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EUROPEAN COMMISSION – CONSULTATION PAPER
REVIEW OF THE MIFID

FRENCH BANKING FEDERATION'S RESPONSE

GENERAL REMARKS

- The French Banking Federation (FBF) represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorized as banks and doing business in France, i.e. more than 500 commercial, cooperative and mutual banks. FBF member banks have more than 25,500 permanent branches in France. They employ 500,000 people in France and around the world, and service 48 million customers.

- As universal banks, French credit institutions are directly and highly impacted by the enforcement of the MiFID on their main business lines: corporate and investment banking, intermediation, distribution.

- For European markets, the reform of the functioning of financial markets must not only be the result of experience acquired during three years of implementation, which is a brief observation period, but also - and more importantly - a European response to problems raised by the economic crisis.

- In this perspective, **the legislative intervention must always be justified by evidences of market failures or market disorders**.

  Considering market failures, the FBF:
  - Notes that **systemic risk resulting from credit derivatives justifies a legislative intervention for CDS TR (TIW) the clearing of "eligible" derivatives and then supports the EMIR project**.
  - Considers that **Equity markets have well resisted**, in terms of functioning, during the crisis despite the very high volatility, but that in the same **one of the**

consequences of the MiFID was market fragmentation and opacity of many new venues which result in less visibility of the price discovery process. Then there is room for improvements in transparency on Equity markets.
- States that in Europe, and specifically in France, there was no market failure in the field of commercialization of financial instruments to non professional investors, despite the high volatility of equity markets, the low reward of monetary products and the uncertainties on bond markets.

- For French Banks, the **MiFID review must mainly focus on the equity markets' architecture**. As it is stated above, the EMIR project addresses the issue of systemic risk mitigation on derivatives markets and in this field the MiFID is less important since the systemic risk mitigation can not be addressed at the trading level.

- Considering the global approach of the European Commission on the **markets**, **the FBF**:

  - **supports most proposals of the Commission concerning equity markets** (transparency, automated trading, SME, creation of OTFs, consolidated tape), even if some clarifications have to be given;
  - **estimates that the transparency of non-equity markets is feasible, also it should be considered with caution and could be relevant only after transactions (post-trade) and with precise calibration as regards the asset classes and the transactions**;
  - deems that pre and post-trade transparency is feasible on exchange traded funds (ETFs) and depositary receipts (DRs);
  - **considers that pre-trade transparency regulatory requirements on non equity markets are not appropriate**:
    - . on bond markets because investors do not need it and because it would harm the liquidity which is already low;
    - . on derivative markets because it is already widely available through various platforms and because it does not make any sense since the transactions are bilateral contracts designed between the intermediary and the investor and depending of specific situations.
  - **estimates that MiFID is not the appropriate vehicle to address the issues related to commodity derivatives markets since**:
    - . the volatility of physical commodity markets is not caused by the use of financial instruments but by general economic underlying causes;
    - . on most of these markets the main actors are not financial institutions and then can not be regulated by the MiFID.

    As a consequence an ad hoc legislative vehicle would be envisaged.

- **Strongly supports *statu quo* of rules applying to commercialization of financial instruments**, since the current regime is already very heavy from the perspective of investors, gives them a high level of protection, and since there was no market failure in continental Europe. The FBF underlines that this absence of market failure must be taken into account considering that MiFID was implemented just before the crisis. The FBF also stresses the problems that have been experienced in some jurisdictions were not caused by a lack of regulation but by the non-application of the existing regulation.

QUESTIONS

DEVELOPMENTS IN MARKET STRUCTURES

General remarks on Equity markets

The FBF agrees with European Commission views on the necessity to correct competition condition asymmetry on **Equity markets** and to enhance the level of transparency on these markets.

There fore **the FBF strongly supports most of the proposals of the Commission on Equity markets**.

The foundation of MiFID was an analysis of Equity markets, based on the monopoly enjoyed by the stock exchanges, either in law or in fact. It should be recalled that, in accordance with the ISD of 10 May 1993, States had the power to impose an obligation to concentrate orders on the regulated market until the MiFID directive's entry into force. The objective was to achieve "*an effective, transparent, integrated trading infrastructure.*"

To this end, the philosophy of MiFID was based on three-pronged reasoning:
- The stock exchanges' monopoly (as long as it continued) did not allow investors to benefit from lower trading costs resulting from market computerization in the 1990s.
- Competition between stock exchanges and other market operators would cause the decrease in trading costs to have an effect on intermediation costs.
- Due to the opening up of competition among various market operators, pre-existing rules relating to investor protection prior to order execution and to execution itself had to be reinforced (by the creation of a "best execution" obligation).

During the MiFID directive's preparatory work, French banks defended pre- and post-trade transparency rules, which were needed to prevent information asymmetries between intermediaries and investors. Competitive distortions, whether real or imagined, the impact of fragmentation on the price discovery process and, to a lesser degree, the directive's allowable exceptions have been the source of most formal criticism since then.

Without calling into question the competition created by other operators for regulated markets, French banks feel that it is necessary to correct existing competitive-condition asymmetries that have appeared since 2007. Indeed, the directive itself has brought about asymmetries and not the economic crisis, which, although it has made the markets much more volatile, has not affected their efficiency in terms of liquidity or resilience.

The FBF supports the following evolutions of MiFID on Equity markets:
- **Extension of pre-trade transparency to all but blocks orders and "imported price" transactions, regardless of the venue on which they are executed.**
- **Reinforcement of ex-post supervision for all trading venues (including dark pools).**
- **Regarding the use of high-frequency trading, an ESMA driven study on possible harmonization in Europe about tick sizes.**

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

The FBF does not oppose to the proposed definition of admission to trading "*as the decision by the operator of a regulated market, MTF, or organised trading facility [...] to allow a financial instrument to be traded on its systems*".

(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.

As a general remark, the FBF understands that the notion of "Organised trading facilities" (OTF) would capture all asset classes: equities, fixed income, derivatives.

On the other hand, the current proposal seems to address concerns raised by the evolution of the equity market since the implementation of MIFID but the FBF it is doubtful that the analysis for pertaining to financial instruments is identical.

Anyway, generally speaking, the FBF supports the proposal of creating OTFs as soon as it is well designed and calibrated for each type of financial instrument.

On the equity market, the issue of the transactions processed outside the trading venues regulated by MIFID (RM, MTF and IS) has been raised by various stakeholders since the implementation of MIFID, but the FBF considers that, before taking any regulatory action, it is necessary to analyze what is behind it and what could be the consequences on the overall market structure (when it is said by some institutions that about 30% to 40% of the transactions are reported to be traded outside the "regulated" MIFID venues, the major part of these transactions does not correspond to addressable liquidity.

The current OTC trading can be divided into three main categories:

- The main part in volume is what is called the "non addressable liquidity", that is to say liquidity which by nature would never be displayed to the market participants by the investment firm which processes this kind of transaction. This activity is mainly related to the derivative activity of the intermediary ((exchange of collateral, exchange of securities basket with ETFs, exchange of equity swaps deltas, hedging of options.). This activity was carried out long before the implementation of MIFID in the same condition than today, is well known by regulators, monitored in house and raises no issue.
- The transactions process through dark pools (for large in scale transactions or not) and crossing systems which are based on the pre trade transparency waivers (large in scale, reference price waivers). These systems are those defined as organised trading facilities in the Commission consultation paper. We do not have precise figures on these activities but according to our members that have put in place this type of systems, it represent today about 10% of the overall liquidity. It should be underlined that in most cases, these transactions are processed accordingly following an express query of the end client.
- The "pure" OTC trading defined as bilateral trades carried out on an ad hoc basis between counterparties and not under any organised facility or system. This type of trading has always existed and does not raise any particular concern.

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

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

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

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

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

The FBF would support the definition given by the Commission under the reservation that it only should apply to OTC derivatives (with respect to criteria defined at section 2.2.3. of the consultation paper) and without prejudice of a specific definition for securities venues based on a multilateral character.

(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 FBF is not opposed to this proposal but estimates that such creation of a new investment service is not necessary, because the services of “execution of orders” or “dealing on own account” already cover these situations. Is shall however be clear that either OTFs will be a specific investment service or will be captured by “execution of orders” or “dealing on own account”, it will benefit from European passport.

(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 FBF does not favour a mandatory conversion depending only on the volume. There shall be precise definitions or each kind of markets or systems (regulated markets, MTFs, OTFs, SIs). The only case in which there shall be a regulatory requirement for an actor to convert into another kind is the changes in the functioning which implies that he practically becomes another kind of market.

But generally the FBF opposes a mandatory obligation to comply with a specific regulatory model because of other reasons than functioning.

For instance, a SI which becomes multilateral has to change his status to become at least an OTF. On the other hand, a crossing network which does not generate any additional liquidity shall not be treated as an MTF since it concerns only the relationship between the broker and its client.

What could be relevant for the FBF would be to apply a rule imposing, when the OTF reaches a certain threshold, to route the order over this threshold on a “lit” market. Of course this obligation involves a precise definition of the threshold, which is to be defined by level 2 measures by ESMA.

(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.

The Commission proposes that:

a) The operator would add the identifier for its crossing system to post-trade information, when this is required under post-trade transparency provisions in MiFID, about transactions executed on the system. Operators would be required to make public aggregated information at the end of each day about the number, value and volume of all transactions executed using the system;

b) The operator would identify in transaction reports whether the transaction was executed on the system.

The FBF welcomes this proposal that would lead to a greater transparency.

(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 FBF considers that the multilateral character of a venue should be the key element of the definition of OTFs and that it is the best way to distinguish OTFs and SIs. This said, not all OTFs shall be treated as MTFs, so the FBF disagrees that systems which bring together the interests of more than two trading partners should automatically be treated as MTFs.

On the other hand, the FBF considers that one point needs to be clarified: an intermediary falls into the SI regime when it books the transaction against a house account or when its proprietary trading has a privileged access. This does not mean that proprietary trading cannot participate to the system as soon as it is strictly treated like other participants of the system and that there is no resilient liquidity in the system (non discretionary rules is also a key element).

Trading of standardised OTC derivatives on exchanges or electronic trading platforms where appropriate – General remarks

On **OTC derivatives**, the FBF supports the EMIR project, provided that prudential incentives are implemented and that the CCPs have a direct access to the central bank liquidity. **Price discovery and liquidity, which are the key factors of market efficiency on Equities, are replaced here by the systemic-risk mitigation, which is the cornerstone of the EMIR project.**

Thus **the FBF is sceptical about the relevance and the efficiency of the mandatory centralisation of trading for OTC derivatives**, while the centralisation of clearing is really the main objective of the regulation of OTC derivatives.

Indeed, the FBF considers that observed issues affecting OTC derivatives should be addressed, first and foremost, through ongoing regulatory efforts on central clearing and reporting, for three main reasons:

- A counterparty to an OTC derivative transaction is exposed to two different kinds of risks: (i) market risk tied to the behaviour of the underlying asset and (ii) the potential default of the other counterparty. Counterparty risk can be reduced by central clearing but never at the level of trading;

- Central clearing does not require centralised trading to be successful. A CCP will stand between two original counterparties, acting as the seller to the original buyer, and as the buyer to the original seller, irrespective of the execution modality employed to transact; for instance, it is conceivable that a contract could be considered standard according to the definition but not according to its size; given that OTC derivatives market is essentially a block deals market, liquidity is in the hands of the dealers; thus why clients should be prevented from using it?

- The benefits traditionally associated to centralised trading (transparency for price discovery and liquidity) are not relevant for OTC derivatives. It seems fairly unrealistic to suppose that liquidity for a particular contract or place of execution could be decreed. An example would be the attempt a few months ago by Liffe to create CDS contracts (on Itraxx indices) which were quoted but only attracted very low liquidity.

- Corporates under certain thresholds and States/ central banks should be exempted from central clearing: in these cases, the price of a derivative transactions does not only depend on market factors but also on the counterparty risk, i.e. the price takes into account the “risk-appetite” (risk limits and internal ratings) and/ or the potential hedging of the counterparty risk of the transaction (i.e. CDS spread). In addition, it is worth noting that the credit valuation adjustment (CVA) capital charge affecting transactions that are not cleared will be significant. The impact of this charge on the price of the transaction will also vary from one intermediary to another.

- An adequate post-trade transparency will enable the various counterparties to assess the quality of execution without undermining liquidity. The trade repositories set up by EMIR would constitute the appropriate solution.

As a consequence, the FBF considers that the central clearing is far more critical to enhancing the OTC derivatives market than centralising the trading process.

Besides these arguments, it would be very inappropriate to put in place a stronger market framework for OTC derivatives (without any exemption or waiver) than the current equity regime, through a new “concentration rule”.

(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.

