THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref.: CESR/05-291b

CESR's Technical Advice on Level 2 Implementing Measures on mandates of the first set where the deadline was extended and the second set of mandates

Markets in Financial Instruments Directive

FEEDBACK STATEMENT

April 2005

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CESR

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INTRODUCTION

1. The Directive on Markets in Financial Instruments (Directive 2004/39/EC - "MiFID" or the "Directive") was adopted by the European Parliament and Council on 21 April 2004 (OJ L145/1 of 30 April 2004). The Directive will replace the Investment Services Directive 93/22/EEC.

2. In accordance with the Lamfalussy Process, the European Commission may adopt implementing measures, so-called "Level 2 measures", with respect to a large number of provisions of the MiFID. Before the European Commission presents a proposal for implementing measures to the European Securities Committee, it seeks the technical advice on these measures from the Committee of European Securities Regulators ("CESR").

3. Both mandates from the Commission asked that CESR should have regard to a number of principles and a working approach agreed between DG Internal Market and the European Securities Committee in developing its advice. These were as follows:

   - CESR should take account of the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.

   - CESR should respond efficiently to the content of the mandates by providing comprehensive advice on all subject matters covered by the delegated powers included in the relevant comitology provision of the level 1 Directive as well as in the relevant Commission request included in the mandate. On the basis of the experience gained in the context of the preparation of the technical advice for the level 2 measures for the Prospectus and the Market Abuse Directives, the Commission has realised that mandates to CESR must be very clear and precise for the items that have to be covered by the advice required are concerned.

   - Acting independently CESR should determine its own working methods, i.e. by creating expert groups depending on the content of the provisions dealt with. Nevertheless, horizontal questions should be dealt with in a way ensuring coherence between the work carried out by the various expert groups.

   - CESR should address to the Commission any questions they might have concerning the clarification on the text of the draft Directive or other parts of Community legislation, which they should consider of relevance to the preparation of its technical advice.

   - The technical advice given by CESR to the Commission should not take the form of a legal text. However, CESR should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting legal terminology used in the field of securities markets.

   - CESR should provide an advice which takes account of the different opinions expressed by the market participants during the various consultations. In case it deviates form the opinion generally expressed it should inform the Commission and justify its position. Particular attention should be paid of the level of detail required by market participants to be included in level 2 legislation.

4. Furthermore, in giving its advice on possible implementing measure, CESR has been asked by the EU Commission to take full account of the following criteria:

   - The protection of investors and market integrity by establishing harmonised requirements governing the activities of authorised intermediaries;

- The promotion of fair, competitive, transparent, efficient and integrated financial markets as well as the promotion of competition;
- To strike a right balance between the objective of establishing a set of harmonised conditions for the licensing and operating of investment firms and regulated markets and the need to avoid excessive intervention in respect of the management and organisation of the investment firm;
- The amount of detail included in the advice should be very carefully calibrated case by case; the advice should ensure clarity and legal certainty but avoid formulations which would lead to overprescriptive, excessively detailed legislation, adding undue burdens and unnecessary costs to the firms and hampering innovation in the field of financial services.

5. On 20 January 2004, the Commission published "*The Provisional Mandate to CESR for technical Advice on Possible Implementing Measures concerning the Future Directive on Financial Instruments Markets*" ("first set of mandates"). The Commission asked CESR to deliver its technical advice in form of an "articulated" text by 31 January 2005. By the end of January 2005 CESR provided the Commission with its technical advice on many areas of this original mandate of the MiFID (Ref.: CESR/05-024c) together with the feedback statement (Ref. CESR/05-025).

6. On 25 June 2004, the Commission published "*The formal request for Technical Advice on Possible Implementing Measures on the Directive on Markets in Financial Instruments*" ("second set of mandates"). In addition to confirming the provisional mandate, published on 20 January 2004, the Commission asked CESR to deliver its technical advice on additional mandates concerning some new areas of the Directive by 30 April 2005.

7. For reasons of coherence between the different rules that are designed to ensure a high degree of competition and efficiency in European markets and in particular between the transparency and best execution provisions of the MiFID the EU Commission, in this formal mandate, decided to extend to 30 April 2005 the deadline granted to CESR in the provisional mandate requesting advice on best execution obligations, market transparency obligations and admission of financial instruments to trading. Furthermore, the Commission decided to accept the request formulated by CESR and extended the deadline for preparing technical advice to 30 April 2005 on client order handling rules, investment research and professional client agreement which is a part of conflicts of interest.

8. This feedback statement covers the following areas, where CESR has given, or has considered giving, technical advice:

   a) definition of investment advice (Art. 4.1);
   b) list of financial instruments – derivatives (Art. 4 – Annex I section C);
   c) investment research (Art. 13.3 and 18);
   d) general obligation to act fairly, honestly and professionally and in accordance with the best interest of the client (Art. 19.1);
   e) suitability test (Art. 19.4);
   f) appropriateness test (Art. 19.5);
   g) execution only (Art. 19.6);
   h) professional client agreement (Art. 19.7);
   i) best execution (Art. 21);
   j) client order handling (Art. 22.1);
   k) display of client limit orders (Art. 22.2);
   l) transactions executed with eligible counterparties (Art. 24);
   m) pre-trade transparency obligations (Art. 4 and 27);
   n) market transparency obligations (Art. 28-30, 43-45); and
   o) admission of financial instruments to trading (Art. 40).

9. In order to accomplish its tasks CESR set up two Expert Groups: Expert Group on Markets, chaired by Mr Karl-Burkhard Caspari and Expert Group on Intermediaries, chaired by Mr Callum McCarthy. The Expert Groups are coordinated through a steering group, chaired by CESR's Chairman, Mr Arthur Docters van Leeuwen. The Expert Groups are assisted by a

Consultative Working Group formed of 21 market participants by CESR (the complete list of participants is given in Annex 2).

10. CESR's aim was to answer to questions regarding these areas with an advice that is flexible enough to address the specificities of:

- market structures (for example, regulated markets, OTC markets and MTF);
- size of investment firms (for example, small, medium and large players);
- different products (for example, equities, bonds and derivatives);
- different services (for example, advisor, non-advisory and portfolio management services); and
- different types of clients.

11. CESR's advice is intended to be consistent with all relevant EU legislation. In particular, CESR considered the interactions of the advice with:

a) the provisions of Directive 2003/6/EC on insider dealing and market manipulation ("Market Abuse Directive") and the implementing measures contained in the Directive 2003/125/EC as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest;

b) the provisions concerning the provision of information set out in Council Directive 85/611/EEC of 20 December 1985, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

Other horizontal issues

12. Almost all respondent raised the issue of the level of details: some considered it was too detailed; others favoured a detailed advice to risk of divergences across Europe. CESR considered these arguments on the issue by issue basis and tried to delete all unnecessary details.

13. Many respondents also raised the problem of cost benefit analysis. CESR was fully committed to conduct internal cost-benefit analyses as a general requirement of its work under the Mandates, even if this was very demanding and time-consuming. As to some issues, CESR communicated the results of its considerations to the public; in other instances CESR was not in a position to publish analyses (in particular due to confidentiality reasons). CESR had also invited consultees to provide their cost-benefit analyses when making alternative proposals, which was provided to CESR only in a limited number of responses, though. CESR considers that consultations are part of the overall impact assessment.

14. Many respondents also asked for transitional provisions – going beyond the transitional provisions provided for by the Directive – in areas which would require investment firms to undertake considerable changes to the existing framework, such as the transaction reporting arrangements. CESR was fully aware of this important issue, since the tight timeframe is also applicable to competent authorities when implementing the new requirements in their own systems, but it is a matter for the EU Institutions to cater for additional transitional measures.

SECTION I – INTERMEDIARIES

Definition of investment advice (Article 4(1))

The definition of investment advice raised a lot of attention. Many industry representatives and consumer organisations answered the consultations on this subject.

Recommendations on services

Question 1.1. - *Do you agree that advice on services, such as recommendation to use a particular broker, fund manager or custodian, should not be covered?*

Almost all respondents (with the exception of certain consumer associations) supported CESR's approach that advice on services, such as recommendation to use a particular broker, fund manager or custodian should not be covered. CESR therefore did not see a need for changing its approach in this area.

