SJ/CJ- n° 2197/Div.

Mr Fabrice Demarigny
Secretary General
Committee of European Securities Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

Paris, February 6, 2007

**AFG RESPONSE TO CESR CONSULTATION ON THE PASSEPORT UNDER MIFID**

Dear Mr Demarigny,

The Association Française de la Gestion financière (AFG)[1] welcomes the CESR consultation on the Passport under MiFID.

AFG is actively contributing to all discussions and consultations relating to the Markets in Financial Instruments Directive (MiFID), either directly or through the European Fund and Asset Management Association (EFAMA).

Although we globally agree with CESR on the analysis made, we urge CESR for amending the draft paper following our detailed remarks (see below). In particular, we wish CESR to make clear that regulators have to commit themselves at CESR level on a clear division of responsibilities between home and host regulators for the cross-border services of a branch.

[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include almost 400 management companies and more than 700 investment companies. They are entrepreneurial or belong to French or foreign banking, insurance or asset management groups. AFG members are managing more than 2500 billion euros in the field of investment management, making in particular the French industry the leader in Europe in terms of financial management location for collective investments (with nearly 1500 billion euros i.e. 22% of all EU investment funds assets under management, wherever the funds are domiciled in the EU) and the second at worldwide level. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes funds and products such as regulated hedge funds and a significant part of private equity funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA).

Where this clarification could not be reached at CESR level, then bilateral agreements should be added as a complementary tool.

## A. The timetable in the notification procedures (Articles 31(3) and 32(6) of MiFID)

*Q1 : As regards article 31(3) do you agree with the above regarding what should be the date from which a firm can start to provide cross-border investment services into the host Member State under a passport? If not, for which reasons?*

Yes, we agree with the analysis made on the notification procedures timetable. But we wish CESR to make clear that in the absence of a notification after 30 days from the home authority to the firm stating that the communication has been forwarded to the host authority, the firm could start its cross-border activities.

*Q2: Concerning article 32(6) do you agree with the referral of the firm by the home regulator to the host regulator's or CESR's website when applying for a branch passport, when necessary?*
*Q3: Do you agree with the proposal set out in paragraph 24?*

Q2: Yes, we agree with the analysis. However, according to Article 32 (3) combined with Article 32 (6), a maximum of 5 months can elapse between the day when the firm provides all the necessary information to its home authority (to be forwarded to the host authority) and the day when the branch can effectively be established and start its activities. This maximum of 5 months is obviously too long. Therefore CESR should encourage home authorities to speed up the process when communicating the information to the host authorities and these latter to notify as soon as possible to the firm that its branch can start its activities (before the 2 months have elapsed).

Q3: Yes. For legal certainty, our members would prefer either a referral to CESR's website or a list of applicable rules for branches on the website of the home authority. This means that the home authority could have a list of specific requirements country by country for establishment of branches. This would be extremely helpful for firms.

## B. The division of home/host responsibilities regarding branches

*Q4: What are your views on the exposition given in paragraphs 31-36 above? What grounds do you have to support your views?*

We agree with the analysis made by CESR distinguishing the situation where the supervision relates to a service provided on the ground of the freedom to provide cross-border services and the situation where the service is provided through the establishment of a branch. In the first situation, the home regulator remains responsible for the supervision of the firm. In the second situation (activities through a branch), the supervision is divided between the two regulators: the home regulator is in charge of supervising the organisational matters and the host regulator is monitoring conduct of business matters. This repartition clearly complies with MiFID Level 1.

Though, regarding para 36, we want to stress that the duty of the firm '*to have coherent policies and procedures to ensure that their various cross-border activities, in whatever form, are controlled properly and that the required MiFID protections are delivered to all clients as appropriate*' must be only the *consequence* of a clear statement first by all the national regulators of how they have decided to deal with the issue in their relations with firms. Firms need legal certainty ex ante before committing themselves on the way they will proceed in terms of policies, procedures and controls.

