclosed (is it inside information or not), (ii) the number and identity of investors targeted, and (iii) the precise policies and procedures put in place for handling inside and other sensitive information during the pre-sounding process. In addition, firms should be required to keep a complete record of such pre-sounding or pre-marketing processes.

- Firms should be more transparent towards investors regarding the key steps and criteria in the book-building and allotment process. In practice, issuers can go through the allocation line-by-line with the book-runners before agreeing it, but investors should have enhanced information on the principal allocation criteria before making their investment decision.

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.

The AMF welcomes the orientations put forward by the Commission regarding the regime related to tied agents. The AMF agrees that the possibility to use tied agents could be generalised in all Member States. Indeed, as experience proves, which CESR confirmed in its report referenced 10-859, this option has largely been used by Member States. The AMF believes that the measures proposed by the Commission to accompany this generalisation are adequate to ensure the proper functioning of an EU regime for tied agents. In particular, the AMF fully supports the proposal that tied agents should not be allowed to hold client money or assets. As noted by CESR, and as experienced by the AMF and its predecessors, such a restriction is necessary in order to protect investors and avoid fraud (23 Member States have not opted to implement the existing discretion in MIFID). In addition, the AMF welcomes the clarification that would be brought to article 32(2) second paragraph of Directive 2004/39 regarding the treatment of tied agents as a branch in order to allow appropriate and consistent

[4] Pricing at a deep discount, pre-marketing, securing sub-underwriters and hedging trades.

supervision across Europe. Finally, the Commission's proposals regarding the transmission of information on the identity of tied agents from the home to the host competent authority in the case of provision of services cross border via a tied agent are very opportune. The same is true for the proposal to extend the provisions on tied agents under articles 31 and 32 of Directive 2004/39 to credit institutions. To conclude, the AMF does not think that the tied agents' regime requires any major regulatory modification.

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.

The AMF makes frequent use of telephone recordings in its market abuse investigations which have proven to be useful as a direct and indirect means of obtaining proof and thereby enforcing the rules. Therefore, the AMF can only support the introduction of a common regulatory framework for telephone and electronic recording so as to ensure a level playing field across Europe and legal certainty for investment firms as well as to avoid any risks of distortion between Member States through "regulatory shopping" by firms. The overall ability of regulators to supervise, investigate and enforce European legal provisions will be improved by such a step. In particular they will be in position to fully assist their European counterparts by being able to exchange similar types of information in cross border cases that could be subsequently used in further proceedings.

(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.

As the AMF considers that sufficiently broad harmonised telephone and electronic recording would improve detection, investigation and enforcement against non-compliant behaviour (including market abuse), it fully supports the a recording obligation covering at least any services relating to a client order as well as dealing on own account (including when no client order is involved).

(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.

Considering the on-going technological developments in electronic communications, the scope of the obligation should not be limited to fixed telephone conversations only. Ideally, the obligation should also apply to mobile telephone or other mobile handheld electronic communication devices, without forgetting e-mails, however complex it may be, unless there are strong requirements, effectively enforced by firms, on forbidding the use of such mobile telephones or devices.

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

3 years seems appropriate. Currently in France, relevant telephone records should be kept for at least 6 months which in practice has turned out to be too short in several instances.

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.

In order to fulfil the objective of creating a single EU rulebook, as mentioned in the Commission's consultation document, the AMF calls for a full harmonisation of the EU legislation, involving a removal of specific national requirements. But the attainment of this objective implies that the review of MiFID and its implementing measures takes into account the need to ensure the highest possible level of investor protection by filling gaps in the current legislation and by introducing sufficiently detailed provisions to be applied in the same way by all Member States.

To the extent that genuinely full harmonisation is not attainable in the short term, the proposal of the Commission consisting in the introduction of an on-going obligation (and not only in the initial adoption of those national provisions) to communicate any modification in the national legislation is welcomed.

8.2. Supervisory powers and sanctions

8.2.1. Powers of competent authorities

(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.

A harmonisation of sanctioning powers and an effective and consistent application throughout the EU jurisdictions are key conditions for building up an efficient supervisory system and for sound and fair financial markets. It is indispensable that administrative measures at least have the effect of putting an end to a breach of the provisions of the national measures implementing MiFID. The AMF would like to underline the recent improvements in its sanctioning powers Resulting from the October 22, 2010, Banking and Financial Regulation Act (http://www.amf-france.org/documents/general/9706_1.pdf). In particular, the AMF may now impose much stiffer penalties up to €100 million or ten times any profits made for violation of financial laws and regulations.

(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 our view, criminal sanctions are useful and should also be harmonised to the greatest extent possible. However, the efficiency of the system relies clearly in the first instance on administrative sanctions which present

several advantages including the substantial advantage of being taken much more quickly. It is well known that the rapidity with which a sanction is taken and known after an infringement is committed is a key aspect of its dissuasive nature.

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

Whistleblowing mechanisms have advantages. They also have limits. For instance, even if the employee who has had recourse to whistleblowing is protected, he may incur the risk of being less well treated by the management and sooner or later fired. Employees therefore may hesitate before using the mechanism, with the result that it may not play its role which is to involve all employees in correcting the firm's "bad practices". However, one positive aspect is that it may act as a deterrent against poor behaviour by the management.