The FBF considers that mandating the trading of all clearing eligible and sufficiently liquid derivatives exclusively on venues that provide non-discriminatory and multilateral access would not be relevant. What could be more feasible is have an incentive to centralise trading for all practically cleared derivatives.

Indeed, even if exchange-style trading would, broadly speaking, improve the ability of market participants in general to more quickly and easily determine the range of prices at which they could potentially execute a trade, the FBF believes that there are good reasons for some large counterparties to still trade clearable and sufficient liquid derivatives bilaterally. For example, firms compete with each other for trades from large investors, thus leading to more market-making activity for them and favourable market bid-ask spreads. Importantly, many investment firms commit to providing liquidity to clients with whom they have strong relationships. The FBF considers that such bilateral relationships should be allowed to continue, irrespective of the derivative instruments traded.

An absolute mandate to trade all clearing eligible and sufficiently liquid derivatives in specific trading venues disregards the fact that article 7 of the proposal on a Regulation on OTC derivatives (EMIR), central counterparties and trade repositories foresees an exception from the clearing obligation in favour of non financial counterparties that do not exceed a clearing threshold. As a result of that exception, non-financial counterparties willing to take a position in instruments that would be centrally clearable, can still avoid central clearing and, therefore, have the possibility - if they so desire - to take into account the creditworthiness of the counterparty in the execution phase and also mitigate the credit risk through bilateral collateralisation. As trading on an exchange-style venue calls for a centralised counterparty to guarantee the trades, forcing exempted non-financial counterparties to trade in such venues would take away their right to be exempted from bilateral trading and central clearing.

From an operational perspective, exclusive exchange-style trading for a subset of derivatives may not be a viable commercial proposition considering clients' needs. A common example is where two institutions wish to close a spread transaction in the interest rate market. In such a case, one party would contract to pay the fixed rate for say 5 years whereas the other would agree to pay the fixed rate for 10 years. In this situation the differential between the two rates (the spread) is the generally quoted figure and hence would not be suitable for multilateral execution even though the resultant two transactions would be centrally cleared. Similar examples apply to a spread trade between 10y GBP and 10y EUR swaps. Another example is where a swaption is quoted. The market often trades swaptions as the option plus the offsetting vanilla swap by way as a delta hedge. It would be inefficient if this package would need to be split with the swaption being traded OTC and the swap via a MTF.

In addition to the above, the FBF wishes to highlight that it shares the recent view of the Financial Stability Board[1] that "*organised platform and OTC derivatives trading may meet different kinds of needs. As a result, they can be considered as complementary trading models and could co-exist for the* <u>*same*</u> *product*".

All the above considered, and taking into account the mandate of the G20, the FBF believes as CESR suggested in its feedback statement of December 2010, that it would be technically possible to incentivise the exchange-style trading of sufficiently liquid and cleared derivatives provided that market participants retain the ability to use similar OTC

[1] Implementing OTC Derivatives Markets Reforms. October 2010. FSB (page 43).

products if they better fit their needs, as it is already the case in equity derivatives and commodities markets Competition between exchange traded products and OTC products should remain a key driver of OTC derivative efficiency. Indeed, moving to exchange-trading platforms should be promoted by the clients that should have an interest in using them, failing which such an obligation may only limit their choice and the level of liquidity in these markets without any benefit for them

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

The FBF agrees that, from a regulatory point of view, the trading of clearing eligible and sufficiently liquid derivatives could only be incentivised by the creation of OTFs that would fulfil the established criteria. However, due to the necessity to adopt trading platforms to the characteristics of OTC derivatives, it might need to have more flexibility than for equity-like platforms, in particular regarding multilateral access. Integration or RFQs may also be necessary to attract clients and market-makers on the platforms

(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 FBF is not in favour of mandating that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities and would only accept that regulators develop the appropriate tools and incentives to promote standardisation and make exchange-trading beneficial for clients as well as dealers.

(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.

The FBF considers that successful OTC derivatives exchange-style trading should allow for mechanisms to conduct “block trades” (as with equities). Under this mechanism, two counterparties privately negotiate a price that is agreeable to both – and not necessarily the market price at the time of the trade. Typically, there should be minimum size requirements for such trades and post-trade reporting requirements to ensure that information is disseminated to the market, without revealing who the counterparties are. This mechanism would be conducive to adequate market making and with it, more liquidity volumes.

Additionally, trading of OTC derivatives on regulated markets, MTFs, or organised trading facilities should take place in an environment free of restrictive policies on index licensing by benchmark providers. Anti-competitive restrictions on licensing appear to have been a contributing factor in the failure of MiFID to stimulate competition between trading venues for listed derivatives on benchmark indices.

(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.

As stated above, the FBF is not in favour of mandating that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities. Furthermore, the FBF considers that, as long as organised trading facilities are regulated flexibly and pragmatically going forward, trading of standardised OTC derivatives is likely to naturally move to such venues.

Automated trading and related issues – General remarks

On automated trading, The FBF would like to express its general views:

The FBF supports that potential issues around automated and high frequency trading be given careful consideration, given that:

- First, ***there is no evidence that HFT is detrimental to the market***; rather, the French banking industry considers that HFT has brought helped market to reduce order size and to contribute to best execution.

- Second, ***concerns have been legitimately raised with respect to the large number of cancelled orders***. In this light, any rules should be designed with the objective of preventing market abuse, whilst not however hindering technological progress or unduly restricting competition.

- Third, ***it would not be appropriate to slow down HF traders***.

- Four, ***there must not be any confusion between HFT and flash order problems***; flash orders, which have been seen mostly in the US, are those made visible to some or all market members by a centralized market prior to their official central order-book entry in order to preserve the market's liquidity and increase its attractiveness.

  To take advantage of the opportunities offered by this type of order, investors must react much more quickly (in milliseconds and even microseconds) than market operators. Only large investors involved in high-frequency trading and thus possessed of computerized, automated trading systems have the means to react and take advantage of flash orders.

  Although in theory these orders improve the efficiency of centralized markets, they create unequal treatment among market participants.

  Flash orders have been used for several years. The Chicago Board Options Exchange (CBOE) was the first venue to use them in an attempt to improve execution speed. This activity remained limited until June 2006, when several players, such as Direct Edge, began to specialize in this area. In June 2009, flash orders accounted for approximately 2.4% of all orders executed in the United States.

  Defenders of this practice believe that such information transmission helps to improve market efficiency and market liquidity, while detractors believe that they cause unequal investor treatment in terms of access to market information. The FBF is of the second opinion.

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

The proposed definition of automated and high frequency trading seems too wide. A definition of automated trading as "trading involving the use of computer algorithms to determine any or all aspects of the execution of the trade" would risk capturing Best Execution/ Smart Order Routing systems, which should be clearly excluded.

The FBF also believes that High Frequency Trading will require a precise definition, rather than to be merely considered "a subcategory of automated trading". Such a definition should clarify that trades are always, rather than usually, carried out as principal.

(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 FBF supports this proposition. It is crucial that all entities involved in HFT be regulated and supervised in order to preserve' the integrity of the markets. However, this still leaves open the question of the appropriate rules to be applied within that framework. In any case, in the view of French banks a distinction should be made between proprietary trading and trading on behalf of clients.

(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 FBF agrees with this proposal.

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

The FBF agrees with the suggested requirements.

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

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

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

The FBF considers that the setting up of the tick sizes should be done by the regulators within ESMA. ESME 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.

The tick size should be fixed equity by equity.

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

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

The FBF considers that high frequency traders (HFT) should not be assimilated to market makers, as the strategies HFT pursue does not systematically result in providing liquidity to the market. Therefore, The FBF would oppose this requirement.

(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 FBF does not believe that slowing down HF traders would be the right regulatory approach. As stated above, there is no evidence that requiring orders to rest on the order book for a minimum period of time would improve the micro structure of the equity market. It would probably lead to a changing of strategy of market participants in order to bypass the rule with unforeseeable consequences on the micro structure of the market. Besides that, the FBF considers that alternative proposal to introduce order/transaction ratios seems unworkable.

As rightly pointed out by the European Commission, there is no conclusive evidence that HFT as such is detrimental to the market. Rather, potential concerns around potential market disruptions are best addressed by ongoing supervision and by trading venues’ robust control systems. The comparative advantage acquired by HF Traders through investments made in IT software and co-location, on the other hand, should be considered legitimate.

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 FBF is unclear about what business the SI regime is meant to capture. Generally, the SI regime is seen to be very onerous and of little attraction to most firms. If the Commission’s intention is to enlarge the number of SIs, it should seek to alleviate the applicable rules.

(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.

If the Commission’s intention is to enlarge the number of SIs, it should seek to alleviate the applicable rules.

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

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

The FBF agrees that the same activities should be subject to the same rules.

(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?

The FBF agrees. Closer cooperation between trading venues would be helpful to further enhance market oversight.

SME Markets

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

(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 FBF supports efforts to facilitate access of SMEs to direct funding. This said, it seems that transparency directive and prospectus directive are the key texts

Therefore, the FBF does not believe that MiFID would be the best tool to achieve the desired alleviation of the administrative burden on SMEs.

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

The proposed criteria could be workable. It must however be clarified what happens once a company exceeds these thresholds.

PRE- AND POST-TRADE TRANSPARENCY

Equity markets, Equity-like markets and trade transparency regime for shares traded only on MTFs or OTFs – General remarks

The foundation of the MiFID directive was in fact an analysis of equity markets and their functioning, based on the monopoly enjoyed by the stock exchanges, either in law or in fact. It should be recalled that, in accordance with the ISD of 10 May 1993, States had the power to impose an obligation to concentrate orders on the regulated market until the MiFID directive's entry into force.

The objective was to achieve "*an effective, transparent, integrated trading infrastructure.*"

To this end, the philosophy of the MiFID directive was based on three-pronged reasoning:

- The stock exchanges' monopoly (as long as it continued) did not allow investors to benefit from lower trading costs resulting from market computerization in the 1990s.

- Competition created between stock exchanges and other market operators would cause the decrease in trading costs to have an effect on intermediation costs incurred by investors.

- Due to the opening up of competition among various market operators, pre-existing rules relating to investor protection prior to order execution and to execution itself had to be reinforced (by the creation of a "best execution" obligation).

During the entire MiFID directive's preparatory work, French banks defended pre- and post-trade transparency rules, which were needed to prevent information asymmetries between intermediaries and investors. Competitive distortions, whether real or imagined, the impact of fragmentation on the price discovery process and, to a lesser degree, the directive's allowable exceptions have been the source of most formal criticism since then.

Without calling into question the competition created by other operators for regulated markets, French banks feel that it is necessary to implement reforms that prevent the information and competitive-condition asymmetries that have appeared since the directive became effective.

As a consequence, The FBF strongly believes that the priority is to improve pre- and post-trade transparency, except for block trades, with analysis needed to define block thresholds.

The FBF ***support the following positions:***

- ***Extension of pre-trade transparency to all but blocks orders,*** regardless of the venue on which they are executed, which has the advantage of contributing to equal information among all investors, but could alter the conditions under which institutional orders are executed by opening up the market to arbitrageurs.

- ***Reinforcement of ex-post supervision for all trading venues (including non lit venues).***

- ***General implementation of post-trade transparency based on a common infrastructure, which can serve as a reference for both public data and the regulator, thereby leading to:***
    - Clarification and harmonization of reporting rules.
    - Creation of a European entity charged with consolidating execution data in real time. This single, central organization would also be responsible for making data available, collecting associated revenues and defining a method for redistribution to the infrastructures based on the volumes and quality of the information collected.

<u>Equity markets</u>

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

Considering the evolution of the average size of orders and, as a consequence, of the standard market size as regards the different trading venues, the FBF would support that the interpretation of waivers would be addressed by ESMA.

(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.

IOIs by definition are not actionable and as much do not construe any form of binding offer on either party – they are bilateral marketing device that do not form an order and as such are outside of pre-trade transparency.

However, if there are some forms of IOIs that indeed are actionable (they include firm price, size and direction) then these take on the characteristics of an order and should be treated as such. The FBF agrees tant where actionable IOIs are released to some market participants but not others, this implies a problem of information asymmetry, which in the view of the FBF is opposed to the principle of equality of opportunities between market participants. It should not be tolerated that certain information is only available to a limited number of market participants, on a discriminatory basis.

(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 FBF welcomes the conclusion reached by the Commission whereby the large in scale orders remain "*essential in striking the right balance between market transparency and protecting legitimate interests of market participants who are essential contributors to the liquidity of markets*". As, in our view, it is common practice for brokers to split large in scale orders into smaller orders for execution, the last" child" order will always be an order stub (below the threshold). If this last order cannot be treated dark, its execution will negatively impact the execution price of the LIS order. This is particularly crucial for small LIS orders with a size just above the relevant threshold.