Personal

Question 1.2. – *Do you agree with the approach that a personal recommendation has to be held out as being suited to, or based on a consideration of, the client's personal situation or do you consider this criterion to be unnecessary or ambiguous and would like to refer to the bilateral nature of the relationships and bilateral contacts between the firm and its clients? In the latter case which criteria would you use to differentiate between a "personal recommendation" and a "general recommendation" or a "marketing communication"?*

A clear majority of respondents supported the approach that a personal recommendation has to be held out as being suited to, or based on a consideration of, the client's personal situation. Many respondents added that a contractual relationship could provide significant evidence that a personal recommendation has been given. However, this should not be considered conclusive.

Other respondents considered that advice should be presumed in all bilateral contacts, since clients believe that advice has been given on the basis of consideration of the client's personal situation. The question of whether a client has reasonable grounds to believe that advice has been given should depend on all circumstances of the relationship between the adviser and the client.

Some respondents called for changes in the definition of "personal recommendation". They highlighted the relevance of what would be reasonably understood by the recipient of a communication and suggested certain changes to the proposed definition regarding the "reasonableness of the recipient" (rational or judicious observer) and the "understanding of the communication by recipient". Others claimed that the advice should include the explanation provided in the explanatory text that it always depends on all relevant circumstances whether advice is provided. One respondent also asked for clarification what the expression "holding out" means.

Backed by the majority view in the consultation, CESR retains the approach of basing the "personal" element of the definition of investment advice on whether the recommendation is suited to, or based on a consideration of, the personal circumstances of the recipient. Furthermore we agree with respondents that it is important to include in the definition only communications where it is reasonable to understand them, taking all relevant circumstances into account, as being personal. This is reflected in the newly drafted definition.

Scope of the definition of investment advice (specific vs. generic)

First consultation

Question 1.3. – *Do you think it is reasonable to restrict "investment advice" to recommendations of specific financial instruments or is it necessary to cover generic information including financial planning and asset allocation services for financial instruments?*

A strong majority of respondents believed that "investment advice" should only refer to personal recommendations relating to specific transactions in financial instruments directed to specific investors.

However, many respondents felt that asset allocation and financial planning services should also be considered as investment advice if they include a personal recommendation. Among these respondents, particularly consumer organisations (with the exception of one organization) favoured this approach.

Second consultation

Question 1: Do you believe that investor protection considerations require the application of the above conduct of business requirements from the point at which generic advice is provided or do you believe that sufficient protection is provided in any event to allow the definition of investment advice to be limited to specific recommendations?

Having taken the considerations of CESR in the second consultation paper into account, a clear majority of market participants still favoured a definition which is restricted to a personal recommendation of one or more financial instruments. In addition to the arguments that were expressed in the first consultation on this point, most of them expressed the view that a generic recommendation that will be provided before a specific recommendation also has to be suitable for the client.

Other industry representatives, including most of the asset management industry and most of the representatives of retail investors and consumers, were of the opinion that generic advice should be covered. Some of these respondents, however, expressed the view that generic personal recommendations should only be covered if they are followed by a transaction or made by an investment firm carrying out the transaction. Others mentioned that generic recommendations should only cover asset allocation.

Question 2: Do you believe that considerations relating to the scope of the passport and the scope of the authorisation requirements point towards the inclusion or exclusion of generic advice from the definition of investment advice?

The same market participants who argued in favour or against an extension of the definition to generic advice also expressed the view that the considerations relating to the scope of the passport and the scope of the authorisation would underline their respective views.

CESR understands that Article 4(1) of the Directive refers to recommendations in respect of one or more transactions relating to financial instruments; this might lead to interpreting the scope of the service of advice in a narrow sense. At the same time CESR believes that in practice it is difficult to clearly distinguish generic and specific advice when it relates to personal recommendations based on the personal circumstances of the recipient and, therefore, for needs of legal certainty it is necessary to define the scope of this service in broad sense; CESR also believes that the provision of generic investment advice should be subject to the application of the rules of conduct to ensure adequate investor protection."

Other issues

Respondents also stated their views in relation to many other issues.

Examples provided in the explanatory text

One respondent said that CESR would provide helpful recitals in the explanatory text in order to interpret the more abstract advice in the Box. However, it would be unclear whether some examples are more important than others because they were not represented in the advice.

CESR has recognised that some of the interpretation given in the explanatory text could be redrafted as parts of the definition of "personal recommendation" (for examples, the "*resonableness*" test and the approach that all relevant circumstances should be considered). In relation to the "relevant circumstances that may be taken into account", CESR provides further examples in the advice. These examples are not to be understood as more important than others. However, it is neither feasible to provide examples for every given case in the advice, nor in the explanatory text. CESR therefore decided to retain an abstract definition and to give more concrete guidance in the explanatory text.

Distinctions between investment advice and other activities

Market participants generally agreed with the distinction between investment advice and other activities. Some respondents asked CESR to better distinguish investment advice from other activities which might have similar characteristics, such as general recommendations, marketing communications, information given to client and simple offers.

Some respondents also emphasised that a large number of communications with clients contracts should not be considered as "investment advice", for instance: (a) verbal or written recommendations by investment firms and offers to an undefined group of people as well as – often periodical – marketing publications and market information; (b) discussions or co-ordination activities that typically come up within the scope of sales activities and order executions; or (c) "market colour" (commentary about the depth of market quotas, the extend of liquidity etc).

One respondent felt that the differentiations with other terms and the paragraph on overlaps are unnecessary. Another claimed that more of the explanatory text on the possibility of overlaps should be included in the last paragraph.

Drafting the advice, CESR answered the Commission's mandate to provide criteria for differentiating other terms from a personal recommendation. The paragraph on overlaps provides a substantial clarification that, in case of overlaps, each relevant regimes will apply. CESR's advice is intended to distinguish carefully between other activities such as the provision of information and offers and gave many examples to provide appropriate guidance. Since the cases identified in the explanatory text seem to be important examples, but not the only ones, CESR decided to rely on general principles. Otherwise, the wrong impression could have been given that some examples are more important than others. However, a personal recommendation is only given if all prerequisites mentioned in the definition are met, taking into account all relevant circumstances.

Boundaries between investment advice and financial analysis

One respondent wondered about the use of the term "*recommendation*" with respect to both, investment advice and financial analysis. CESR uses this term in its natural meaning for purposes of investment advice. The term that is most important for differentiating investment advice from research is the term "*personal*". Financial analysis are, in general, not to be understood as being suited to, or based on a consideration of, the personal circumstances of the recipient (although an exception to this position has been noted in the explanatory text).

Implicit recommendations

Some market participants felt that the definition should exclude the reference to implicit personal recommendations because simple information could be understood as being an implicit personal recommendation. The introduction of a distinction between explicit and implicit recommendations would confuse the way in which recommendations may be delivered. Others argued in the second consultation that, particularly in case of generic advice, the boundaries to other activities such as information given to clients, general recommendations and marketing communication would be unclear.

Calibration (SMEs, professional investors, eligible counterparties)

Organisations representing "small" institutions asked CESR to bear in mind that imposing on SMEs the same requirements as on larger institutions would contradict the general policy of the Commission which aims at promoting SMEs, as well as the recitals of the MiFID mentioning "proportionate and relevant requirements".

Other respondents strongly expressed that investment firms and other professional clients do not need to be "advised" on the products and markets and called for distinction between retail and professional clients regarding investment advice.

Since investment advice can be provided by small and large institutions alike and the need for investor protection does not differ in either case, CESR does not see any possibility for a calibration in this respect. Furthermore, CESR is of the opinion that professional clients may also seek advice. In this situation they profit from the same protections as retail investors. However, in determining whether advice has been given to a professional client the nature of the client may be taken into account as a relevant circumstance.

Possible inconsistencies with existing EU legislation

Some respondents asked CESR to ensure consistency between the two regimes set up by the 2002/92/EC Directive on insurance mediation (IMD) and the MiFID because the activity of investment advice is often undertaken concurrently with the activity of insurance mediation as defined in the IMD in many Member States.

Others called for a maximum level of consistency between the MiFID measures and UCITS Directives, especially for asset managers performing individual and collective portfolio management.