(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

It is indeed key for the efficiency of the sanctioning process that sanctions be published. It is also important to allow for derogations in certain circumstances, for instance if the publications would cause serious disruption on the markets or to cause a disproportionate prejudice to the parties involved. This is what is provided for in French law, based on the provisions of the Market Abuse Directive (see article 14-4). There is no reason why sanctions under MiFID should be treated differently from the way they are treated under MAD.

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?

It is key that the EU takes a more coherent approach *vis-à-vis* third countries and in this light, the AMF is in favor of a third country regime which is based on the application of clear international principles and offers the same guarantees in terms of investor protection, transparency and resiliency of the system as the regime set up by MiFID.

Indeed, the EU needs to carry on strengthening its integration and cohesiveness *vis-à-vis* third countries. In addition to the initiatives underway at the institutional level, it is necessary to define very precisely the conditions in which foreign entities can provide services in the EU. It is not enough, as the Commission rightly points out, to leave it to Member States to decide on this, subject to providing that national provisions do not result in treatment more favorable than that given to EU firms. In EU legislation in general, in MiFID in particular but also in the legislation currently drafted on OTC derivatives for example, we clearly need to include provisions regarding how third-country firms and infrastructures can provide services in the EU. The EU also needs to define in these texts the precise conditions for equivalence of regulatory and supervisory regimes. This is key to ensuring an adequate economic equilibrium in which Europe does not open itself without reciprocity.

As regards trading platforms, be they operated by market operators or by intermediaries, and given the extreme diversity of such platforms, the AMF is of the view that any exemptive relief or equivalence regime should be limited to exchanges/regulated markets. The AMF also notes that an exemptive relief and equivalence mechanism for exchanges should not only be based on an assessment of the equivalence of the third country regime but also include a decision by ESMA to potentially recognize foreign exchanges on an individual basis.

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

It is essential that the Commission defines the conditions for the provision of services by foreign entities on the EU territory, which would determine precisely the conditions for equivalence of regulatory and supervisory regimes. The AMF welcomes the chapter heading proposed by the Commission: requirement for authorization for investment firms and market operators, organizational and conduct of business requirements, effective supervisory powers of competent authorities, applicable rules against market abuse including disclosure requirements for issuers.

The AMF fully supports the role envisaged for ESMA in the Commission consultative document. ESMA should play an enhanced role of coordination also with regards to the contacts with third countries' supervisory authorities including the conclusion of MOUs.

Again, it will be necessary to ensure strict equivalence and strict reciprocity in any mutual recognition approach. Determining the fulfilment of such conditions should be a responsibility of the European Commission in coordination with ESMA.

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

The rationale for an approach limited to non retail business would be to allow for a staged approach. However, as the crisis has shown, the border between retail and non retail business can be easily blurred. Therefore we caution against allowing access by third-country firms to non-retail investors as a risk-free approach to the issue of third-country firms' access to European investors.

The AMF would also like to point out that, in a situation where access by third-country firms to non-retail clients would be allowed under a mutual recognition regime, these firms would not be subject to "EU client-facing obligations" as proposed in the consultation document, but to their own national regime deemed equivalent to the EU regime.

(141) No question asked.

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.

The AMF considers that both ESMA and the national competent authorities have to be able to take action including a restriction or a ban to protect market integrity or financial stability in order to enhance the level of investor protection[5].

(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 AMF is of the view that when national regulators determine that an OTC derivative product is standardised and suitable for clearing, but no CCP is willing to clear that product, relevant authorities should first investigate the reason for this. Subsequent to an investigation, if authorities determine there is insufficient justification for the lack of clearing, the authorities should take appropriate measures to facilitate central clearing. Such action could include creating incentives to encourage innovation by CCPs in a timely yet prudent manner or eventually considering measures that could include limiting, restricting or ultimately banning trading in OTC derivatives products that are suitable for clearing but not centrally cleared.

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

The AMF considers the following types of products deserve more regulatory attention.

1- CfDs
2- Some complex ETFs
3-Some subordinated debt products
4- Commodity derivatives and ETCs (exchange-traded commodities)
5- Forex products (see our answers to question 85)
6- ABS and ABCP
7-Money markets funds
8-PRIPs, especially investment-based insurance products
9- CDS

[5] In respect with money markets funds with constant liquidation value or hedges funds offering high rate leverage level, national regulators should be able to alert the European authorities (ESMA) in order to enable them to adopt urgent measures aiming at reducing the systemic risks that may arise from such products.

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.

The AMF is supportive of all policy measures that are intended to prevent manipulative behaviour, to control or limit disproportionate price movements, to avoid the risks of over-concentration of positions and herding behaviour on derivative markets.

In this regard, the AMF welcomes the Commission's initiative to provide regulators with the option to set limits as effective tools to combat market manipulation, instability and volatility. In addition to the power to intervene flexibly whenever the circumstances so require ("position management"), the use of position and/or accountability limits on certain exchange-traded OTC or derivatives products would be an effective way to prevent manipulation and disorderly markets arising from large positions (e.g. amassed close to the settlement date of a physical delivery), especially concerning participants that are not hedging their positions in the physical markets.