Hence, we consider that orders stubs should still benefit from the large in scale waiver.

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

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

(31) What is your opinion about keeping the large in scale waiver thresholds in their current format? Please explain the reasons for your views.
French banks are neutral on this question.

On the one hand, they do not see evident and urgent reason to to change the current calibration for large in scale orders. The diminution of the average trade size observed on the regulated markets in the recent years does not mean that the average size of client's orders has diminished. The development of algorithm trading and high frequency trading explains the trend in the reduction of the average trade size. As such, these kind of trading cannot justify the modification of the calibration for large in scale orders.

On the other hand, they could support a general evolution of the thresholds depending on the evolutions (up and down) of the average size of orders executed on the market.

(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 FBF supports the amendment to the framework directive to publish post trade information as quickly as technically possible. However, the FBF considers that the introduction of an implementing act mandating the reduction of the reporting deadline from 3 minutes to 1 minute for all trades is not practicable. Indeed, reporting within 1 minute would not be possible for manually handled trades. Besides, it is not clear what would be the added value of their reporting within 1minute, instead of 3.

As per the deferred publication regime, the FBF considers that the Commission´s proposal to exempt the very largest trades from the announced general regime (i.e. from 3 days to the end of the trading day) is a step in the right direction. The FBF believes, nonetheless, that deferred publication for those trades should be allowed in a minimum 24 hours-timeframe (as opposed to before the opening of the following trading day) as they are often executed close to the end of the trading day: forcing firms to publish whilst they are still on risk and cannot even unwind a position as the market is closed would leave those firms vulnerable.

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

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

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

The FBF UCITS also would like that UCITS are excluded, since the underwritings/ redemptions of UCITS are done on the basis of the valuation given by the asset management company.

(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.

Broadly speaking, the FBF considers that appropriate transparency rules must be designed on the basis of a consideration of the targeted investor basis and the depth and form of information most appropriate for these investors. The FBF also considers that the transparency regime should be calibrated by the MTF or OTF operator.

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

The FBF would agree and underlines that the calibrated regime shod not harm the liquidity of SME markets.

<u>Non Equity markets – General remarks</u>

The French Banking Federation, at every occasion given by CESR and by the Commission across consultation papers, has always supported a general principal of full pre and post-trade transparency on Equity markets and a principle of appropriate post-trade transparency on non-equity markets, with specific calibration depending on asset classes and on the nature of transactions. Last but no least, on derivative markets, while pre-trade transparency does not make sense, post-trade transparency could be feasible in some field, depending on the underlying assets and of the nature of transactions.

The general position of the FBF is that:

- ***Each asset class needs to be reviewed separately to determine correct approach;***
- ***Liquidity of non equity markets is not of the same nature as liquidity on equity markets;***
- ***The current equity framework is not relevant for other instruments;***
- ***In many cases, execution prices are negotiated bilaterally due to constraints in supply and ability to liquidate inventory. Too much Price discovery/ transparency in these instruments could be detrimental to liquidity.***

<u>Bond markets</u>

- ***Bond markets have five main characteristics:***
  - By nature, Bond markets are largely ***wholesale markets*** on which the intermediaries are remunerated by spreads and not by commissions;
  - The ***integrity of the market and the prevention of market failure depend on the competition between the dealers*** who bring liquidity and not on transparency;
  - While Government bonds generally generate regular liquidity (*i.e.* more than 2 transactions per day), ***Corporate Bond markets are by nature primary markets***. In Europe, about 200 000 corporate bonds are listed. Only about one hundred are traded more than once a day, and about fifty more than twice a day. The operational reality of these markets is that the secondary market exists only for approximately one month after the issuance.
  - Institutional investors (Insurers, asset managers), intend to hold the bonds until maturity. ***There is no more "secondary market" as intellectually defined but only a "redemption market"*** for investor who would like to sell. And who is always able to easily get the offers from market makers. In this field, the FBF notices that institutional investors who always ask for more transparency on Equity markets have never asked for such general transparency on Bond markets because they don't need it.
  - In most cases, ***the very few retail investors in France keep bonds until maturity***; as a consequence, the general absence of secondary market for retail investors reflects the fact that these investors are only looking for a stable and annual remuneration of their investment.

- ***These characteristics of bond markets are completely different from those of the equity markets*** which are the following:
  - Liquidity and price discovery largely depend on the centralisation of the transactions (except for block trades) on order driven markets as on price driven market;
  - The trading venues are mature;
  - There is a permanent flow of financial information concerning issuers (from both Medias and Issuers' periodic publication) which largely defines the

investors’ behaviour on the sell side or on the buy side;
- There is a significant retail market.

- **Pre-trade transparency is not appropriate, but delayed post-trade transparency is feasible**. Pre-trade transparency would probably be detrimental to liquidity since it would have a dissuasive effect on market makers to offer a bid and ask for corporate bonds. As these markets are structurally made for “redemption”, the offers shall be made only for institutional investors wishing to buy or sell for specific purposes and who will anyway find the offers of the market makers.

- ***Post-trade transparency is feasible*****,** provided that a proper delay of reporting after the transactions (end of the day for all that day’s transactions, for instance) and a proper definition of the threshold under which the transactions will be reported are designed in Level 2 measures. A distinction should also be made between Corporate and Government bonds. Last but not least, data centralisation could be envisaged in order to facilitate access by all players. These properly designed principles could be set up, with incentives for self-regulation.

- ***Considering secondary markets liquidity***, the FBF is ready to consider any ***incentive for an industry initiative to implement mechanisms for improving this liquidity*** (*via* offer centralization and matching of buyer and seller interests). In France, several initiatives are being discussed.

Derivatives markets

- a sufficiently centralised architecture needs to be defined for European markets (involving standardisation, clearing and information) to allow European financing and investment banks to prevent systemic market risk. To this end, the creation of clearinghouses for derivatives should be encouraged, and clearinghouse governance standards that reflect their “Utility” character and promote cross-zone concentration should be put in place. In this perspective, the FBF supports the EMIR project.

- Continued efforts at standardisation, the prudential incentive to extend clearing and the definition of clearing rules are at the heart of the debates, which will take place within the context of directives on capital requirements for market infrastructures.

- Priority must be given to **credit derivative markets**, for which French banks propose two areas of reform:

  - **A prudential incentive to harmonize contracts and centralized clearing via preferential capital treatment of derivatives cleared on CCPs (rather than the implementation of punitive treatment of derivatives cleared bilaterally).**

  - **Implementation of central clearing counterparties supervised by the central bank issuing the currency in which the derivatives are denominated.**

- On these bases, post-trade transparency could be envisaged but not in general terms: it should be calibrated for each asset class and with specific requirements designed at level 2 by ESMA. The FBF supports the European Commission approach in this concern.

This case by case calibration of post-trade information shall be based on limited information on the counterparties and underlying as regards the complete information which is done to Trade repositories. In this area, a collective approach as regards transparency does not make much sense. Post-trade price transparency in relation to liquid OTC derivatives to regulators should be supported on a trade-by trade basis, and to the public on an aggregated basis, via a single trade repository per asset class (to avoid fragmentation of data). The FBF also stresses that post-trade transparency would not give a real comparability of the prices, because OTC derivatives are rarely identical and because the price will reflect a specific counterparty risk for each bank.

- On the contrary, pre-trade transparency does not make sense. Indeed, derivatives are coverage instruments designed in order to hedge some risks: derivative markets (credit derivatives, commodity derivatives, interest rate derivative and so on) are done for this purpose; they are not investor markets but coverage markets which functioning is not collective but led by individual and OTC needs and behaviours.

(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 FBF underlines that transparency makes sense for the most actively traded non-equity instruments. In this respect, the FBF considers that:

- Not necessarily all bonds and structured products with a prospectus are the more liquid/frequently traded market segment. Liquidity depends, on the contrary, on the simplicity of the issuance and on the rating and reputation of the issuer;
- While there could be a room for a pre-trade transparency on derivatives which will practically be cleared through CCPs, the extension of such regime would be unworkable for "*any OTC derivative*" as the Commission proposes by reference to Article 6(1) of the Commission's proposal on derivatives, central counterparties and trade repositories.

(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).

Generally speaking, FBF notes that this proposal could impose more requirements for non-equity instruments than for equities.

The FBF opposes pre-transparency obligations for OTC traded instruments. Participants in the OTC markets do not complain about lack of pre-trade information and are not asking for any, as recognised by CESR in its corresponding technical advice.

In many segments of the OTC derivatives market, for example, counterparties are able to access a number of sources for price discovery. The exact mechanism may vary by asset class, reflecting different characteristics of the products and participants.

The FBF therefore do not see what would be the benefit of such transparency regime. In addition, the technical details of the pre-trade regime (i.e. quotes reflect market size, are binding below a specific trade size and do not deviate from pre-trade information available for comparable or identical instruments on exchange-like trading venues) run counter to the way bonds and derivatives are currently priced and may - if imposed - damage liquidity in the market.

In connection to the regime envisaged for the instruments under the scope of the proposal (bar for the exceptions suggested by the FBF under the response to the above question) and that are traded on regulated markets, MTFs and organised trading facilities, the FBF considers that whilst the proposed "continuous updating of available and actionable trading interest" could theoretically help market participants to more quickly determine the range of prices at which they could execute a trade and to more quickly and easily identify a counterparty offering attractive terms, the fact is that important segments of the concerned pool of instruments – for example, corporate bonds - trade very infrequently. These markets, it should be reminded, remain mostly wholesale. Therefore, the FBF would suggest that, instead of imposing a regime that may be relatively unnecessary, the Commission concentrates instead in targeting known market failures such as effective quote (and, eventually, quote actionability) disclosure to the market.

(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.

The FBF opposes the introduction of a pre-trade transparency regime for instruments that are traded OTC (see response above).

(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.

As a general remark, the FBF considers a post trade transparency regime for non equity instruments should be designed considering that the primary emphasis should lie on easy accessibility and ease of understanding rather than on the level of detail of the disclosures. The FBF notes that there would be multiple dangers in a too granular regime as it would invite comparisons between products that are essentially different and might distract the attention from market fundamentals.

Importantly, post trade transparency should be designed in such a way that protects liquidity provision.

Furthermore, the FBF supports the intention of the Commission to device a regime that is transaction-based and agrees that certain volume thresholds would need to be established as it would be near-impossible to disclose every fixed-income instrument or derivative transaction that is carried out. An unlimited scope is unlikely to be of real value to the broader public.

As CESR put it in its consultation papers, Mifid should make a difference between corporate bonds and other non equity products. For corporate bonds, it is possible to tailor a specific post-trade transparency regime for small orders based on the CESR proposals, even if thresholds and publication delays need probably to be reviewed as they appeared quite hard to implement – please refer in that regard to the former FBF answer to CESR consultation on non-equity transparency.

For Corporate bonds, in connection to delays, the FBF considers that real-time or close-to-real time price dissemination could actually make dealers more averse to large orders, thus significantly deteriorating liquidity and the attractiveness of these markets for institutional investors. Time delays should not make it difficult for market makers to commit capital to transactions.

With regard to OTC derivatives, the FBF recalls the role that central counterparties and trade repositories could play as price disseminators. As basic infrastructures in the OTC derivatives markets, the FBF recommends to design any post-trade transparency regime levering into existing market practices.

Moreover, proper post-trade transparency requirements per transaction would be much more difficult to implement due to the non-standardisation (and therefore, the non-comparability) of products and the adverse effects they may create for dealers (in particular for large positions – taking into account that anonymous publication is not really efficient for large trades where several dealers may have been consulted.

As an alternative implying much less disruptive effects in the markets, the Commission may propose the diffusion in the market of aggregated data on a regular (daily) basis.

(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.

The FBF believes that disclosure should start first on the most liquid instruments and consider in a next step to what extent any extension would further benefit the public, on the basis of a proper impact assessment.

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

The FBF could support further identification of trades that are OTC in post-trade transparency reports. In the area of OTC derivatives, for example, trade repositories will be registering the details of any OTC derivative contract counterparties have entered into. However, any mandate in this regard should be assessed against the cost of implementation this regime and the benefits that more accurate information about levels of OTC trading would render to the market.

Furthermore, the FBF would oppose to flagging if this could be used to determine other aspects of the order, such as whether the order results in short positions.

DATA CONSOLIDATION

The FBF considers supports a general implementation of post-trade transparency based on a common infrastructure, which can serve as a reference for both public data and the regulator, thereby leading to:

- Clarification and harmonization of reporting rules.
- Creation of a European entity charged with consolidating execution data in real time. This single, central organization would also be responsible for making data available, collecting associated revenues and defining a method for redistribution to the infrastructures based on the volumes and quality of the information collected.

(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 FBF supports this proposal in order to improve the quality of the data published and prevent some markets participants to publish on their website. Going forward, it should lie in the responsibility of ESMA to clarify and enforce APA´s standards.