According to CESR's evaluation, there are no inconsistencies with other directives. Since investment advice is a new "core" service under the MiFID, the relevant provisions of the Directive have to be applied when investment advice is provided as regulation occupation or business on a professional basis in relation to one or more financial instruments is provided and the advisor cannot rely on any exemption under MiFID.

Corporate advisor in the private equity field and advisors of portfolio managers

Some respondents felt that the advice should not cover advice provided to an investment manager or the support and advisory services which private equity investors provide to the corporations they invest in.

CESR is of the opinion that, as a general approach, all advisory services which meet the conditions for a "*personal recommendation* " should be covered by the definition. However, in the individual case, the relevant circumstances such as the nature of the recipient and the relationship with the advisors could lead to the conclusion that is not to reasonable to understand the communication as being a personal recommendation.

Inclusion of an assessment of timing and other decisions relating to a transaction

One respondent argued that advice on, and discretion as to, timing should not be caught because it would be common practice to ask a broker to time the transaction to minimise market impact. The decision when to execute the order would potentially be covered in this case.

Having considered this, CESR clarified in the explanatory text that the delay of the execution of a transaction in financial instruments would rather constitute an issue of best execution. However, CESR still thinks that an advice on the timing of a transaction in financial instruments may be investment advice.

One market participant felt that the assessment of whether to route the order to a regulated market, an MTF or a systematic internaliser should be covered by investment advice.

Since this decision is an aspect of best execution, CESR does not think that advice on this question should be covered by investment advice.

Disclaimers

Some market participants argued that the use of disclaimers must be possible to prevent that a general recommendation becomes a personal recommendation. Others felt that disclaimers should not be used exhaustively.

Other respondents pointed out that a disclaimer should not qualify a recommendation as non-personal but it would be appropriate for firms to rely on disclaimers in those cases where information on particular products may be provided to customer on a non-advisory basis

CESR retains the position that disclaimers could be one of the circumstances that are relevant in determining that no investment advice has been provided. However, the use of disclaimers is not decisive. Rather, all relevant circumstances have to be taken into account. Thus, a disclaimer will not prevent a communication that otherwise falls within the definition of investment advice from being considered as such.

List of financial instruments – derivatives (Article 4 – Annex I section C)

General comments

CESR's October consultation document included a discussion of the nature of a derivative as part of the introduction to the draft advice in this area. CESR believes these observations may be of use in promoting a common understanding of the Directive. However, it has not included them in the final version of its advice because they do not fall within the scope of the mandates and are not necessary to answer them. However, this area may be an appropriate subject for future work at level 3.

A number of respondents to the consultation paper commented on the relationship between the definition of financial instruments and netting laws. There is no direct link at a Community level between the definition of a financial instrument under MiFID and the scope of netting laws. CESR has therefore not taken into account the appropriate scope of netting laws in finalising its advice and has instead focused on relevant considerations, such as the appropriate scope of authorisation requirements and the passport.

3.1(1) Definition of commodity

Question 2.1: *Should "commodities" for this purpose be limited to goods?*

Question 2.2: *Alternatively, should an approach be taken that permits rights or property specifically mentioned in C(10) and other intangibles to be treated as "commodities" as well?*

While the responses to these questions were mixed, most respondents were in favour of commodities being limited to goods, with the following provisos for many positive respondents (a) electricity should be included as a good and (b) section C(10) should be defined in a sufficiently broad and open-ended manner so as to cover other deliverable intangibles. However, a minority of respondents argued that "commodity" should be given its widest possible definition so as not to constrain future market developments.

In this context, CESR considered the exemptions in Articles 2(1)(i) and (k) of the Directive. Article 2(1)(i) applies in relation to certain persons providing investment services in commodity derivatives or derivative contracts included in section C(10). However, Article 2(1)(k) only applies to certain persons whose main business consists of dealing on own account in commodities and/or commodity derivatives, but does not refer to derivative contracts included in section C(10). The reason behind this difference in approach is not immediately apparent. However, it could be seen as indicating that there should not be an overlap between the two categories of derivatives (which would be the case if a broad definition of commodities were taken). This view is reinforced by the wording of section C(10) which refers to "other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section …"

CESR has therefore maintained its proposed approach of limiting the definition of commodities to goods, while making it clear that electricity should be considered as a good for this purpose. However, when taken together, CESR's advice on the definition of commodities and on the scope of section C(10) is intended to cover a broad and flexible range of underlyings, while maintaining the definition of a financial instrument within appropriate bounds.

As discussed below, CESR has also continued to base the advice under mandate 3.1(6) on the structure of sections C(5) to (7). This should reduce the practical implications of whether a particular contract is a commodity derivative or falls within section C(10).

Question 2.3: *Should derivative instruments based on telecommunications bandwidth be considered to be within the scope of the Directive?*

Question 2.4: *If it should be considered within the scope of the Directive, should it be considered to be within the scope of paragraph C(7) or paragraph C(10) of Annex I?*

Almost all respondents who answered this question agreed that derivative instruments based on telecommunications bandwidth should be included within the scope of the Directive and should be considered within the scope of section C(10). CESR's advice adopts this approach.

Question 2.5: *If the definition of "commodities" is restricted to goods, should a requirement be imposed that there must be a liquid market in the underlying?*

Question 2.6: *If not, should a requirement be imposed that, in addition to being capable of delivery, the underlying must be capable of being traded and if so, should there be a requirement for a liquid market?*

The majority of respondents who replied to these questions were not in favour of a requirement that there should be a liquid market in the underlying commodity or of a requirement that the underlying commodity should be capable of being traded. This majority view supported the approach proposed in the October consultation document and CESR has retained this approach in its final advice.

Other comments

There were a number of detailed comments on the definition of delivery, which have informed some changes of detail to the formulation used in the October consultation document.

One group of respondents proposed that the same definition of delivery should also be used for the purpose of determining whether a contract can be physically settled and therefore falls within section C(6) or (7). Such an approach would provide useful assistance in interpreting the schedule to the Directive and, more particularly, in interpreting the scope of section C(7). CESR has therefore incorporated it in its advice.

There were a number of detailed comments on CESR's proposed non-exhaustive list of things that would be considered as commodities, including calls for it to be written at a higher level of generality. CESR has taken such an approach, which should address many respondents' concerns, while retaining the approach of a non-exhaustive list.

There was broad support for including fungibility as one of the criteria for the definition of a commodity and for the explanation CESR had proposed for this term. However, some respondents questioned whether it is necessary to include a definition of fungibility within the advice. CESR notes that the concept of fungibility as explained by CESR appears to have been broadly recognised by the respondents and therefore agrees that it is not necessary to go into this level of detail in its advice.

3.1(2) & (3) Commercial purposes and characteristics of other derivative financial instruments

Analysis of the relevance of the purpose of the contract

The consultation document included a statement reflecting the concern of the services of the European Commission that the way in which CESR proposed to approach this issue results in a regulatory structure that could lead to a situation where the same OTC contract could in certain circumstances fall within the scope of the Directive and not in others. They observed that the same contract would be subject to different regulatory requirements depending on the legal nature of the counterparty and that this will create an important problem for investment firms which will be regulated or not on the basis of the nature of their counterparty. The Commission services have expressed concerns as to whether this approach would be consistent with the line reflected in the Directive which consists in dealing with the supervision and regulation of commodity derivatives markets taking into consideration aspects of substance rather than formal ones.

In view of these concerns, CESR has re-visited its analysis of these questions. In addition to focusing on the responses to the consultation, CESR has also analysed the underlying policy considerations and the level 1 text of the Directive. The question of whether the status of one party should be determinative is considered below in relation to the responses to question 2.8.

Responses to the consultation

A significant majority of respondents supported CESR's approach of considering the specific circumstances of the parties to a contract, although a minority preferred an approach that did not involve such a consideration. For example, a combined response by a number of trade associations stated that: "We agree with CESR that paragraph C(7) of Annex I requires an examination of the facts and circumstances of individual transactions and the parties' intentions in order to determine whether or not a contract has a commercial purpose. There are no "badges" which will, by themselves, determine whether a transaction having particular objective characteristics has or does not have a commercial purpose."

Analysis of policy considerations

The question of when a physically settled contract for the delivery of commodities ceases to be a simple commercial contract and becomes a financial instrument raises different policy questions from the treatment of cash settled contracts (or contracts with an option for cash settlement) and contracts that are traded on a regulated market or MTF.