However, before implementing this kind of approach it will be necessary to examine thoroughly the detail of any limits including their scope. Furthermore, it will be necessary to make sure that any such limits can homogenously be applied to all relevant market participants including on the OTC markets. A too rigid policy could result in trading activity migrating to less regulated regimes and eventually be detrimental to markets efficiency and to the price formation process in general.

(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;

The AMF clearly distinguishes the market manipulation issue from the disproportionate price movement issue. The latter can not be addressed by the sole financial regulators and requires an effective global regulatory framework and stronger cooperation between financial market regulators, physical market regulators and where applicable, the relevant competition authorities.

Nonetheless, the AMF believes that derivatives markets (exchanges and OTC) for commodity products are exposed to specific risks due to the duality of their nature. Therefore, market abuse legislation should be designed to take into account these specificities. For instance, it is necessary to ensure effective supervisory oversight and sanctions against cross manipulation between physical markets and derivatives markets.

In addition to effective supervision and enforcement against manipulation, the AMF is of the view that regulators should be able to mitigate the risks, including manipulation arising from large positions. In this regard, imposing position limits depending on the circumstances is likely to constitute an effective regulatory tool.

However, detecting market abuse requires enhancing the transparency of large positions by providing regulators with comprehensive, accurate and timely information on derivatives trades (thanks to position reporting to exchanges or regulators, or to transaction reporting to trade repositories).

As previously highlighted, the appropriateness and consequences of position limits should be examined carefully. Since speculative positions taken by participants should not be considered as *de facto* manipulative, it seems crucial to assess properly whether such investors materially impact the derivatives markets and how any undesired impact can be reduced.

(ii) to reduce systemic risk;

The AMF supports the Commission's objectives to undertake an improvement in derivatives market regulation, especially regarding commodities markets. Promoting central clearing, enhancing market transparency through exchange trading and trade repositories, preventing market abuse, and expanding the regulatory perimeter are legitimate indeed crucial policy goals. Taken together harmonized, clear and effective regulatory provisions in these area will contribute importantly to the reduction of systemic risks.

Besides the reduction of counterparty risk through more systematic CCP clearing, position limits could contribute to mitigate systemic risk by avoiding that underlying asset prices (e.g. for commodities) are disproportionately impacted by trends on financial markets compared to physical market fundamentals.

In conjunction with enhanced transparency of physical market fundamentals (and of financial market position taking), it seems that mandatory position limits for very large financial positions could be an effective tool to mitigate systemic risk arising from positions taken by the various market participants across different markets, be they derivative or spot markets. A more holistic approach to derivatives market surveillance will be necessary to ensure the stability and integrity of markets, especially on commodities markets.

(iii) to prevent disorderly markets and developments detrimental to investors;

The AMF is of the view that position limits will likely have little or no effect on medium and long term price trends, but can help to minimise sudden and harmful short term price movements. They are very likely to be necessary, at least in some markets, to prevent undue volatility.

With regard to the commodity price volatility issue, the AMF highlights the importance of greater transparency including the need for more timely and accurate data and forecasts on market fundamentals. Enhanced transparency should help in smoothing medium term price trends by enabling both the demand and the supply sides to react better to change.

(iv) to safeguard the stability and delivery and settlement arrangements of physical commodity markets.

Commodity derivatives markets closely interact with the physical markets. Implementing an effective regulatory framework implies to keep in mind that delivery arrangements for physical assets are crucial in respect of the

price formation process. Position limits could be a way to more effectively ensure timely and efficient delivery of underlying assets. Hence, position limits could contribute to addressing the issue of convergence between spot and futures prices during the life of the commodities derivatives contracts (the so called “basis risk”), especially during the current “spot” settlement month. In addition, it is crucial to ensure that delivery of commodities is prompt.

(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.

The AMF considers that regulatory efforts should focus on commodities derivatives in priority to tackle the fundamental issues in relation with energy and food security and pricing.. Indeed, given the duality of their nature and the recent structural changes in these markets (such as the increased participation of non-professional investors and other financial players mainly through index funds or hedge funds) a more transparent and efficient regulatory framework for commodities markets (including spot markets) must be implemented urgently.

The AMF would emphasize that, as far as other derivatives are concerned, it is particularly important to maintain heightened regulatory scrutiny of the CDS markets.

(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?

It is important to adapt position limits to the nature of the participants in the markets. In this regard, the AMF believes that clear distinctions must be made by EU rules e.g. between financial investors acting on own account and taking speculative positions and commercial participants (producers, traders and end-users) hedging their physical positions.

However, if a proportionate approach appears essential to achieve the abovementioned objectives, it is also crucial to ascertain that the rules are not potentially detrimental to efficient markets and to the price formation process. The exclusion of key financial players could indeed hamper market efficiency by reducing depth and liquidity.

Position limit levels for the current “spot” month for futures giving rise to physical delivery, should be determined by regulators in terms of percentage of deliverable supply for the relevant commodity.

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