(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 FBF agrees with the conditions identified by the Commission for APAs. It should be noted, however, that - in the area of OTC derivatives - the Commission should consider a system to recognise (as opposed to authorise) trade repositories based outside the EU. This is consistent with the relevant provision in the Commission's proposal for OTC derivatives, central counterparties and trade repositories.

(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 FBF is supportive of the broadly-defined, suggested improvements to the quality and format of information. Indeed, such improvements are a precondition for the efficient functioning of APAs or any other entities tasked with data consolidation.

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

The FBF considers that consolidation of transparency information in equity markets should receive first and exclusive attention. Going forward and, on the basis of experience, an adequately customised solution might be considered for the most liquid instruments in the non equity markets. Most non-equity products are, however, relatively illiquid and for them data consolidation would be meaningless.

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

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

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

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

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

A reasonable cost should factor in three elements: the public nature of market data; the need to ensure that provision of such data keeps us with IT and market developments and a market-average commercial return for the APAs.

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

As stated above (see response to question 46) the FBF considers that equity markets should receive first and exclusive attention.

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

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

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

(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).

The FBF considers that, if Option A would be privileged, it should be a consortium regrouping all actors involved in the centralisation of transaction data: stock exchanges, MTFs, data vendors (such as Bloomberg and Reuters).

(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?

The FBF considers that market participants should not be obliged to acquire data from the entity selected under the tender process. Market participants should, indeed, be free to purchase data from other competing providers.

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

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

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

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

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

The FBF sees the consolidation of the tape as a phased project. The first stage should be the successful roll-out of the proposed arrangement in connection to APAs.

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

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

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

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

MEASURES SPECIFIC TO COMMODITY DERIVATIVES MARKETS

General remarks

- First, the FBF is aware that the high volatility of prices on soft commodity markets (especially cereals, sugar and milk) is a problem for third world countries and that this is the main reason why the topic is on top of the G20 agenda under French Presidency in 2011.

- The proposed measures specific to commodities markets stem from the assumption that the presence of financial investors in commodities markets is associated to price increases and volatility. The FBF disagrees with this assumption.

  Most commodity markets has always known high volatility for many reasons (climate events, crisis of producers, geopolitical events…) and the FBF notes that when people claim that the use of financial instruments increases volatility, we enter a debate which has never been academically or empirically settled.

  About the role of forwards, there are two theories and it can be argued either way. On the one hand, one could argues that the forward market eases the volatility of the cash market (transfer effects resulting from competition between the two markets), and on the other hand there is the theory of complementarities. In the case of wheat, the second theory appears to be more correct. However, this does not amount to proof for every commodity.

- In this context, the banking industry has never asked and never intended to be active on these markets. The banks were asked by their clients, in the context of cross border trade and coverage needs, to hedge their positions. European banks have only answered these needs from non financial actors and have no appetite to develop any proprietary activities on these markets.

- As a consequence, if there would be stringent rules on the use of commodity derivatives, it would not be a major stake for banks and they could live with.

- However, banks have the skills to appropriately answer the needs of coverage on these markets and consider that the coverage activities for the account of major actors (energy producers, agricultural goods producers, sovereign consumers – Republic of Mexico has been appointed by the G20 to work on these problematic because the main flow of physical deliveries and financial coverage is between sovereign states and producers and the financial actors have no crucial role) are essential to limit the high volatility of these markets.

- **Regarding those specificities, the FBF is of the opinion that:**

  - **The MiFID is not the good legislative vehicle to appropriately address the issues related to Commodity markets since most actors are not financial entities;**

  - **An *ad hoc* directive would probably be the best way to address the various problematic of these markets;**

- **Banks are not asking for any regulation or de-regulation on these markets because this is simply not a core business for them;**

- **However the French banking industry would be happy to share views on what could be done to enhance the efficiency and the transparency of these markets in order to ensure that they meet their primary purpose which is coverage and volatility mitigation.**

- More specifically, the FBF would favour, in an *ad hoc* directive, full regulatory transparency and the provision of such (granular) transparency in a way that is as meaningful as possible to the supervisors. As a result, supervisors should be in a position to ensure market integrity. The case for market transparency is, however, unclear and may even damage the commercial interests of market participants.

- The FBF does not agree with an interventionist approach with regard to commodities derivatives contract design. Contract design should essentially remain an industry-driven process aimed at fulfilling private commercial needs.

- Exemptions in MiFID should remain fir for purpose and, consequently, the FBF would not oppose to their amendment to ensure that objective. Removal or narrowing down of existing exemptions is, nonetheless, likely to imply significant cost implications to which exempted parties would need to gradually adapt.

- As regards these general remarks, the FBF does not give any specific answer to questions 60 to 66.

(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 FBF agrees that more transparency is needed in the commodities space, in the context of both derivatives and physical markets.

Although we support the general approach aiming at increasing the transparency, we have the following comments with regard to the proposition that trading venues would make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity:

- Firstly, French banks think that the European authorities should have an ambitious approach on transparency and should build a consistent mechanism as soon as position reporting requirement are at stake.

  More specifically, in a context where they are convinced that it should not be required to execute all standardised (derivative) contracts in an OTF, we think that liquidity will not necessarily be concentrated in the trading venues (regulated markets, MTFs, OTFs). Thus, requiring only the OTFs to report the positions may not be appropriate.

  Consequently, the FBF is of the opinion that reporting should be made using a trade repository, in full consistency with EMIR,

- Secondly the reporting regime should be created in a context of close dialogue with other market places so as to avoid regulatory arbitrage and duplication of reporting,

- Thirdly, the FBF thinks that position information should not be limited to “regulated entities” but required vis-à-vis all market players, including those who could (have) benefit from the exemption given their commodities activities (and, once again, in full consistency with EMIR). In other words, position reporting requirement should apply to all “categories of traders”,

- Fourthly, the FBF estimates that the European Commission should create a consistent set of rules designed to avoid any breach of confidentiality obligations that could be imposed to the market players notably by their domestic banking secrecy laws.

(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.

The FBF is convinced that categorisation of commodities traders is one of the main tool allowing regulators and market operators to perform their supervisory functions in a proper way. The US CFTC has shown that this tool could be relevant and we think that regulatory convergence is needed in this area.

Nevertheless, French banks are of the opinion that categories of commodity traders should be carefully designed taken into account the following points:

- In their view, classifying commodity traders by type of strategy (hedge versus speculation), such as the CFTC does, is not the most efficient way to reflect the reality of the commodities market,

- The FBF proposes to capture the reality of the market by creating the following four categories:

    - <u>Producers</u>: would be those who take hedging positions to hedge themselves against a decrease of the market,
    - <u>Consumers and transformers</u>: would be those who take hedging positions to hedge themselves against an increase of the market,
    - <u>Dealers</u>: would be those who take hedging positions to hedge clients’ positions against either an increase or decrease of the market,
    - <u>Liquidity providers</u>: would be those who take positions not to hedge themselves or clients’ positions.

- For instance, the FBF does not think that the definition of hedge accounting under international accounting standards could be useful in this area because it does not allow capturing the reality of the market. The fact that “Producers” on the one hand and “Consumers/transformers” on the other hand could use the same accounting standards is an example.

(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.

As stated above, The FBF agrees that more transparency is needed in the commodities space.

The disclosure of harmonised position information is a necessary tool to achieve this objective but under the following conditions, as already highlighted:

- reporting should be made using a trade repository, in full consistency with EMIR,
- the reporting regime should be created in a context of dialogue with other market places so as to avoid regulatory arbitrage and duplication of reporting,
- position information should not be limited to “regulated entities” but required vis-à-vis all market players,
- the reporting regime should be created so as to avoid any breach of confidentiality obligations that could be imposed to the market players.

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

The FBF has no position on this question.

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

The FBF strongly supports the European Commission’s objective to narrow the scope of the exemptions for commodity firms. We are convinced that a level playing field across all market players providing liquidity to the market should be ensured.

With regard to the proposed modifications:

- French banks fully agree with the proposal to delete the exemption in Article 2(1)(k). Recent experience shows that the competitive disadvantages between European banks and some major corporate should be removed in the best interest of the clients.

- French banks have some concerns regarding the way the exemptions contained in Article 2(1)(i) are proposed to be modified.

  Even if they agree with the general approach, we think that for both the first part and the second part of the exemption in Article 2(1)(i) the European Commission should propose a more appropriate solution based on the systemic risk that some market players could pose.

  They propose to modify both part of the exemption in Article 2(1)(i) so that the situations they intend to cover are submitted to the same regime. In our view, the regime should focus on a quantitative threshold which would be used to establish whether a firm would become subject to MiFID. In practice, if the positions of the firm exceed that threshold, then it would become subject to MiFID for all its transactions.

  The FBF draws European Commission’s attention to the fact that:
  - this threshold should be calculated taking into account the sum of <u>gross</u> positions based on the nominal value of each of these positions in order (1) to avoid any arbitrage and (2) to manage the systemic importance of these firms,

- The European authorities, including especially ESMA, should be appointed to provide regulatory standards aimed to determine the way this quantitative threshold is designed.

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

The FBF agrees with the European Commission that the criterion of whether the contract is cleared by a CCP or subject to margining should be removed from the definition of other derivative financial instrument in the framework directive and implementing regulation.

This would clarify the scope of the definition of financial instruments and will be useful not only to take into account the current regulatory developments (EMIR will encourage more transactions to be centrally cleared and MiFID would encourage more transactions to be centrally traded) but also to avoid any interpretation in this area (nature of the forwards).

Furthermore, we think that, in practice, this will encourage the legal standardisation.

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

French banks think that emission allowances should not be qualified as financial instruments for the following reasons:

- Firstly, as underlined by the report from the task force chaired by Michel PRADA, emission allowances as well as the CO2 market have a specific nature (absence of issuer, unique registry, regulatory nature of the market, administrative authorizations…),

- Secondly, given the above-mentioned specificity of the emission allowances, if they were to be qualified as financial instruments, we are of the opinion that some parts of the financial regulation would not be relevant, including, but not limited to, the market abuse directive,

- Thirdly, qualifying emission allowances as financial instruments would have significant bad impacts on the way European-based firms active in the carbon market provide their services at the level of the identification and implementation of greenhouse gas emission reduction projects ("origination"). Before being traded in the context of a secondary market, some firms provide services aimed to develop, register and monitor climate change projects generating carbon credits for either compliance or voluntary offset purposes. In this context, if emission allowances were to be qualified as financial instruments, obligations to comply with would be not only too burden but also not relevant at all and without any added value given the services provided to the clients as well as their needs.

TRANSACTION REPORTING

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

(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 FBF is in favour of extending the scope of transaction reporting obligations to financial instruments whose value derives from (as opposed to correlates with) that of a financial instrument admitted to trading on a regulated market.

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

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

As stated under response to question 67, the FBF considers that position reports are a more appropriate tool for detecting market abuse than transaction reports.

(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.

Not applicable – the FBF opposes the extension of transaction reporting to commodity derivatives

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

Inasmuch as such obligation would enhance the ability of supervisory competent authorities to monitor abuses under the Market Abuse Directive, the FBF would not oppose. However, it should be noted the likely high costs associated to the expected systems built up should not be passed on intermediaries and investors.

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

Inasmuch as it is confirmed that the obligation would fall on trading venues and not on intermediaries, the FBF would not oppose.

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

The FBF considers that in the event an order data storage obligation is imposed to trading venues, it would make sense to seek a level playing field amongst them.

(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 FBF notes that the current definition found in Article 5 of the Commission’s implementing regulation is understood by the market. This does not amount to an opposition on the part of the FBF to review the definition as long as the case is clearly made of the added benefits of the suggested one. In that regard, the FBF notes that an agreement may not necessarily contain all the necessary reportable data (e.g. execution price and /or the market or platform of execution).

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

The FBF members note that such identification is not practicable for two reasons:

- Harmonisation of client identifiers. There is currently no unique way to identify clients (and citizens for the same token) across the EU. The identification of non-EU client would also present major complications.

- Confidentiality of the information. Even if a common client identifier is arrived at, introducing a new framework to pass orders and secure data is likely to result in very high costs, not accessible to all securities firms. Even then, as client data are eventually spread throughout the chain of intermediaries, the risk of data leak increases.

(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 FBF considers that the introduction of an obligation forcing the receiver and transmitter of an order to transmit certain details of that order to the executing broker is not practicable for the following reasons:

- **Confidentiality**. Clients may oppose the dissemination of their details to an executing firm which they have no direct relationship;

- **Double reporting**. The proposal may result in high levels of double reporting, leaving firms that receive and transmit or otherwise handle orders in an unclear position with regards to in which capacity they should report;

- **Cost**. The determination of whether a reporting obligation exists and what that obligation entails is likely to call on executing firms to build new systems at a significant cost.