The latter types of derivatives are treated as financial instruments without the imposition of further conditions. While they may be used by a commercial undertaking in the course of its business activities, cash settlement (or the option to settle in cash) or the fact that the contract is traded on a regulated market or MTF provides a clear distinction between such contracts and general contracts for the supply of commodities, which makes such an approach appropriate (in conjunction with the use of appropriate exemptions).

This type of clear dividing line is not present in the case of OTC physically settled contracts. There is much greater potential for overlap between general commercial activities and investment services and activities in relation to such contracts. It is possible that different parties will use the same or similar contracts for commercial and for investment purposes. For example, one party to a contract for the forward sale of oil may be interested in the actual supply of oil, while the other is simply seeking an exposure to fluctuations in its price. The intention of the second party may not be known to the first and the absence of cash settlement (or a cash settlement option) and the fact that the contract is not traded on a regulated market or MTF means that there is no clear signpost that the contract should be treated as a financial instrument. CESR's analysis is that these characteristics of OTC physically settled contracts mean that it is necessary to consider the purpose for which the particular contract is entered into by the parties in addition to its other characteristics.

Fine tuning the definition of financial instruments to address such issues has raised difficult questions of balancing the desire for certainty with a proportionate approach in a number of jurisdictions, both within and outside of the EU.

While avoiding a consideration of the purpose of the contract would provide greater certainty as to whether a particular contract falls within or outside of the scope of the Directive, it would also result

in an approach that includes contracts that should not be included within the scope of the Directive and excludes those that should not be excluded. It would also risk creating perverse incentives for parties to modify their behaviour.

For example, if the definition of a financial instrument depended solely on the characteristics of the contract other than its purpose; parties would be able to avoid the application of the Directive simply by customising their contract (without necessarily changing the substance of its terms). Indeed, in many cases, the purpose for which the particular the contract is entered into is a more substantial criteria than the particular type of contract that is used.

An approach that focused on the general characteristics of the contract without considering the purpose for which the particular contract is entered into would also create perverse incentives. For, example, focusing too much on the use of industry standard agreements would create an incentive not to use such agreements, even though such agreements play an important role in reducing transaction costs and increase legal certainty in the wider commercial sphere. Also, focusing too much on the use of margining or other collateralisation techniques would have the effect of discouraging the use of such arrangements in the normal commercial sphere, despite the fact they have significant benefits for risk management purposes that should not be the exclusive preserve of the investment sphere.

Analysis of the level 1 text

The final text of the Directive splits commodity derivatives into three different categories: those that are cash settled or with an option for cash settlement (C(5)); those that can be physically settled that are traded on a regulated market or MTF (C(6)); and OTC physically settled derivatives that can be physically settled not being for commercial purposes, which have the characteristics of other derivative financial instruments (C(7)). This can be contrasted with the November 2002 Commission proposal for the Directive, which referred to: "Options and futures contracts in respect of securities, currencies, interest rates or yields, commodities or other derivatives instruments, indices or measures", without splitting commodity derivatives into different categories. These extensive amendments indicate an intention to apply different tests in relation to different types of commodity derivatives, applying additional conditions in relation to the third category. Such an approach is entirely consistent with the above analysis of the policy issues surrounding OTC physically settled contracts.

The level 1 text of section C(7) refers to contracts "not being for commercial purposes" in addition to whether they have "the characteristics of other derivative financial instruments". The most natural reading of the term "purpose" is as a reference to the purpose for which the particular contract was entered into. If the intention was to discount the purpose underlying the particular contract and to focus on the wider use of the contract, one would have expected the text to refer simply to "contracts which have the characteristic of other derivative contracts". This supports the conclusion that a consideration of the purposes of the contract is required by the level 1 text in addition to a consideration of its other characteristics. This leads to the conclusion that two contracts that have similar or identical terms can fall within or outside of the scope of the Directive depending on the purposes for which they are used. This consideration of "purposes" does not feature elsewhere in the level 1 list of financial instruments. This underscores the fact that the nature of section C(7) is different to that of the other categories of financial instruments. Again, in view of the above policy analysis, this is an appropriate approach (and as discussed below, it is also appropriate to treat OTC "physically" settled contracts falling within section C(10) in the same way because they give rise to comparable regulatory issues).

***Question 2.7**: Should there be an initial filter to exclude contracts which are likely to be spot contracts? If so, do you agree with the proposed approach of excluding contracts whose settlement period does not exceed the lesser of two business days and the generally accepted settlement period in the relevant market?*

Most respondents supported the use of such a filter, although nearly all respondents also argued that it should be set at a longer period. For example, a number of respondents argued for a test based on the longer of a fixed period of days or the standard settlement period in the market instead of the

shorter of those periods. There were also calls for the fixed period of days to be extended from two business days to seven calendar days.

On balance, CESR believes it is appropriate to maintain the substance of its initial proposal in this area. Focusing on the greater of the generally accepted settlement period and a fixed period would mean that in markets with longer settlement periods, significant levels of trading on a forward basis (far exceeding the volumes of actual physical settlement) could take place between trade date and settlement date without the potential that they would fall within the scope of the Directive. CESR has also chosen a fixed period based on business days over calendar days because a calendar day test would produce arbitrary consequences in a market based on business day settlement periods.

However, CESR wishes to emphasise that the test is merely one of a number of determinative factors to be used to determine the scope of section C(7). It should not be seen as a definition of what is or is not a spot contract for this or for any other purposes. The fact that a contract does not fall within the specified period does not mean that it is automatically a financial instrument. It is necessary to consider the other factors specified in the advice and the text of section C(7) itself.

***Question 2.8**: Should the status of the parties to the contract only be relevant for determining whether the exemptions in Articles 2(1)(i) and (k) or should it also be taken into consideration as an indicative factor for determining whether there is a commodity derivative as opposed to a commercial contract for the supply of commodities?*

***Question 2.9**: Should commercial merchants be required to rely on the intention to deliver test or should the producer and user indicating factor apply to them as well? If so how can a commercial merchant be differentiated from a speculator?*

A significant majority of respondents supported the proposition that the status of the parties should be relevant both for determining the scope of the exemptions and for determining whether there is a commodity derivative as opposed to a commercial contract for the supply of commodities. Some respondents also emphasised the intention of the parties concerning delivery. For example, a combined response by participants in the German energy markets included the following statement: "We agree that the intention to deliver a certain commodity respectively to accept the delivery of the commodity is a key factor for a transaction having a commercial purpose. We therefore agree with CESR's approach to use the parties` intention to deliver as a factor for the ascertainment that a transaction has been concluded for commercial purposes."

In view of the evidential differences surrounding an attempt to determine the purpose of the contract, it is appropriate to look to the circumstances and past dealings of the parties as factors in performing this evaluation. CESR's advice therefore continues to include the status of the parties among its proposed factors.

However, CESR has upgraded the intention of the parties concerning delivery (when shared by both parties) to become a determinative factor while keeping the status of the parties as an indicative factor. If both parties intend to deliver the underlying, it is extremely likely that the contract will be entered into for commercial purposes. If neither party intends to deliver the underlying, it is extremely likely that the will not be entered into for commercial purposes and its other characteristics will be very similar to those of a contract falling within section C(5). However, the fact that a person is a user, producer or merchant in relation to the underlying does not necessarily mean that they will enter into all contracts for commercial purposes. It should therefore merely be an indicator.

***Question 2.10**: Do you agree with an approach under which the status of the contract for both parties is based on a consideration of the status and/or intent of either of the parties?*

***Question 2.11**: If both elements of [paragraph (3)[1] of the consultation draft] are present should this be conclusive or indicative? If indicative, if only one is present is that still an indicator?*

[1] As noted by respondents, this was incorrectly referred to as paragraph (2) in the consultation document.

There was strong support for the proposition that the status of the contract for a party should be based on a consideration of the status and/or intention of that party. This was because of concerns that a person could require authorisation based on facts and circumstances that are not know to him.

A number of respondents supported the proposition that where the status and/or intention of the parties differed, the status of the same contract could differ for those two parties. Some respondents who supported such an approach argued that if it was not adopted, the status of the contract for both parties should be based on a consideration of the status and/or intentions of either party.