*Q5: Do you agree with the practical supervisory challenges as identified by CESR? Are there any others that you envisage may occur and could benefit from consideration by CESR?*

Yes.

Though, there is a wondering regarding a specific but crucial case of cross-border marketing, i.e. the case of non-UCITS funds in the EU, notes and certificates. We agree that, according to para 37, '*MiFID does not provide for the 'host' regulator to apply any "common good" requirements (for example MiFID marketing provisions) to any business conducted on a cross-border services business into its territory direct from the home state'*. However, in the case of UCITS, the passporting of UCITS is still subject to a cross-border notification procedure which provides for a remaining power of the host regulator in the fields of marketing and advertising. We do not see any reasons why non-UCITS funds, notes and certificates (including potentially non-European financial products) would not be subject to a similar procedure or at least with the host marketing conditions (knowing that the case of funds has never been discussed at EU level during the whole negotiation process of the MiFID). In particular regarding non-European financial products, such a potential free access to the European market should be strictly prohibited as long as reciprocity agreements are not in place with non-European countries in order to ensure the free access of European financial products to the market of these non-European countries.

*Q6: Do you agree with the suggested desired outcomes? Are they capable of being shared for the benefit of all stakeholders?*

Yes.
But as already mentioned in our answer to Q4, the duties/commitments of firms in providing clear governance and controls in case of cross-border activities should be required only once regulators have already clearly stated how they will divide the responsibilities among themselves and what they expect from the firms.

*Q7: Do you agree with the broad 'criteria' outlined above and as set out in more detail in Annex 2, against which CESR will evaluate possible solutions? Do you have any comments? Are there any others you would suggest that could be material when considering the relative merits of different practical solutions?*

We agree with CESR for providing such a list of 'broad criteria' to be used in the evaluation of practical solutions.

But we consider that CESR Members must commit themselves beyond a list of 'broad criteria'. They must set up clear procedures and sharing of responsibilities in cross-border provision of services. In this view, this list of criteria must help CESR in setting up such clear procedures and responsibilities.

*Q8: Do you have any comments on the possible solutions identified above? Do you have any others that you feel could help?*

In order to get both legal certainty and clarity of regulators' respective responsibilities when speaking with the relevant regulators, firms would benefit from getting the following solution:

Para 47 (freedom of cross-border services): we agree with CESR on the single responsibility of the home regulator, which complies with the MiFID provisions.

Para 48 (freedom of establishment of a branch): we agree on a mix of letters a and f:

- letter a, by drawing a precise line in practice between the responsibilities of the relevant regulators, ensures a higher degree of legal certainty for firms;

- letter f, as a complement to letter a, by setting up joint working between the relevant regulators, would solve in practice the issue where this line between regulators' responsibilities has not been made clear and would also facilitate cross-border convergence further on in regulators' practices.

Regarding a possible single contact point, we think it should not be a general principle as such. What is crucial is to set up clear coordination procedures between regulators. If possible, the best for us would be for CESR members to adopt a single coordination procedure among themselves as far as possible, completed by bilateral agreements when single European procedures could not been found.

Para 49 (conduct of business rules for branches): we agree on letters a and c:

- letter a makes a link between the local regulator and the local business of the branch, which makes sense in terms of local knowledge of issues;

- letter c, made of joint supervision, would improve further convergence in regulators' practices (as in letter f of Para 48).

In no case letter b should be followed, as delegating or outsourcing supervision tasks – but without delegating responsibilities – would create major confusion for firms.

*Q9: Do you agree with the broad evaluation and conclusions as outlined in paragraphs 50-55 above? What does your own evaluation suggest? What evidence base can you provide to support your conclusions?*

*Two blank tables are provided at Annexes 3(i) and 3(ii) for respondents to user to create their own 'tick lists' to help formulate their own evaluation. CESR would welcome completed copies together with supporting analysis as part of any feedback to this consultation.*

Once again, what is needed is a clear cut between the responsibilities of the home and host regulators. This is the main target CESR members have to work on.