An alternative –as recommended by CESR in its advice to the Commission – would be to give firms that receive and transmit or otherwise handle orders the choice of either transmitting certain details of that order to the executing broker or making a transaction report to the competent authority.

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

The FBF opposes this suggestion. It is unclear what the added benefits of identifying the individual trader may be in terms of market abuse detection be when the trader is customarily not the person who made the decision to trade.

Furthermore, the FBF would like to note that CERS's advice to the Commission in the context of the MiFID review recommends that transaction reports distinguish between trades that are purely proprietary - whereby and individual trader has initiated and executed the trade - and trades that are client servicing. The FBF considers that CESR's recommendation would provide competent authorities with an effective proxy for the purpose of market abuse monitoring.

(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.

The FBF agrees that the harmonisation of transaction reporting format and content across the EEA should remain a long term objective. Arriving at such objective calls for an intense and permanent dialogue between the Commission, ESMA and the industry. Two conditions for effective progress would be the gradual alignment of existing, diverse national market microstructures that currently justify different reporting formats and contents; a consideration of the costs that such harmonisation would place on reporting firms, particularly in those active in smaller EEA markets.

(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.

Although from a technical viewpoint, it be would be challenging for European authorities, the FBF strongly supports such a reporting mechanism at EU level, driven 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.

The FBF opposes this recommendation. It should be noted that, as a result of a bilateral agreement, many investment firms report on behalf of its client (e.g. smaller investment firms) to the Approved Reporting Mechanism of the latter. Forcing third parties reporting on behalf of investment firms to become ARM would lead to transformation cost being passed onto the clients - making it more expensive to trade - and to an unintended situation of inter ARM reporting.

(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.

The FBF considers that the possibility to waive in MiFID reporting conducted under an obligation in EMIR would be facilitate the arrangement of the flow of information to be provided by investment firms to regulators for transaction reporting purposes in the best possible way; and would also avoid duplication of reporting obligations.

Importantly:

- data content standards for the two forms of reporting should be consistent;
- transaction reporting obligations in the context of MiFID that could eventually be fulfilled by trade repositories should be suspended until these transactions could be reported through trade repositories established pursuant the relevant legislation.

(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.

The FBF is supportive of requiring that trade repositories should meet the obligations to be approved as an Approved Reporting Mechanism in order to take advantage of possible reporting synergies as they become a reporting channel for transaction reporting purposes.

INVESTOR PROTECTION AND PROVISION OF INVESTMENT SERVICES,

GENERAL REMARKS

- The implementation of the MiFID has led to the creation within distribution networks of extensive systems necessitating significant human and financial resources to strengthen written documentation dedicated to investor protection (client classification, suitability and appropriateness tests, best execution and transparency on inducements). These measures, whose implementation was complex and cumbersome, have not yet been truly evaluated after just three years in existence.

- ***Despite its exceptional severity, the financial crisis beginning in 2007 did not lead to market failures in the sale of financial instruments in Europe***. In this respect, the failures observed in the sale of securitisation vehicles were limited to United States. In France, the number of claims or legal proceedings did not increase despite the downturn in equity markets, the weakness of money-market returns and uncertainties in bond markets, and generally speaking no market failures were observed, prompting the FBF to underline the effective application of MiFID rules despite the crisis context.

- ***While the adaptation of existing rules would be appropriate in certain areas of MiFID*** (particularly the functioning and transparency of markets), ***it may, in the area of investor protection, have the opposite of the intended effects on the confidence of market investors***; in this respect, an excessively formalised approach should be avoided, especially since the framework of the existing directive is already considered cumbersome and intrusive by investors; similarly, any rules that could lead to a modification of distribution models (investment advice and inducements) may create more wariness than confidence among investors.

- ***The FBF considers as an absolute necessity to keep a clear distinction between***:
    - The **sale** itself, which is based on a clear, precise and fair information on the underlying risks of the product;
    - ***The investment advice*** which is a service provided at the request of the investor and with regard to the specific situation of the investor (suitability test);
    - ***Portfolio management***.

  Any ambiguity on the distinction between these three situations and, as a consequence, on the responsibilities of the intermediaries would generate misunderstandings between the investor and the distributor and potentially contentious situations which would be detrimental for both the investor and the distributor.

  The envisaged measures on “after-sale” service would induce intermediaries to act very cautiously and to orient savings to less risky products in terms of legal/ contentious risk. In other terms, the less risky asset (not only in financial terms but also in legal terms) would be privileged; the behavioural consequence would be detrimental to the diversification of portfolios and would be the opposite of the underlying rationale of the regulation which is to adapt the offer to the specific situation of each client.

- In contrast, the harmonization of distribution rules for financial instruments proposed by the PRIPs project, whatever the intermediary’s status, on the basis of MiFID and KIID (Key Investor Information Document) rules being drawn up today for UCITS under the UCITS IV directive, is desirable to promote a level playing field between all entities selling comparable products. The FBF supports the proposals put forward by this PRIPs project.

The French Banking Federation considers it essential to maintain the equilibrium of the existing rules and would like any changes to be limited and exclusively linked to observations of market failures. If abusive behaviours have been identified by the regulators, they can and they must be punished on the basis of the existing rules.

The FBF could support calibrated and precise modifications to existing rules and intends to make proposals in some areas.

However the FBF will oppose a broad modification of the rules that would favour a single distribution system (namely an obligation for independent advice paid by investors with an open architecture). This has not demonstrated its superiority over other existing systems, particularly France’s integrated distribution system, which is appreciated by investors and whose robustness was demonstrated during the crisis.

1. **Investment advice.**

First, the FBF would like to highlight that the investment advice is an investment service: therefore investment advice has a contractual nature and the investor has to ask for the provision of this service; logically, the FBF considers that the investor has to ask for an additional service “after sale” and shall ask for a written contract in order to get this “after sale” service.

Naturally, at the moment of the given investment advice and of the sale, the FBF considers that the distributor has to provide clear, precise and fair information on the products and that this information should include a list of events (indicative and non exhaustive list) which could durably or definitely harm the expected behaviour of the product as regards the initially expected return.

In other terms, it is precisely at the moment of the sale that the investment advice shall be organised on a contractual basis and that the duties of the distributor must be clear.

Consequently, the FBF does not support the implementation of a mandatory obligation of “after sale” duty without any explicit contractual agreement between the distributor and the investor, FBF underlines that any regulatory obligation would generate many misunderstandings and potentially contentious situations which finally would be detrimental to both the investor and the distributor.

The FBF wishes to express the following positions:

- **The distinction between independent advice and non-independent advice is acceptable on the condition** that there is no moral connotation behind this distinction; in other words, **that the independent advice would not be considered fair *per se* when the non-independent advice would be considered unfair *per se***;

  The FBF underlines that although the French distribution model is largely integrated, and is thus underpinned by non-independent advice, it is fair and has advantages recognised by investors:

  - The investor is aware of the relationship between his intermediary and the group’s producer or producers. For the investor, this closeness between producer and intermediary inspires confidence in the banker’s knowledge of the product compared with that of an independent broker; in other words, the investor expects his bank to be able to offer the full range of financial products that it has itself created, since the investor considers this to be a sign of the bank’s solidity;

  - A wide range of products is offered, even if these are in-house products, with each group offering several dozen funds or other investment products; moreover, the investor can always ask to subscribe to the products of another institution;

  - A hallmark of the French banking model is that investors expect a broad relationship that includes payment, credit and savings services (which is not the case for savers in other countries, particularly the UK); when investors wish to buy other investment products, they usually solicit several intermediaries to benefit from the offerings of different producers;

- A widening of the range of external products that is disproportionate to real investor demand would drive up costs, increase the difficulty of tracking products and, at the end of the day, impair the quality of the advice, i.e. the opposite of the Commission's stated objective;

- An open architecture within networks would create difficulties in tracking competing products and, in particular, the ratings of establishments involved in selling these products (for example, formula funds that have taken out swap contracts exposing them to counterparty risk, which are integrated in the price of the product; during the crisis, it turned out that many funds had counterparty risk to Lehman Brothers); in this regard, the French distribution model was highly resilient during the crisis, which was not the case throughout Europe, and French banks inspire confidence in investors.

• **The FBF has strong reservations on the "after-sales service" describer in the consultation paper. The FBF underlines the following points:**

  - ***The investor is responsible of the investment decision***: it would be unreasonable and ambiguous to introduce a mandatory obligation of "after-sale" service which would not be solicited by the investor and without any contractual basis.

    In most cases, particularly in France, investment advice, as defined in MiFID, is provided without any remuneration. This service is considered by the investor as a punctual, ancillary to the sale and the investor does not expect the distributor to follow up the investment. Inversely, when an investment services agreement in concluded specifically with the investor – *i.e.* when the investor has precisely designed his objectives and the content of the services he expects – the FBF does not oppose to the introduction of a clause (not mandatory but freely agreed) dedicated to the "after-sale" service.

    This distinction based on the expectations of the investors and contractualised is crucial. The introduction of a mandatory obligation of after-sale service would not only generate misunderstandings but also high contentious risks which would lead to cautious behaviours finally detrimental to the quality of the service and to the diversification of portfolios.

  - ***follow-up should never focus on the investor's situation,*** which depends on his willingness to submit information about himself to the bank; in other words, when a change occurs in the investor's situation that is liable to have an impact on his financial situation (e.g. divorce or unemployment), it is up to the investor to inform the bank and to appoint a new advisor if he deems necessary.

  - for reviewing the situation of financial products, the FBF considers **the initial information given to the client, which underpins the investment advice, to be crucial, and it is this information and advice that determine the respective responsibilities of the producer/issuer and the intermediary.**

    Accordingly, the KIID (for UCITS and, in the near future, PRIPs) and the summary of the prospectus (securities) contains essential information that the intermediary relies on to deliver his advice; this information must be understood by the investor and allow him to track the product's performance himself.

However, **in a general manner, the distributor should not be required to provide an autonomous monitoring and follow-up. Indeed, in most cases, this follow-up is not practically possible.**

From FBFs point of view, the quality of information and of investment advice at the moment of the sale, is essential. When a failure occurs, the full responsibility of the distributor (or of the issuer/ producer) must be engaged. This responsibility has a contractual nature *vis à vis* the investor, and a professional nature *vis à vis* the regulator.

- **the monitoring and follow-up of products** should not only be tightly regulated, as we said earlier, but should also **benefit only non-professional clients, not professional clients.** The latter are not only able, but most times they also have the regulatory duty to track their portfolio and their risk. They also have the possibility to opt for a more protective regime for each product, and if they have not chosen this option at the outset, it is not reasonable to exonerate them from the follow-up of products they hold.

- **advice only takes place when the investor has the final investment decision**; in other words, there is no advice in discretionary management contracts, just as there is no management when the client has the final investment decision. As such, no confusion should ever be made between advice and discretionary management.

- **a formalized approach should not be mandatory where advice is concerned** – it only becomes mandatory under discretionary management. It should be underlined here that a review of the suitability test provides traceability, as does – and this situation is increasingly common – an on-line information search by the investor, which gives him access to general information according to parameters that he has himself chosen.

- **It is essential to make a clear distinction between advice and information:** information is general and non-customized, and the content of its support tool (the KIID – key investor information document) is the full responsibility of the producer, the distributor being responsible for the provision of this KIID and, when the investor so requests, the advice provided thereafter. Advice is not automatic and depends on whether the investor wants to receive it.

2. <u>Complex products</u>

A **firm understanding of products and their underlying risks** by investors is a legitimate concern that the FBF recognises, but **it must not lead to a generalisation of the distinction between complex and non-complex products beyond execution only.** A clear distinction should be drawn between two situations:

- **a sale without a preliminary appropriateness test** (execution only): this service should be maintained while allowing an evolution of the product range concerned, although without touching coordinated UCITS, whose complexity is designed to protect all or part of the capital and thus to avoid total and direct exposure to market risk (this is the case of formula funds, for example).

- **a sale with a preliminary appropriateness test:** complex products generally serve to guarantee all or part of the capital at maturity when simple products do not allow this. Consequently, complexity should be taken into account by the advisor as a constraining factor in promoting the product uniquely when it is coupled with a heightened risk. If it is designed to reduce this risk, it should not be taken into account.

In addition, regarding information that should be given about the complexity of the product, the FBF considers that the objective of this information should be to give the investor a full understanding of the level of risk of the product in question. Its objective should not be to give the investor an understanding of the structure of this product, firstly because this is of no interest for the investor when he knows the level of risk of the product, and secondly because it is not possible in practice.

3. Inducements

Investors are satisfied with the existing rules on inducements and the FBF wishes to maintain them. The FBF also opposes a ban on fees paid for portfolio management and is sceptical about a ban on fees for independent advice.