Respondents generally favoured an approach under which the satisfaction of both of the tests in paragraph 3 of box 3 of the consultation document would be conclusive and the satisfaction of only one would be indicative.

Having analysed this question further, CESR does not believe it is possible to reconcile a position where a contract has a different status for each of the parties with the Directive. The text of Annex I implies that contracts either are or are not financial instruments. An approach that provided a contract with a different status for the different parties would also raise difficult practical and legal questions. For example, while one party may be subject to conduct of business requirements in relation to that contract, would the other party benefit from the protections provided by such requirements?

CESR's analysis is also that it is not appropriate that the status or intention of one party should result in a determinative conclusion that a contract falls within the scope of the Directive, as this would be more likely to result in adverse and unforeseen consequences for the other party.

As noted above, the Commission services has stated that a drawback of such an approach would be the fact that the same contract would be subject to different regulatory requirements depending on the legal nature of the counterparty and that this will create an important problem for investment firms which will be regulated or not on the basis of the nature of their counterparty.

However, viewed from the standpoint of the investment firm's counterparty, the contrary argument can be raised. Why should the status of the contract for a commercial party automatically change because of the status and intention of the counterparty? If a farmer is selling his crop, he does not necessarily care whether he is selling it to an investment firm or a supermarket. If he intends to deliver, the contract is still part of his most basic commercial activities. For the same reason, it is appropriate that the investment firm should not be subject to the additional burden of conduct of business regulation when entering into the contract. Why should the farmer get additional protections just because he agrees to sell his crop to an investment firm instead of a supermarket? This is consistent with the second recital to the Directive, which refers to the protection of "investors", not the protection of commercial participants in the physical commodities markets. It is also difficult to see such a contract as giving "rise to regulatory issues comparable to traditional financial instruments" and therefore why it should be brought within the scope of regulation. The fact that the farmer may benefit from exemptions under the Directive is not an answer to the question because the status of the contract will also be relevant to any parties who assist that farmer in the sale of his crop, who will not necessarily benefit from those exemptions.

It is again important to emphasise that CESR's advice is concerned primarily with the appropriate scope of authorisation requirements and other consequences that flow directly from the categorisation of a contract as a financial instrument. Its advice is not intended to be used for other purposes.

As discussed above, the advice treats the intention of the parties concerning delivery as a determinative factor where it is shared by both parties, but treats intention concerning delivery as an indicative factor where the intention of the parties differs. This approach allows a more balanced approach to be taken in the latter case.

Other comments on CESR's proposed approach

While there were a variety of different comments on the specific modulations of the proposed test, most respondents supported the use of a combination of determinative factors and indicative factors. CESR recognises that the use of indicative factors may result in less certainty in some cases. CESR has therefore increased the use of determinative factors in the advice to provide certainty in a greater number of cases, while retaining indicative factors where the use of determinative factors would create an arbitrary definition of financial instruments. CESR has addressed the interaction between these different positive and negative determinative factors by providing a description of the order in which they are to be applied.

A number of respondents suggested that the second and third mandates should be addressed separately and sequentially. However, only a limited number of responses proposed an actual methodology for addressing these two issues sequentially (and these seemed to involve a substantial overlap between the two tests).

CESR does not believe it is necessary for the advice to separately identify elements of the test as falling within either the "commercial purpose" or "characteristics of a derivative" conditions. However, as both conditions must be satisfied if a contract is to fall within the scope of section C(7), each of the positive determinative factors necessarily involves a combination of both conditions, while each of the negative determinative factors may involve a consideration of either or both conditions.

- The first two positive determinative factors address contracts traded on third country market places or trading facilities or that are expressed to be traded on a regulated market, MTF or equivalent third country marketplace or trading facility. They clearly have the characteristics of other derivative financial instruments and in view of the fact that there is a strong correlation between such contracts and contracts falling within section C(6), CESR believes it is appropriate for such contracts to be deemed not to be made for commercial purposes. This approach will increase legal certainty and result in the consistent treatment of contracts that raise similar regulatory issues. This approach allows such contracts to be evaluated on the same basis as contracts falling within section C(6).

- The three negative determinative factors that follow address a number of different issues. The first considers contracts whose settlement times are so short that they should not be seen as having the characteristics of other derivative financial instruments (although the limited implications of this test, which are discussed above, should be borne in mind). The second focuses on the commercial purposes of one of the parties. The third applies where both parties intend to deliver the underlying. In such a case it is so likely that the contract will have been entered into for commercial purposes that it should be seen as falling outside of the definition of a financial instrument.

- The last two positive determinative factors focus on cases where delivery of the underlying is extremely unlikely to happen (either because of lack of intention or because of legal obstacles). Where this is the case, it is much more likely that the contract is not entered into for commercial purposes and the characteristics of the contract will be very similar to those of a contract falling within section C(5). It is therefore appropriate to treat such contracts as falling within the definition of a financial instrument.

- The indicative factors that are to be used where none of the determinative factors are present involve a consideration of both the characteristics of the contract and its purpose. As indicated in the advice, all of these factors must be considered and the overall picture based on those factors taken as a result.

CESR does not believe its approach will cause undue problems, provided these tests are only used for the purpose of determining which contracts fall within section C(7) of Annex I to the Directive. In view of the specific policy considerations that surround section C(7), CESR has made it clear that its advice in this area should not be used for other purposes, such as interpreting sections C(5) and (6) of Annex I to the Directive.

3.1(4) Definition of climatic variables, freight rates, emission allowances, inflation rates and official economic statistics

The overriding consensus of respondents was in favour of CESR's proposed approach that no further implementation measures are necessary and CESR has not changed its approach in the final advice.

3.1(5) Other categories of assets, rights, obligations, indices and measures

As noted above, the consensus was for the advice on this mandate to comprise a set of open-ended criteria rather than limiting section C(10) to a narrow range of instruments (especially as the definition of commodities has been limited to goods).

There was also support for the approach of combining a non-exhaustive list of specific underlyings that should be included with an additional category based on more general criteria, although a number of respondents made detailed comments on the proposed general criteria.

Following comments from one of the groups of respondents, CESR has added geological, environmental or other physical variables to the list of specifically identified underlyings. CESR has also modified the detail of the proposed criteria in response to industry comments, while still seeking to include appropriate limitations on the definition of a financial instrument. In particular, CESR does not believe it is appropriate for contracts relating to services in general to be included within section C(10) (as opposed to the specifically identified categories, such as commodity storage capacity). Such an approach would involve a significant extension of the potential interaction between section C(7) and general commercial activities, without concrete evidence of the need for it beyond the cases that have been specifically identified.

However, CESR's advice on this mandate does include an index or measure relating to the price of volume of transactions in any service. Such contracts are very likely to be cash settled and the extension of the scope of the Directive into this area is less likely to overlap to the same extent with general commercial activities.

3.1(6) Characteristics of other derivative financial instruments

The consensus of the responses supported CESR's approach in relation to this mandate and this has been retained in the final advice.

Investment research (Article 13(3) and 18)

The technical advice on the management of conflicts of interest was subject to two consultative processes. The measures for the management of particular conflicts where the provision of investment research is involved was initially integrated in the CESR's Technical Advice on Level 2 Implementing Measures on the first set of mandates. Therefore, the piece of the advice addressing the specificities of investment research was originally included in a separate section of the advice on implementing measures for the management of conflicts of interest under Articles 13(3) and 18 of the Directive.

The wide range of different comments and mixed opinions expressed by respondents and the interactions of the definition and scope of provisions on investment research with the parallel work on the definition of "personal recommendation", made it necessary to delay the delivery of CESR's technical advice on this issue.

Respondents expressed disagreement with CESR on the need and the legal basis for its advice in this area in view of the requirements that are already set out in the Market Abuse Directive and its implementing measures (MAD).

CESR believes that the objectives and the scope of the MAD are different from those of the MiFID. The MAD addresses market integrity. As a result, the MAD requirements apply where investment

research is intended for distribution channels or for the public and the disclosure requirements are limited to recommendations concerning financial instruments that are admitted to trading on a regulated market in at least one Member State. Articles 13(3) and 18 of MiFID deal with investor protection issues and the scope of investment research subject to requirements under these articles should not be subject to these limitations.