In addition, in Para 53, we support the idea that regulators have to communicate their view to the firms.

Our members would like CESR members to agree among themselves at CESR level and to establish a list of matters that are supervised by each regulator. Although, as stated by CESR, the division of 'responsibilities' for branches is theoretically made between the home and the host authorities. In practice, it is difficult to always distinguish organisational matters to conduct of business matters. Once again, for more legal certainty, our members would appreciate if CESR could encourage its members to agree among themselves on the exact division of responsibilities and to make public the division of responsibilities (at least to provide/make available a list 'a minima' of fields monitored by each regulator).

## C. The cross-border activities of investment firms through tied agents

*Q10: In the absence of a single public registry of tied agents, how might Member States enhance co-operation for the benefit of clients?*
*Q11: Do you agree that there is a need for co-operation between competent authorities to help ensure that the requirements for good repute and possession of knowledge for tied agents can be met in practice? Do you agree that prior to registration the home Member State should be able to exchange information with the competent authority of the Member State where a tied agent is located to help establish that he has the required good repute and knowledge? Would any specific guidelines be helpful; if so, what are your suggestions?*
*Q12: To help resolve the practical questions on the supervision of tied agents, good co-operation between regulators will be necessary. CESR is minded to conduct further work in this area. Do you have any practical suggestions or comments that could help CESR fine-tune its approach for tied agents?*

Q10: One efficient solution would be to create a single European registry of tied agents at CESR level (coming from all existing national registries). A second best would be cooperation between regulators: the host regulator could register tied agents and communicate the information to the home regulator. In any case, regulators should communicate among themselves to inform each other whether they authorise tied agents or not.

Q11: To help ensure that tied agents meet the requirements of good repute and possession of knowledge, we agree:

- on the need for cooperation between competent authorities; and
- that prior to registration, home regulator should be able to exchange information with the competent authority of the Member State where a tied agent is located.

## E. The activities of representative offices

Let us first stress that the situation taken into account by CESR only relates to a firm established in a Member State having a representative office into another Member State. We want to make clear that CESR must also consider the situation and the applicable rules when non-European firms have representative offices in the EU, in order to avoid any risk of unlevelled playing field at the expense of European firms (by freely permitting representative

offices of non-European firms to get access to the EU): the rules applicable to the representative offices of non-European firms must be at least as stringent (or even more stringent, as long as reciprocity agreements have not been concluded with these non-European countries) as compared to those applicable to representative offices of European firms.

| *Q15: Do you agree with the arguments set out in this chapter?* |
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Yes.

We agree with Para 97.

We agree with Para 98 for joint clarification between regulators on practical cases.

We also agree with Para 99.

But in any case, we consider that non-EU firms having representative offices in the EU must comply with the same rules.

**F. Transitional arrangements**

| *Q16: Do you agree with the proposal of mapping ISD to MiFID proposed in Annex 1? What changes or possible alternatives would you suggest?* |
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Yes.

**G. Further harmonisation by way of a protocol between competent authorities**

| *Q17: Do you consider the suggested approach appropriate and/or do you see other issues that should be handled in this protocol?* |
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Yes.
As already stated, our members agree with a protocol containing standard items shared by all regulators at EU level (through CESR), completed by bilateral agreements in the cases which do not fit with a EU protocol.

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If you wish to discuss the contents of this letter with us, please contact myself at 01 44 94 94 14 (e-mail: p.bollon@afg.asso.fr), Stéphane Janin, Head of International Affairs Division, at 01 44 94 94 04 (e-mail: s.janin@afg.asso.fr) or Catherine Jasserand, Deputy Head of International Affairs Division, at 01 44 94 96 58 (e-mail: c.jasserand@afg.asso.fr).

Yours sincerely,

(signed)

Pierre Bollon