With regard to **portfolio management,** the FBF considers that the argument that the investor does not take the investment decision is not decisive. Before giving a mandate for portfolio management to the intermediary, the investor is profiled under MiFID rules (the suitability test) and defines the management objectives. Accordingly, the investor does at least take the decision to define these management objectives that the intermediary will take into account in his management decisions.

The portfolio management agreement also makes the manager a permanent service provider who delivers a service over time and can trade the portfolio under management. He also follows markets and products, while respecting the management objective defined by the investor, when the latter cannot do so in practice. This is a major value-added of the service that justifies the payment of inducements.

Moreover, the total commission paid by the investor for the portfolio management service gives him access to these external products for a lower cost than if he subscribed to them directly. This is logical given that the manager negotiates brokerage commissions on a pooled basis, whereas the individual investor who subscribes to products outside this management contract pays a non-negotiated brokerage commission.

Lastly, although this argument is essentially an economic one, portfolio management has become widely available in bank branch networks in recent years, whereas it was previously the preserve of the wealthy clients of independent fund managers or private banks. If a ban is placed on the payment of commissions, this model would no longer be viable for branch networks.

With regard to **Investment advice**, the FBF considers that greater transparency on inducements is far more pertinent than an outright ban in the case of independent advice (*see our response to question 103*). Once again, it is important to measure the economic impact on all entities, and hence ultimately on investors, of a regulatory change that would pose a threat to entire distribution systems, even though no market failure has been observed.

4. Classification of investors

The FBF is in favour of maintaining the existing classification.

With regard to local authorities, it underlines that French banks already systematically classify them as non-professional clients.

The FBF also underlines a practical difficulty: clients' refusal to accept the formalised approach that goes with this classification (appropriateness and suitability tests). It is desirable to consider possible safe harbours for intermediaries in terms of responsibility if clients refuse to accept the formalized approach of MiFID when requesting access to risky and complex products.

Questions

Part 7 – Investor Protection and provision of investment services

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

In the FBF's view, the application of rules analogous to those of the directive to entities that may in principle be entitled to exemptions would have few consequences, since in France this concerns financial investment advisors (*the status of CIF – conseillers en investissement financier*), who are already subject to very similar rules. In addition, French banks approve of this principle.

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

The FBF supports this inclusion of structured deposits in the MiFID – this idea has already existed for three years in the context of work on PRIPs – on condition:

- that the definition is the same as that in the PRIPs project and founded on the observation that the return is calculated with reference to an index or a financial market instrument and would not capture deposits with a 100% percent guarantee on capital (in this respect, within the public consultation on retail investment products, a majority of FBF members supports option 1 for the definition of structured products);
- that it only addresses structured deposits for retail clients, and consequently excludes interbank deposits.

(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.

It is important to distinguish between two situations:

- that in which the investor client to whom the bank or investment company offers its own securities (equities or bonds): in this situation there is no reason not to apply the MiFID, and the FBF supports the Commission's proposal on condition that it does indeed aim to apply the MiFID and not to create a special regime that is over-regulated compared with that applicable to another type of investment (whether the intermediary sells the securities of a third party or the bank, it is in both cases an investment services provider that performs reception and transmission of orders or order execution of orders on behalf of its client);

- that of employees who can be entitled, under an employee savings scheme, to profit share, a retirement savings plan (the PERCO in France, for example) or shares in the company: the MiFID should not apply in this case, since these are specific regimes in which employees not only have an investment perspective but also other objectives (fiscal or social). Moreover, if such a principle is applied, there would be no reason to differentiate between the situation of these plans in financial institutions and that of plans in commercial companies that do not belong to the financial sector, unless a distortion is created in the legal treatment of identical situations.

(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

In France, many retail investors use the internet to place orders for shares and UCITS (more than 70% of orders) and do not wish to receive advice in this context. Execution-only services are particularly well suited to these situations and must be maintained.

The question posed by the Commission exclusively applies to simple products, if this service is maintained. The FBF notes that the principal modification is to coordinated UCITS, some of which could be considered in the future to be complex. On this last point, the FBF opposes the idea that coordinated UCITS should be split into two categories – complex and non-complex – for three reasons, except, and this must be the only case, if complexity increases the risk of the product:

- First, the UCITS IV directive provides for the implementation, effective as of July 1st, 2011, of a standard key investor information document (KIID) that gives the investor access to clear and precise information on the product and allows him to understand its key characteristics, particularly the risk/return trade-off, which is the determining factor for any investment choice; the KIID is mainly founded on the notion of risk derived from the synthetic risk indicator that regulators, within the CESR, have worked on for three years; to challenge today the fact that the notion of the risk/return trade-off should be at the centre of the key information given to investors (since even in the absence of advice, the investor will always be entitled to the KIID) and replaced with the notion of complexity would call everything into question without providing any significant value-added for investors;

- Second, this separation would have a paradoxical and counterproductive consequence for investor protection: a coordinated equity UCITS without a formula or any capital guarantee would benefit from execution-only services, since it would be considered a simple product, whereas a formula equity UCITS with a partial capital guarantee (for example, 90% at maturity) would not do so, since it would be considered complex. This situation would not be understood by investors, and this example is far from theoretical: formula UCITS have been created and their formulas calibrated to protect the investor – their complexity exists to guarantee all or part of the capital. On this point, the FBF does not share the Commission’s view that complexity is a risk factor. The notion of risk that interests the client and about which he must be fully informed (or advised at his request) is the risk of capital loss.

- Lastly, the term coordinated UCIT is recognised not only in Europe but also internationally, and this would be imperilled if it were split in two.

(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.

This situation has not been observed in France, and the FBF therefore has no objection to it in principle.

Nonetheless, it is important not to reverse the proposal and to create an obligation for institutions that grant consumer loans to check if the client uses the loan to acquire financial instruments. Firstly, the client must have sole responsibility for the declaration he makes about the destination of the loan he requests. Secondly, in practice such checks are not possible given that the borrowed sum can be transferred to another institution, preventing the lender from monitoring its use.

(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 FBF considers that coordinated UCITS should be considered as simple instruments for the reasons given in the response to question 87:

- it is the notion of risk that principally interests the client, not that of complexity;
- the KIID must give the client a clear vision of the characteristics of the product, including formula-based ones;
- formula funds are designed, using a formula, to protect all or part of the capital when this would be fully exposed without the formula in question.

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

No. Investors need it to place orders in all situations in which they do not wish to seek advice, especially on the Internet.

In any case, the provision of an execution-only service does not exempt the intermediary from his information obligation or the investor from having a KIID.

(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.

French banks approve of the distinction that can be made between independent advice and non-independent advice, but they firmly reject the notion that the non-independent advice should be considered unfair when the independent advice is considered fair. The FBF therefore asks that, if the distinction based on independence is retained, it should not be based on any presumption of fairness.

The advice provided by banking groups in France gives the investor access to privileged, but not sole, access to a wide range of in-house funds (on average between 25 and 40 different funds reflecting the diversity of markets, both geographically and by asset class), and the remuneration of advisors is not determined by the category of fund they sell. Accordingly, the FBF considers that the advice, though not independent, is fair.

In this regard, the FBF considers that investors wishing to obtain advice attach importance to the variety of funds on offer, but not to the variety of producers of these funds. When they expect the bank to offer them this advice, they also expect this bank to offer a range of funds (a mark of its solidity and its ability to satisfy their needs) and make a practice, when seeking diversification between producers, of going to another intermediary. Multi-banking really exists in the area of investments.

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

The MiFID has created significant formality in the relationship between the intermediary and investor via client profiling (through suitability and appropriateness tests).

This formality, though not questionable in itself, is not always well accepted by investors, who can find it intrusive.

Moreover, besides the formality introduced by the MiFID, investor information is set to be strengthened by the implementation of the KIID, which will be the basic information tool used by the intermediary when it provides investment advice at the client's request.

The FBF considers this measure to be sufficient and notes that investors do not seek formal advice in writing.

In any case, in light of the investor profile resulting from the suitability test, the definition of products suited to his profile (the appropriateness test) and the content of the KIID, it will always be easy for investor to use this written and factual information if the advice is unsuitable.

Making it an obligation to provide written advice would not add any value but would considerably weigh down the relationship with the intermediary, which is already considered too formal by clients (besides the formalism of the MiFID, it should not be forgotten that the banking relationship also requires much formality linked to anti-money laundering measures and that this formality is often not appreciated by clients because of its intrusiveness).

(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 FBF opposes any regulatory provision that would require intermediaries to monitor and follow-up the financial instruments or the investor's situation. The investor is in a position to request appropriate information or advice in order to monitor its portfolio. If a requirement had to be included, the "after-sale" service should be based on qn additional clause in an investment advice explicit contract between the investor and the distributor. The FBF underlines that:

- ***The investor is responsible of the investment decision (see. executive summary)***
- ***Follow-up should never focus on the investor's situation,*** which depends on his willingness to submit information about himself to the bank; in other words, when a change occurs in the investor's situation that is liable to have an impact on his financial situation (e.g. divorce or unemployment), it is up to the investor to inform the bank and to appoint a new advisor if he deems necessary.
- For reviewing the situation of financial products, the FBF considers **the initial information given to the client, which underpins the investment advice, to be crucial, and it is this information and advice that determine the respective responsibilities of the producer/issuer and the distributor.**

Accordingly, the KIID (for UCITS and, in the near future, PRIPs) and the summary of the prospectus (securities) contains essential information that the intermediary relies on to deliver his advice; this information must be understood by the investor and allow him in normal conditions to track the product's performance himself and to request further assistance if needed.

However, **in a general manner, the distributor should not be required to provide an autonomous follow-up. Indeed, in most cases, this follow-up is not practically possible.**

For example, for equities or equity UCITS, some market information (market trends, periodical information provided by the issuer, such as profit warning, changes in executive management, financial analysis, collateral effects of events affecting a company of the same economic sector, and so on.) can obviously not be tracked by the distributor or passed on to the investor. The evolution of exchange parity or social and politic situation, specifically in emerging countries, could have a significant impact on the stock exchanges. In addition, because of its frequency, it would be troubling for the investor given that an equity investment is inherently a long-term investment.

Similarly, for example, for bonds or other debt instruments, some market information that can have a significant impact on behaviour (change of the issuer's rating, inflation, situation of the reference sovereign debt, and so on) cannot be tracked by the distributor.

However, a number of events that can significantly affect the performance of financial products (a non exhaustive list) must be included in the information provided at the time of sale to the investor, thereby allowing the investor to react or to request new advice from his intermediary (e.g. a rights issues or takeover bid for an equity investment or an increase in inflation for a bond investment).

The quality of information and advice at the time of sale are indeed essential, in the FBF's view, and should a failure be observed, the intermediary (or the issuer/producer depending on the case) must be held responsible.

- Anyway, the contractualisation of the "after-sale" service should **benefit only non-professional clients, not professional clients.** The latter are able, on the basis of information provided at the time of sale, to follow their portfolio and their risk. They also have the possibility to opt for a more protective regime for each product, and if they have not chosen this option at the outset, it is not reasonable to exonerate them from the follow-up of products they hold.

(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 to be limited to longer term investments? Do you consider this could be applied to all situations where advice has been provided or could the intermediary maintain the possibility not to offer this additional service? Please explain the reasons for your views.

The FBF considers that a clear distinction must be made between the two situations:
- a modification of the client's situation (notably accidents in his personal or professional life) cannot be actively reviewed by the intermediary. It is the client's responsibility to inform the intermediary and, if he deems necessary, request a review of his portfolio to obtain new advice;

- the review of the product's situation must be regulated, as was underlined in response to question 93.

The FBF also considers that advice should not be automatic. Just as the initial advice is a service provided at the client's request, the subsequent information given to the investor must be at most an invitation to the investor to request new advice if he deems necessary, not an automatic commitment to provide new advice.

(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.

In a general manner, in response to questions 95 to 100, which concern client information about complex products, the FBF:

- **Firstly, underlines that complexity is only a relevant piece of information for the investor if this complexity heightens the product's risk, which is not the case for many products** (for example, formula funds, since the complex element – the formula – is designed on the contrary to reduce the risk in a situation where a simple product, without a formula but with the same market benchmark, would give the investor more exposure to market risk)**;**
- Secondly, considers that **the information** (i.e.: providing risk / gain / valuation simulations and profiling before trades) provided to clients on complex products **should be fully aligned, and consistent, with the proposals being discussed in the context of the PRIPS legislation**;
- **Thirdly, the information requirement should be limited to non-professional clients.**

Information on the possible scenarios for a product's behaviour on the basis of different factors is fundamental for investors.