In addition, the substantive nature of the requirements is different. Article 13(3) requires investment firms to maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent their conflicts of interest from adversely affecting the interest of any client. Article 18(2) requires disclosure where the arrangements made in this respect are not sufficient to ensure, with reasonable confidence, that this result will be obtained, MAD addresses the fair presentation of materials that recommend investment decisions or strategies and it focuses on the disclosure of conflicts of interest. Disclosure under Article 18(2) of the Directive should be understood as an exceptional measure. CESR's advice under Article 13(3) and 18 of the Directive focuses on the investment firm's internal policies and controls for the identification and proper management of conflicts, designed to ensure analysts' objectivity and independence in the preparation of investment research and the prevention of dealing ahead practices (as foreseen by IOSCO). This is intended to minimise the risk of damage to investors as a result of relying on investment research as an impartial basis on which to take their investment decisions.

Although it is recognised that MAD may overlap with provisions on investment research under the Directive, CESR's approach is based on the assumption that both Directives complement each other through different but balanced requirements that do not conflict. CESR therefore believes that, as far as investment research is concerned, all respective requirements should apply in certain cases.

Definition and scope

The first consultation paper defined investment research by reference to the ancillary service in Annex, Section B(5) of the Directive. Many respondents asked for clarification of this definition. It was also considered that the definition proposed was inappropriately broad because it included other forms of general recommendation based on, but different from, genuine investment research.

Other respondents welcomed the initial proposal for differentiation between "objective" and "non-objective" investment research to give firms enough flexibility to implement the proposed measures and to categorise their products accordingly with proper disclosure. However, it was suggested that requiring investment firms to list each and every specific aspect of non-compliance would not provide any additional benefit to the user whilst imposing a significant burden to firms.

It was also suggested that the concept of research should be a single one and maybe more restricted, leaving more scope to "marketing communications". One respondent advocated an alternative approach of differentiating analyst research from other material in order that the former can be recognised as such, giving the additional weight to the fact that investment research has been produced by a qualified analyst.

Following comments, CESR has altered its advice in this area. The revised version of the definition of the investment research in the technical advice still bases the concept of investment research on the ancillary service in the Directive. However, it has combined this with the key elements of a recommendation under the Directive 2003/125/EC. Furthermore, CESR has provided that a communication potentially falling within this new definition would not be subject to the additional organisational requirements under CESR's technical advice, if it is clearly and prominently labelled as a marketing communication and it clearly and prominently disclosues that it has not been prepared in accordance with the applicable requirements designed to promote the independence of investment research and is not subject to the prohibition on dealing ahead of the dissemination or investment research. This exclusion should not be available if the circumstances relating to the dissemination or presentation of the information would lead a reasonable person to rely on it as investment research. The same definition and limitation is also used in CESR's advice under Article 22(1) on dealing ahead of investment research.

CESR believes that this approach will:

- Increase clarity of the nature of material being sent to clients;
- Increase the accountability of the producers of the material to their clients;
- Assist the monitoring and enforcement of the requirements; and
- Increase the level of regulatory certainty for firms.

Some respondents asked for clarification that the requirements designed to promote independence and the prevention of dealing ahead just relate to the preparation of investment research, excluding the dissemination of that research by third parties that may outsource the service and distribute unaltered investment research produced by others.

CESR agrees with an approach based on a different treatment of production and dissemination of investment research. As stated in the revised explanatory text to CESR's final advice, the proposed measures for the management of conflicts are applicable to investment research that is produced and intended for dissemination outside investment firms and their groups, whether orally or in written form. This excludes investment research that is only produced for internal use by investment firms or the members of their group. On the other hand, paragraphs 2, 3 and 4 of the revised technical advice provide for different and specific obligations on the disseminators of investment research produced by third parties. The scope of these requirements depends on a number of factors, including whether the disseminator has altered the substance of the disseminated investment research, and whether the producer is a member of the disseminator's group.

Questions

Question 6.3.:

(a) Is it appropriate for an investment firm that publishes or issues investment research to maintain information barriers between analysts and its other divisions?
(b) If so, which divisions should be separated by information barriers in order to prevent analysts' research from being prejudiced?

Although there was support for the establishment of information barriers, respondents expressed differing views and concerns about the scope and the nature of these barriers.

Some consider that the establishment of information barriers is one of a range of tools to foster independence, and suggested that CESR does not need to provide further guidance. It was also felt that it would not be effective to "erect" barriers to prevent all interaction and thus limit the necessary assistance between investment research and other areas, because this interaction was considered necessary to assist analysts and other business areas in their work. It was then proposed that the way to prevent undue influence on analysts should be left to the judgement of the firm's senior management.

Although some respondents have proposed barriers between investment research and portfolio management and proprietary trading, the majority suggested that barriers between investment research and corporate finance business are the most relevant. Just one respondent supported full ring fencing all around analysts.

Following comments, CESR has altered the advice in this area (see paragraph 1(f) of the final advice). The new proposal seeks consistency with CESR's approach to information barriers in the CESR's Technical Advice on Level 2 Implementing Measures on the first set of mandates and, at the same time, emphasizes the importance of the prevention of undue influence on analysts in the process of preparation of the investment research from adversely affecting analysts´ objectivity.

Question 6.4.: Should the derogation from the requirements in paragraph 16(f)(i) to (v) be available if:

(a) the investment firm complies with the requirements in paragraphs 17, 18 and 19 of the first option set out below; or
(b) the investment firm complies with the requirements in paragraph 17 of the second option set out below?

The responses were mixed. Although many respondents were largely in favour of flexibility to categorize their research products as objective or non-objective with a different treatment for different categories of investment research, there has been a split in responses as far as the options to address this differentiation are concerned.

Some respondents considered that one of the impacts of the first option could be to severely limit the production of research on small and medium size companies, adversely affecting liquidity and the price-formation processes. It was argued that this option would limit information-gathering synergies and thus make the production of research on certain companies less economically viable.

Some respondents noted that firms might classify research as non-objective for reasons other than from a desire not to have to comply with regulatory requirements.

Many respondents supported CESR's approach that clear disclosure should be imposed where firms do not fully comply with all requirements (option 2 of the consultation paper). However, some expressed concerns on the need to provide substantive descriptions that would lead to a disproportionate amount of material being included within research. It was also suggested that CESR should allow less stringent requirements to be applied according to the nature of the recipient.

Some did not support any of the two options proposed, asking for a mixed approach. Other respondents felt the two options were too onerous, unnecessary and complex.

Following comments, CESR has altered the advice. The final technical advice avoids a definition of investment research based on the evaluation of the process that produced the communication or according to the characteristics of the material contained within. Thus, the concepts of "objective" and "non-objective research" were removed. CESR's advice only refers to investment research and the concept of "non-objective" research has been replaced by "clearly labelled marketing communications". These communications are excluded from the scope of application of the provisions for the preparation of investment research.

CESR's final advice focuses on fair and proper disclosure of communications to clients, stressing the importance of preventing recipients' being mislead by communications that are presented as investment research even though they were not prepared in accordance with the applicable requirements.

It is recognised that investment research and marketing communications may overlap (e.g. when a research is used as part of a marketing campaign). In this case, CESR is of the opinion that all respective requirements should apply.

Other issues on the contents of the conflicts policy

The term "analyst" has been removed from the text because it was felt it might be confusing since there is no definition in the Directive. The requirements on analysts now refer to the "relevant persons" whose involvement in the preparation of the substance of investment research make it necessary to apply requirements for the prevention of dealing ahead practices or any undue influence that might adversely affect their objectivity. Generally, this concerns the relevant persons of the investment firm that produce the substance of the investment research (which would, for example, exclude compliance staff who merely prepare the disclosures required under the MAD). However, it is appropriate to apply the requirements concerning trading ahead of investment research to any relevant person involved in the production of the investment research because of the ability to misuse information gained in the course of such involvement.

Respondents also provided detailed drafting comments regarding paragraphs 16(f)(ii) (separate supervision) and 16(f)(iii) (remuneration) of the consultation paper.

These comments were also raised and considered by CESR in its Technical Advice on Level 2 Implementing Measures on the first set of mandates and first the feedback statement. In particular, CESR agreed that there should be some limitation and adopted the concept of "direct supervision" in its advice. Regarding the provisions on remuneration structures, CESR also agreed that the advice should allow remuneration that depends on the global performance of the firm and the revised advice was focused on direct interactions between the revenues of conflicting activities and the remuneration of the relevant persons.