In this context, the FBF considers that this information already exists:

- for securities, through the "best and worst-case scenarios", which issuers of securities are required to anticipate under the prospective directive and which is included in the summary of the prospectus that is made available to investors;
- for UCITS, and in the near future for all PRIPs, through the tab on possible scenarios (optimistic, neutral and pessimistic) that must be included in the KIID.

In the FBF's view, the intermediary has full responsibility for making this information available to the investor, but it is naturally the issuer/producer who has full responsibility for defining the possible scenarios.

Under these conditions, the FBF supports the principle that information should be supplied about these scenarios on the exclusive basis of those anticipated by the issuer/producer.

(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?

The FBF is not favourable to such an obligation to provide regular (quarterly, as proposed, for example) and independent product valuations for two main reasons:

- either the product has a market price (a quotation or bid/ask price), in which case an independent valuation makes no sense: the market value is both public and uncontested;
- or the product is valued by the producer/issuer (liquidation value for UCITS) and checked by the custodian: this valuation is also made public and it is hard to see how an independent entity could provide an appropriate valuation. In addition, how

should this independence be defined? What would this entity be? And how would it be remunerated?

The risk would be of having divergent valuations, creating confusion in the mind of the investor.

In addition, in the case of many structured products, firms already offer firm buy-back prices on a daily basis which may (with reference to the fact that the buy-back price is set daily) fluctuate with reference to the NAV of the product. Requiring firms to provide separate valuations independent from the buy-back price risks confusing clients and may unduly complicate the buy-back process.

(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.

The FBF is highly sceptical about the pertinence of such a valuation for two reasons:

- firstly, some structured products can be structured in such a way that they reduce or offset the effects of a change in the valuation of the underlying assets; such a valuation could therefore have no pertinence at the level of the structured product itself;
- secondly, what use would such a valuation be for the investor given that the product is structured?

(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

The FBF opposes a mandatory obligation but considers it must be subject to a freely agreed contractualisation, between the producer and the distributor, of the notification of the modifications.

(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.

We disagree with this proposal which reduces the difference in term of protection between the three MIFID client classifications (non professional clients, professional clients and eligible counterparties).

The current MIFID regulation already allows any eligible counterparty to request a change of its classification (for part or all its transactions) in order to enjoy more protection. Please refer to answer to question (105) for more detailed comments.

(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 FBF notes that there is no European benchmark for these products, that no authority exists to label such products and that no plans exist to create one. Consequently, responsibility for classifying or potentially declassifying these products (and the consequences of a weak financial performance) are not defined anywhere.

The FBF therefore opposes any such mandatory information.

In addition, the FBF has major reservations about the opportunity to normalise such a label at the European level, since this could suggest to investors that other products are not ethically or socially responsible.

(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.

Investors are satisfied with the summary disclosure provided *ex-ante* and never in practice request exhaustive information. Accordingly, the removal of the possibility to provide a summary disclosure does not appear justified.

(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.

In practice, such a change should not pose a major problem, but the FBF underlines yet again that in practice this information does not interest investors, who never request details on commissions.

(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.

Firstly, the FBF wishes underline that the MiFID could have some cross-border effects that the regulation of inducements sheds a particular light on:

- **first, the application of the MiFID to applies to European banks that offer their services outside Europe *via* branches, such as in Asia for example, remains unclear and the FBF underlines that in such situation, these branches are in competition with local entities that do not have to apply this directive and that benefit from the flexibility of the framework in which they can operate vis-à-vis local investors; So it must be clear that MiFID does not apply to non eu branches of EU firms in their business with non EU clients;**
- **bans on certain types of remuneration by the MiFID would have a major economic impact on some activities that would consequently be penalised or even become unviable in Europe, encouraging European investors to seek services outside Europe from providers not subject to the MiFID. In this respect, a ban on inducements for discretionary management is dangerous.**

▪ ***Portfolio management***

With regard to portfolio management, the FBF considers that the argument that the investor does not take the investment decision is not decisive. Before awarding a portfolio management agreement to the intermediary, the investor is profiled under MiFID rules (the suitability test) and defines the management objectives. Accordingly, the investor does at least take the decision to define these management objectives that the intermediary will take into account in his management decisions.

The portfolio management agreement also makes the manager a permanent service provider who delivers a service over time and is able to trade the portfolio under management. He also follows markets and products, while respecting the management objective defined by the investor, when the latter cannot do so in practice. This is a major value-added of the service that justifies the payment of inducements, particularly since it gives the investor access to products selected under a portfolio management agreement.

Above all, in economic terms, an outright ban on inducements for portfolio management would have detrimental effects on both investors and intermediaries for several reasons:

- firstly, such a change in the architecture of remuneration would result in the reappearance of higher up-front fees (in the form of management fees), which would be difficult to persuade investors to accept;
- secondly, discretionary management has become widely available in bank branch networks in recent years, whereas it was previously the preserve of the wealthy clients of independent fund managers or private banks, which were the only ones prepared to accept entry; the risk is thus of seeing the disappearance of what could be called "proximity" discretionary management.

The existing portfolio management model, which branch network clients are satisfied and which has given them access to a quality service, would therefore be endangered if a ban was placed on inducements, since it would become economically unviable.

Rather than a ban, the FBF would like to see a study of the opportunity to strengthen transparency in two areas: by providing in the management agreement a list of the applicable fees and by informing clients of any trading on the portfolio.

- ***Independent advice***

The FBF is not opposed to a distinction being made between independent advice and non-independent advice or to a differentiated treatment of these two services in terms of remuneration.

However it is concerned about the association that is sometimes made in the Commission's consultation between independence and fair treatment and, conversely, between the absence of independence and fairness (*please refer to the response to question 91*).

The FBF also underlines that advice can be fair despite being non-independent (since a very wide range of products is offered) and that, in this case, there is no reason for a ban on inducements.

In the case of an independent advisor (CIF status in France) who offers an independent advisory service, the FBF is not in principle opposed to specific rules on remuneration in the form of inducements.

It nevertheless calls the Commission's attention to the fact that it would be commercially difficult for these entities to introduce a new remuneration model (which would in fact involve remuneration of the advice itself), which investors have no experience of and are not prepared to accept in France, as a replacement for the remuneration method based on inducements, which, though requiring transparency, is accepted by investors. The latter could have the impression that a service hitherto provided for free (the advice) would henceforth be charged for. A ban could therefore have a direct impact on the economic viability of this business. And it would have the opposite effect to that intended by regulators: instead of increasing the number of entities and opening up distribution architectures, it would actually lead to the disappearance of many independent advisors.

It is also worth underlining that because the remuneration of intermediaries is the fruit of a contract with producers this is a source of adaptability that protects investors. For example, when the product behaves in such a way that does not correspond to the expected return at the time of the advised subscription, the producer and the intermediary can adapt it (this is what happened in 2009 and 2010 on money-market UCITS): the inducements system allows this flexibility, which is beneficial to clients, whereas a ban on these inducements, which would give rise to a much higher entry fee, would leave clients worse off.

Again in economic terms, independent advisers, which are generally small entities, will be exposed to the risk of non-payment of commissions by their clients (retail or corporate) if they are no longer remunerated by producers. This could result in a sharp increase in the cost of investment and advisory costs to cover client defaults.

Lastly, when the producer remunerates the intermediary, the client is informed of the maximum remuneration in the case of multi-distribution. Without this information, each intermediary would be able to set its entry fee without the client having any comparative information if the product is distributed by several intermediaries.

- ***All services***

  The FBF considers, for obvious operational and commercial reasons and in consideration of clients' comprehension of the overhaul of remuneration methods that this would entail, that an outright ban on inducements for all services is not appropriate. The FBF also notes that no institution representing investors is seeking such a general ban.

(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.

In the FBF's view, no market failure has occurred since the implementation of the MiFID that would justify a review of the existing classification, bearing in mind that for French banks:

- clients who are physical persons are systematically classified as retail clients, as are local authorities, associations and SMEs;
- some large corporates and funds, classified by default as professional clients, ask to be classified as retail clients but do not accept the immediate consequence, which is the formality attached to this classification (appropriateness test: check on knowledge and experience);
- lastly, the notion of eligible counterparty is not challenged by investors classified as such.

The FBF therefore favours maintaining the status quo in this area.

(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;

The FBF supports this principle, which in any case underpins the relation of trust between intermediaries and their clients, while underlining that eligible counterparties are already free to request greater protection, be it occasionally or generally, by opting for a more protective status.

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);

The FBF is not favourable to such limitations, but it has consistently argued over the past three years for the full transparency of certain vehicles, especially securitisation vehicles, and their simplification (which can be observed today, since securitisation is being revived in Europe on the basis of homogeneous and simple products, contrary to those sold in the US in the mid-2000s).

and/or
c) Clarify the list of eligible counterparties and professional clients per se in order to exclude local public authorities/municipalities?
Please explain the reasons for your views.

The FBF supports this proposal, which already corresponds to the operational reality in France.

(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, the FBF supports the retention of this presumption and underlines that these clients already have the possibility, and are informed of such, to choose to be classified as retail clients, in a general manner or product by product. As such, the FBF does not see any reason to modify the current presumption.

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

Each European country has its own civil legal system and principles of civil responsibility. Naturally, the FBF supports any initiative that improves convergence, and hence promotes harmonisation, of this civil responsibility, particularly to avoid regulatory arbitrage that some entities could be tempted to make.
Moreover, the FBF underlines that the concept of contractual civil responsibility at the European level cannot be separated from that of the civil law of obligations in Europe, and that in this area the absence of harmonisation risks making the principle of European civil responsibility ineffective.

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

This list seems appropriate.

(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.

The FBF underlines that the principle of best execution already exists, that it places the intermediary in the situation of having to justify order execution conditions and that investors do not all have the same approach to this notion (some seek speed of execution, for example, rather than the best price).

In addition, the FBF fully supports (see the response to questions 51 to 59) the idea of a European consolidated tape for equity markets, whose fragmentation naturally calls for heightened vigilance about execution conditions.

(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.

We disagree with the idea to enhance the MIFID provisions relative to "best execution" for the time being while the industry practice among the EEA is not still harmonized (see the comment above for question 91). Ensuring that all EEA countries comply with the same rules and have a similar interpretation of MIFID shall constitute a pre-requisite before enhancing MIFID provisions.

The main issue raised by the above proposal is to modify current best execution requirements (obligation of means) to establish an obligation of results: this will be contradictory with recital (66) of Directive 2006/73/EC which stands "in order to give effect to that policy, an investment firm should select the execution venues that enable it to obtain on a consistent basis the best possible result for the execution of client orders."

Another issue with the above proposal is relative to the clearness of too detailed execution policies. Issuing guidelines at the European Commission level would be more appropriate rather than a template of execution policies which will be to enough flexible to deal with.

(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 situation whereby the investment service provider acts as an intermediary and the situation whereby the ISP deals for its own account should be distinguished:

- In the first case, the best execution rules should apply as the investment service is execution of orders or reception and transmission of orders;
- In the second case, the client shops around before dealing (request for quote); the investment service provided with is "dealing for own account". We consider that in this case the ISP is not providing its client with execution of orders as the client is acting as a counterpart.

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

The FBF considers such transactions to be agency trades because of the requirement to comply with best execution requirements. We believe that this analysis should apply both for the purposes of MiFID and ideally also under the Capital Requirements Directive.

Authorisation and organisational requirements

(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.

Extending the supervisory authority role beyond the “fit and proper test” as existing today would certainly be an error. The Board of Directors of financial institutions must assemble not only skills with regard to risk, but also diversified competencies with regard to strategy, management, distribution, etc. The profile of directors must be defined by the Board of Directors in consideration of the characteristics of the institution and the balance of its composition at the time it decides to launch the process of recruiting a new director.

Confusion of responsibility must absolutely be avoided. The Board is, first of all, an expression of entrepreneurship and its role cannot be shortened to a control function.

As stated in the executive summary, we believe that independence is a critical criterion. In this respect, our Board has defined that an independent Director is:

- an outstanding professional with proven expertise built on experience and demonstrated ability to assess risks and issues;
- strong enough to express his own opinion and analyses in any circumstances;
- available and free to carry his duties with the required hindsight and involvement;
- fully committed to the firm’s fate and his “affectio societatis” makes him deeply associated to and supportive of its culture and ethics.

(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 position of Compliance, Risks and Internal Audit functions should be assessed not only regarding MIFID but also regarding prudential regulations applicable to financial services providers, as their soundness is most important to their clients, supervisors, etc.

These three functions, that should be the pillars of the internal control framework, should be on the same standing. We are in the opinion that the statement that Compliance should be granted “ a “prominent role” should be extended to Risks and Internal audit. We want to stress that compliance with regulations is not sufficient to ensure soundness of financial services providers and protection of investors. Internal control should be deeply embedded in businesses through risk culture, risk management, knowledge of environment, anticipation, etc…to which compliance is a major contributor but not the only one.