Therefore, paragraphs 1(g) and 1(h) of the revised version of the technical advice on investment research had also been amended accordingly.

A number of respondents expressed disagreement with the provision in paragraph 16(f)(iv) of the consultation paper, which limits analysts involvement in activities other than the preparation of investment research. In particular, respondents expressed concern about the limitation of analysts' participation in issuers "road shows", pitches and marketing campaigns, because such limitation was interpreted as a prohibition. It was argued that the commercial role of analysts is very important and must be permitted.

CESR agrees that there may be no apparent conflict in certain cases (e.g. if research analysts are not active participants in specific road shows). Therefore, the scope of the prohibition in the advice is limited to those cases where "such involvement is inconsistent with analysts' objectivity, or could reasonably be considered to be so". As stated before, CESR is of the opinion that all measures in the investment firm's conflicts policy must be designed to ensure both, analysts' objectivity and independence in the preparation of investment research and the prevention of dealing ahead.

General obligation to act fairly, honestly and professional and in accordance with the best interest of the client (Article 19(1))

Portfolio Management

In CESR's October 2004 Consultation Paper two measures were proposed under Article 19(1) in order to complete the advice provided under other provisions of the Directive in relation to portfolio management. The two measures were closely based on previous CESR Standards on Investor Protection and were designed to afford additional protection to retail clients.

One of the measures would require firms providing portfolio management services to retail clients to define and follow investment strategies. Some respondents questioned the usefulness of such a requirement but others considered that firms should have such strategies.

Having considered these different views, CESR has decided to maintain its advice unchanged in this respect.

The draft advice on the other measure stated that transactions carried out by firms on behalf of retail clients should be exclusively motivated by the interests of such clients and in accordance with the management objectives set out in the retail portfolio management agreement. Some respondents objected to the concept of "exclusive motivation" as being too absolute, saying that other legitimate reasons, such as the interest of the firm in attracting additional clients by achieving portfolio performance superior to that of its competitors, should naturally not be ruled out. Some respondents also pointed out that, if the draft advice on the content of the retail portfolio management agreement was maintained, it was not necessary to add that the firm should respect the agreement concluded with the retail client.

Having considered these arguments, and noting that its advice under Article 19(4) requires the investment firm to ensure that transactions carried out are in line with the client's investment objectives, CESR has decided not to maintain its proposed advice in this respect. The general obligation under Article 19(1) of the Directive that firms must act in accordance with the interests

of their clients, combined with the advice given under Articles 19(4) and 19(7), should suffice to meet the policy objectives in this area.

Lending

In CESR's March 2005 Consultation Paper it was proposed, as an implementing measure under Article 19(1) of the Directive, that an investment firm, before lending money to a retail client for the purpose of carrying out a transaction in financial instruments, should obtain information about the retail client's financial situation and take reasonable measures to ensure that the loan is "suitable".

The responses from industry were overwhelmingly negative, the responses from consumers were largely positive.

Having considered the arguments put forward, CESR has decided not to maintain its advice in this respect. CESR considers however that the general obligation under Article 19(1) of the Directive that firms must "act honestly, fairly and professionally in accordance with the best interests of their clients" should apply where a firm lends money to enable a client to carry out a transaction in financial instruments and the firm is involved in the transaction.

Suitability test (Article 19(4))

General comments

Respondents generally agreed with CESR's approach for implementing measures under Article 19(4). However, some questions were raised and detailed proposals on the drafting were made.

Some market participants explicitly endorsed the differentiation between professional clients and retail clients as regards their knowledge and experience. However, others were concerned that even professional clients may not be knowledgeable of all financial instruments, products and services. One respondent went on to criticise the proposal that information on the professional client's knowledge and experience does not need to be obtained once the professional status has been established. It was suggested that investment firms should be required to provide to all professional clients more information about their status and new products. However, CESR cannot neglect the wording of Annex II. According to it, professional clients listed in the Annex II (1) are deemed to have knowledge and experience for all financial instruments and transactions. For all other clients that may be treated as professionals upon request, their knowledge and experience has to be assessed. This could lead to a classification of clients as professional for certain financial instruments and transactions only.

CESR therefore confirms that a professional client is deemed to have sufficient knowledge and therefore the respective information does not need to be obtained. Where the client is only classified as professional for some transactions, products and services, but not for others, the presumption of knowledge and experience will only apply to the extent that the client is classified as a professional client.

Some respondents expressed the opinion that there should be no suitability requirements for professional clients and eligible counterparties and sought confirmation from CESR that no suitability obligations applied in such cases. CESR disagrees with this comment. Article 19(4) applies in relation to business with retail clients as well as business with professional clients and eligible counterparties. Article 24 is restricted to the services of execution of orders on behalf of clients and receiving and transmitting of orders as well as dealing on own account and any directly related ancillary services. Therefore, Article 19(4) applies also in relation to eligible counterparties because of the services addressed by this provision. The different nature of the client is only taken into account regarding the information that is to be requested concerning the knowledge and experience of a professional client (which may include somebody who is an eligible counterparty for other purposes). Moreover, the Directive differentiates between different kinds of services. The suitability-test is only required if investment advice or portfolio management services are provided. If a professional client or an eligible counterparty does not need investment advice or portfolio

management services from the firm, it is free to deal under Article 19(5) or (where applicable) Article 19(6), without the suitability regime applying.

Other market participants stated that, in certain circumstances, the wider knowledge and experience of the client should be relevant, not just their knowledge and experience of the envisaged transactions, products and services. Otherwise, it was argued, the CESR advice would be too inflexible and would not cover developments in the client relationship or any demands for new financial instruments. Since this aspect of the CESR advice was not intended to unnecessarily impede investment in financial instruments the client has not yet invested in or to restrict the information used for the suitability-test, we clarified in the explanatory text that, in certain cases, the wider knowledge and experience may be relevant.

Some respondents urged CESR to differentiate more clearly between the duties and obligations of investment firms when providing investment advice as opposed to portfolio management services. They also asked for a clarification of the interrelation of Article 19(4), (5) and (6). CESR is of the opinion that the advice is flexible enough to accommodate the different services. However, we addressed these concerns by introducing a reference in paragraph 6(b) to the "nature and extent of the service provided" and the clarification in paragraph 8 that the suitability-test must be conducted in the light of any previous transaction "undertaken within the same mandate". Though not explicitly mentioned in the advice, it is CESR's common understanding that a client could, according to the circumstances, effect transactions outside an advisory relationship or a portfolio management service according to Article 19(5) and/or Article 19(6).

Regarding the different responsibilities of investment firms for different services, CESR confirms that an investment advisor can agree to keep a client's portfolio under review without providing portfolio management services. For example, this would be the case if an investment advisor agreed to review the client's portfolio periodically and advise him with investment advice as market developments arise. Where this is the case, the suitability obligation shall apply in respect of the evaluation of the portfolio as well as any recommendation.

Furthermore, some respondents stated that the criteria for assessing the suitability must include an understanding of the consequences. Since this criterion would be very difficult for investment firms to assess and for competent authorities to enforce, CESR did not take up this proposal.

Question 4.1.: *Do market participants think that adequate investment advice or portfolio management service is still possible on the basis of the assumption that the client has no knowledge and experience, the assets provided by the client are his only liquid assets and/or the financial instruments envisaged have the lowest level of risk if the client is not able to or refuses to provide any information either on his knowledge and experience, his financial situation or its investment objectives? Or would this assumption give a reasonable observer of the type of the client or potential client the impression that the recommendation is not suited to, or based on a consideration of his personal circumstances?*

Most respondents felt that it should still be possible to give advice to both professional and retail clients where the client has not provided information on his knowledge and experience, his financial situation or his investment objectives. In this case, cautious assumptions should be made about the investment objectives of the client, his knowledge and experience and his financial situation. However, respondents argued that CESR should provide general principles in this area rather than going into detail.

Some respondents stated that the assumptions proposed by CESR were too restrictive because it would be difficult to recommend equity products if it was assumed that the assets provided for the investment are the only liquid assets of the client. Others said that information available to the investment firm should also be taken into account before the reliance on an assumption could be considered.