We are in the opinion that internal control framework matters should be driven by prudential regulation of financial services providers and that the approach of MIFID to this topic, if it sets rules, should be more to ensure that they do not impair such prudential regulation and are fully compatible with it, than adding to it supplementary or different rules that could be confusing. We would like to recall that, in France, the role of these functions has already been very much strengthened through regulation.

The Commission indicates that "the three internal functions should be able to report directly to the board of directors". We strongly beleive that those three functions clearly report to the CEO and no one else:

1. those functions cannot circumvent the CEO and address an issue directly to the board without the prior consent and knowledge of the CEO;

2. the Board may request the head of those functions to answer any question deemed necessary without the consent of the CEO (but with his prior knowledge) and, as the case may be, outside his/her presence but on the basis of information available to the executive management.

Lastly, the Commission mentions that "the removal of the officers responsible for the internal control functions would be subject to prior approval by the board". The officers responsible for the internal control functions being appointed by the executive management, we believe that prior approval of the board of directors is inappropriate; however prior information of the board of directors seems a good practice.

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

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

Validation of transactions, new products and services and new activities is a main component of management of risks of all nature, i.e. of internal control frame work and is dealt with by prudential regulation.

As already said in answer to Q 114, we are in the opinion that internal control framework matters should be driven by prudential regulation of financial services providers and that the approach of MIFID to this topic, if it sets rules, should be more to ensure that they do not impair such prudential regulation and are fully compatible with it, than adding to it supplementary or different rules that could be confusing.

In any case, we believe that the process/organisational requirements put in place must be proportionate to the interests at stake.

In order to comment the Commission's thought on article 7.3.3, point g), let us recall that the board of directors determines the orientation of the company's activity and oversees its implementation. This being said, it is not its responsibility to approve new financial products. Moreover, such an approval procedure would not be compatible with the deadlines and responsiveness that characterize commercial and financial activities. Nonetheless, it is its responsibility to ensure that an appropriate procedure is in place as displayed in the above mentioned report.

This would certainly be different for a major change in the activity of the institution or a new significant development abroad, which would then be considered as a strategic decision to be normally reviewed or, in certain cases, approved beforehand by the Board.

(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 FBF has no specific comment.

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

We do not consider that implementing measures are required: the current MIFID framework is sufficient to allow adequate management of conflicts of interest.

The potential issue relative to remuneration shall not only focus on sales staff but it should be analyzed globally in order to cover other functions within investment service providers. The underlying issue shall not be limited on investor protection but also to the risk management within investment service providers. To this respect, a more important role in the remuneration process should be granted to compliance functions.

The FBF therefore would like to underline that a statement in paragraph 7.3.5 of the consultation paper should be modified as following:

"it would be very difficult for a firm which creates strong incentives for its sales staff to sell certain products, e.g. through internal bonus structures ***that do not take into account MIFID compliance level***, to be able to manage the conflicts of interest thereby created"

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

These subjects should not be covered by MIFID as there is a European directive dedicated to collateral. Covering in MIFID such issues would add complexity and lack of clarify of the European regulatory framework. We notice in particular that prohibiting of title transfers collateral arrangements involving retail clients could be contradictory with the European directive relative to Collateral that has just been reviewed.

Prior to introducing such new rules, an analysis of their impact should be performed in particular on netting & collateral agreements.

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

First, we do not share the Commission's concern regarding the exclusion of "client assets protection rules" when speaking of full ownership transfer collateral. It seems quite consistent, at least with French law, that assets granted as collateral with full ownership transfer do not fall under the clients' assets protection rules as those assets are then no longer the client' assets event if it is temporary.

Second, independently of the client classification such prohibition seems to go against (i) local ownership rights which give the owner the right to dispose of its property; (ii) provisions of the Collateral Directive which achieved significant harmonisation and securitisation of collateral agreements in financial operations across Europe.

As for retail clients, in practice, the collateral agreements they are involved with are usually out of the scope of the Collateral Directive and thus do not involve a full transfer of ownership. Therefore we do not share the Commission's position and are of the opinion that such prohibition is not appropriate for providing retail clients with further protection which in our opinion could be reached by strengthening compulsory/information requirements when retail clients enter into transactions involving provision of collateral (see beside Questions 119 and 20).

We are opposed to introducing further rights for Member States to exercise the option to introduce different rules and prohibitions that are not applied in other Member States. The granting of such options only serves to undermine the harmonisation objectives of MiFID. In any case, we feel regulation of collateral transfer is currently adequately regulated under the Collateral Directive, and any proposals for change in this area should be considered as part of a review of that directive, not MiFID.

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

First, we want to stress that using/lending retail clients' financial instruments is not market practice, at least in France, and can only occur with the express autorisation of the client (condition imposed by MIFID).

Yes, we endorse the view that when financial instruments of retails clients are used in stock lending transactions which involve temporary transfer of ownership of those instruments, implementation of specific requirements regarding collateral constitution and management could be appropriate. This would ensure retail clients fully understand the type of financial operation and risk involved,.

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

Concerning information requirements we are not opposed to the Commission's proposal, however, we feel it is important that any changes in this regard should be proportionate as the information needs of professional clients and retail clients are clearly different.

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

Yes, we support the Commission proposal to further harmonize due diligence obligations at the European level.. Besides, managing counterparty risk using several providers is already market practice in the global custody services arena.

ESMA seems to be the appropriate authority to issue such guidance and standards.

(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.

The FBF has great reservations, both on the European Commission's conclusions concerning a supposed absence of rules in this field of activity, and on the proposals it puts forward.

The reasons are as follows:

- It is not true to say that this activity is carried out in the absence of any regulatory framework. This framework is generally set by the investment services provider (by means of its own internal rules), in accordance with MiFID rules on conflicts of interest and on market abuse (and may also include specific rules laid down by the market regulator). This framework is generally documented at all stages: preparatory meetings (minutes of meetings), preliminary contacts (marketing pitches), market soundings, book building, records of activities carried out by investment services providers. Procedures do exist and can be examined by regulators in the event of an inquiry.

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

- The allocation process is also controlled by both internal and securities regulator's rules. Should the need for harmonization be felt necessary, one should start from the existing rules and not try and create new ones. Allocation criteria are by definition subjective (they can vary from one type of client, or one type of operation, to another) and they evolve with time. Among these, examples include not only the degree of interest expressed by investors, but also the volume of assets under management (when investors are hedge funds or IFAs), transaction size, possible participation of existing shareholders, and so on. Filing of the various documents is naturally guaranteed, if only to comply with general internal control rules. Therefore, allocations cannot be set by the investment services provider in a completely unbalanced manner. Regarding allocations, one should also mention another important criterion: investor quality. To be more precise, investors are classified into several categories according to their investment strategy (long-term or short-term holding). As a general rule, investors wishing to invest long term are better "served" than investors classified as "short only".

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

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

Partie 8 – Further convergence of the regulatory framework and of supervisory services

(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 FBF has no position on these questions, which in France do not concern bank branch networks at the operating level.

(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.

In investment banks, such recording is already the operating rule.

In French branch networks, the vast majority of orders are already recorded and dated, either electronically (more than 70% of orders are placed via the Internet) or by telephone (around 25% of orders are placed via recorded call centres). In branch networks, residual market orders placed in branches (an ever smaller number) are systemically recorded in writing (in particular, telephone orders that do not go through call centres are always confirmed by fax).

Accordingly, the need for a regulatory framework for recording is less acute than in other countries.

Nevertheless, the FBF underlines that if such a requirement is applied to all telephones in bank branches, this would create a major problem with regard to the protection and privacy of individual data, which far outstrips the framework of the MiFID given the scope of the banking relationship (a telephone conversation can touch on many subjects, some of which are very personal). In addition, it would be very difficult to persuade clients to accept the principle of recording calls in branches, since this would be considered intrusive.

(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.

Subject to the reservations expressed in response to question 129, the FBF considers that the proposed field of application is appropriate.

(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.

In the FBF's view, this type of recording must be an obligation applied to any form of communication that does not leave a written trace, especially, when this is possible (which is rarely the case, since investment banks generally prohibit this practice), orders placed via mobile handsets.

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

Three years is considered an acceptable timeframe, especially given that when a client wishes to contest the execution conditions of his order or to point out an error, he does so very soon after the execution (not more than a few weeks in the vast majority of 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.

We disagree with this proposal: cancelling the Article 4 of Directive 2006/73/EC could lead Member States to adopt their own specific regulation that could contradict with MIFID objectives relative to the European Passport (freedom of the investment services provision within EEA countries and free establishment of European investment firms' branches within EEA states)

(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.

These proposals should not fundamentally affect the state of French substantive law

(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.

The FBF approves the application of sanctions as defined by the Commission (i.e. "*the most serious infringements [...] should be punishable by effective, proportionate and dissuasive criminal sanctions*") in these situations.

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

The FBF notes that whistleblowing policies and procedures are already common in most large financial institutions (especially international institutions) and are part of their internal control framework.

As noted in response to Question 114 above, the FBF is of the opinion that, subject to limited exceptions (e.g. in relation to asset managers), internal control framework matters should be driven by prudential regulation of financial services providers and that the approach of MIFID, if it sets rules, should be more to ensure that they do not impair such prudential regulation and are fully compatible with it, rather than adding to it supplementary or different rules that could be confusing. French banks believe that this approach should apply to whistleblowing and that no specific provisions should be introduced under MiFID in this regard.

(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.

The FBF opposes such a proposal. Public censure should be seen as one power only in the suite of potential measures that may be imposed by a court or a regulator and should not be used in every instance. In particular, since disclosure of a breach may have a punitive effect on the firm in breach, the mandatory disclosure of breaches may in certain circumstances cause unfair prejudice to the party in breach, or else have an effect disproportionate to the nature of the initial breach.

(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?

The FBF does not support such a proposal. As the Commission notes in section 8.3 of the Consultation, Member States' existing international obligations (e.g. under international trade and competition laws) mean that they are already required to impose on third country firms requirements that are at least equivalent to those set out in MiFID. In addition, Article 15(3) of the Level 1 Directive already allows the Commission to adopt measures requiring competent authorities to limit or suspend authorisation of third-country firms where third countries do not extend the same treatment to European firms as they do to domestic investment firms. Introducing an EU-level set of requirements that third country regimes must meet in order to be considered "equivalent" has the potential to lead to disagreements with third country governments and/or regulatory authorities, which could have an adverse impact on EU firms' ability to undertake business overseas.

REINFORCEMENT OF SUPERVISORY POWERS IN KEY AREAS

(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 FBF underlines that ESMA already has the power to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union (article 9.5 of ESMA Regulation) in the cases specified and under the conditions laid down in the corresponding legislative acts. In this regard, the FBF considers that supervisory authorities should be sufficiently equipped to prevent a threat to financial stability or market integrity and, therefore, it acquits to habilitate ESMA to act, also, in the context of MiFID.

Apart from this comment, considering the cross-border nature of financial markets, the FBF disagrees with the proposal to empower "*national*" regulators to ban or restrict the trading or distribution of a product in certain circumstances. Level 1 reserves such competence for ESMA for a good reason as use of those powers by national supervisors may be subject to unmitigated conflict of interest and may lead to market fragmentation.

Last but not least, such interventions must not be based on the protection of investors for two reasons:
- the uncertainty which would be implied, considering the absence of definition of even clear criteria of situations in which the protection of investor in threatened;
- second, as a consequence, it would be very easy to ban or limit activities on such imprecise notion of "protection of investor".

(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 FBF disagrees for the following reasons:

- The lack of central clearing does not preclude that the exposures emanating from OTC derivatives cannot be properly risk-managed through appropriate collateralisation arrangements. Therefore, trading of such instruments does not necessarily exacerbate systemic risk.

- The exercise of any such power will undermine the purpose of the proposed exemption from CCP clearing afforded to non-financial end-users.

- Trading leads to the provision of fair, reliable and generally accepted pricing which is necessary for valuations and risk assessment of contracts in the clearing phase. Banning trading of certain instruments is likely to impair credit risk management and, hence, add to systemic risk.

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

The FBF considers that supervision should mainly be dynamic and adaptable. Attention to specific products or practices may lead to complacent or tick-the-box supervision.

(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 FBF has serious concerns over the effectiveness of position limits to address issues related to trading activities that are proven to be price-distorting.

The French banking industry believes that dynamic position management may be a more market-friendly, less intrusive alternative. In its response to the Commission's request for additional information in relation to the review of MiFID, CESR itself has recognised that "*there (is not) sufficient evidence so far that position limits can systematically be used to limit the impact significant positions may have on the prices and market generally*".

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

Please see our response to question 145.

(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 FBF has not particular views in this regard.

(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?

As stated under response to question 145, the FBF has serious concerns over the effectiveness of position limits.