Some market participants also answered that it is unfair to place the burden of obtaining the information on investment firms.

On the other hand, a few respondents stated that it was not possible to provide investment advice or portfolio management services in a meaningful manner, if the client is not willing to provide information about his knowledge and experience, his financial situation and/or his investment objectives. One respondent mentioned that, for portfolio management services, at least the information on the client's investment objectives would be needed.

In CESR's opinion, Article 19(4) makes clear that, generally, the onus is on the investment firm to obtain the necessary information from the client. However, CESR decided to introduce some flexibility if the client fails to provide information and the relevant information is not otherwise available to the investment firm. In this scenario, the provision of investment advice should not be forbidden if the investment firm proceeds on a cautious basis in respect of the missing information. However, this does not hinder investment firms from refraining to provide the service if they have the feeling that an assumption cannot replace the information in a meaningful manner or they otherwise do not wish to proceed. In any case, this possibility does not override the requirements set out in CESR's previous advice to the European Commission (for example, that the retail client agreement must set out the management objectives agreed with the client).

Specific drafting suggestions

Additionally, CESR received a lot of specific drafting proposals from respondents. Some of these proposals were taken into account when redrafting the advice.

In paragraph 1 CESR provides examples of particular types of information that have to be obtained from the client or potential client in order to assess the suitability. In our opinion, this is part of the mandate to find "criteria for assessing the minimum level of information". The intention of this part of the advice is to provide some guidance about the particular types of information that may be requested from the client and considered for assessing suitability. Therefore, the list is not exhaustive and other useful information (for example, the client's own assessment of his knowledge) could be obtained and taken into account. However, it is not intended that the client could only be advised on products he is familiar with. This is clarified in the revised explanatory text.

On paragraph 4, some respondents proposed a rewording arguing that it will be very difficult for investment firms to establish the accuracy of the information. Since this requirement is already limited to "manifestly" inaccurate information, CESR does not see any necessity for amendments. It is clear that only obvious inaccuracies are covered.

Some respondents asked for clarification of the respective responsibilities of investment firms providing investment advice on an occasional or continuing basis or the service of portfolio management under paragraph 5. CESR redrafted the advice in order to provide more clarity. In particular, it has been clarified that, in the case of occasional advice, instead of a regular review, the investment firm may choose to check whether the client profile is still up-to-date only when the retail client seeks advice or the investment firm offers advice.

In this respect, market participants also felt that it is too burdensome and operationally not feasible for many investment firms to take into account the development in the relationship of the client and the investment firm. Though CESR has retained its proposal, we take the opportunity to clarify that the reference to the development of the client relationship is intended to address concerns that, otherwise, the status quo may be considered to be fixed.

Furthermore, respondents felt that the burden to obtain information could be shifted contractually to the client. Level 1 requires the investment firm to obtain information from the client when they provide investment advice or portfolio management. In CESR's opinion, paragraph 5 already tries to balance the information obligation appropriately between the client and the investment firm.

Though one respondent explicitly endorsed the criterion that "the greater the level of risk involved in the transaction, the more important the financial situation will be in determining the suitability", CESR redrafted the advice because it was felt that the former paragraph 6(c) was drafted too narrowly. However, the interdependence of the level of risk of the envisaged transaction with the financial situation is still covered by the more abstract version.

Appropriateness test (Article 19(5))

Some respondents asked for clarification of the general interrelation between Article 19(4), 19(5) and 19(6) and requested that CESR should provide a clear description of the regime applying to Article 19(5).

The European Commission has restricted the mandate for CESR relating to Article 19(5) to the determination of the criteria for assessing the minimum level of information that should be obtained from the client regarding his knowledge and experience and the criteria for assessing, on the basis of the information received, the appropriateness for the client or potential client of the investment service or product envisaged. CESR has therefore followed the mandate and has not provided an outline of the concept of level 1. However, Article 19(4), (5) and (6) distinguish the obligations of investment firms according to the service provided. Accordingly, if neither investment advice nor portfolio management is provided, an investment firm is not obliged to ask for information about the clients' financial situation and investment objectives. Moreover, if an execution-only service is provided under the conditions of Article 19(6), it is clear from the Level 1 text that neither the requirements under Article 19(4) nor under Article 19(5) apply.

In general, there was much support for CESR's advice under Article 19(5), in particular for the treatment of professional clients. Only one respondent was concerned that a professional client could be professional for all products and strategies from the simplest to the most complex ones. In order to address this concern, CESR amended its advice to clarify that it is possible to classify a client as professional for some transactions, products or services and as retail or others. Additionally, a professional client has the option to ask for a higher level of protection when it deems it is unable to properly assess or manage the risk involved in certain types of transactions, products or services. Alternatively, it could ask for investment advice.

Respondents generally believed that the obligation to obtain a wide range of information regarding the knowledge and experience of the client for the purpose of Article 19(5) might result in a full suitability assessment being required before information could be provided via direct mail/direct offer for low risk products. In its advice CESR provides a range of examples in which areas information about the client's knowledge and experience might be obtained. However, the information to be obtained in any particular case will depend on the application of the criteria set out in paragraph 2 of the advice.

Some respondents expressed concerns that the obligation to assess knowledge and experience on an ongoing basis would be very difficult, if not impossible, with no additional benefit for the client, because it is unlikely that gains in the client's knowledge would alter the firm's assessment of risk.

CESR considered the practical impact and the justification for the obligation to update the knowledge and experience on an ongoing basis. CESR believes that for the purpose of Article 19(5) it would not be helpful to apply this obligation as a general concept. If the client is interested in a modification of his risk profile in order to be able to trade other types of financial instruments, engage in other types of transactions and/or orders he will inform the investment firm accordingly. The investment firm could then provide further information to the client in order to uplift his knowledge. This may lead to a different assessment as to the type of transactions and/or financial instruments appropriate for the client.

According to CESR's advice under Article 19(5), an investment firm shall be entitled to rely on the information about the knowledge and experience provided by the retail client or potential retail client, unless it is manifestly inaccurate or incomplete. Some respondents felt that this requirement imposes an inappropriate and impractical obligation on investment firms. CESR believes that it is appropriate to restrict, in this way, the ability to rely on the information provided by the client. However, it should be noted that this restriction will only apply in such cases, where the investment firm is aware that the information provided by the client is obviously inaccurate or incomplete. Therefore, CESR does not see any practical problems.

Execution only (Article 19(6))

Non-complex instruments

Question 5.1.: *In determining criteria, should CESR pay more attention to the legal categorisation or the economic effect of the financial instrument?*

A strong majority of respondents felt that CESR should pay more attention to the economic effect of the financial instrument rather than to its legal categorisation. Some respondents favoured both approaches. Respondents argued that the criteria for non-complex instruments should emphasise the complexity of the outcome rather than the complexity of the construction of those instruments. Therefore, CESR should not place unnecessary restrictions on the use of new and innovative products that can offer to investors more efficient ways of achieving similar economic outcomes than those provided by more traditional investments.

Many respondents argued against a general categorisation of all derivatives as complex. They presumed that Article 19(6) would have excluded all derivatives instead of the exclusion of bonds and securitised debt embedding a derivative if this had been intended by the legislator.

Others argued that some instruments that are generally considered to be derivatives would not be more complex or riskier than other non-derivative products. Moreover, they asked CESR to take into consideration that a categorisation of financial instruments as derivatives would be a very difficult task since there are many different types of instruments that have lots of different features.

On the other hand, respondents came up with a lot of different proposals on the kinds of financial instruments that include at least a derivative element but which they argued should be regarded as non-complex instruments.

Regarding the criteria for non-complex instruments, CESR pursues an abstract approach. The test for non-complex instruments sets out criteria relating to the transferability of the instrument, the risk of additional liability of the client above his original contribution and the availability of information about the instrument (i.e. some transparency requirements). These criteria are intended to provide the necessary flexibility for a wide range of existing and innovative financial instruments.

Though CESR fully understands the concerns of market participants regarding the strict exclusion of derivatives, we have to acknowledge that level 1 intended the exclusion of derivatives from the execution-only service under Article 19(6). The wording of the level 1 text reflects a political compromise. The Commission Services advised CESR that the express list of certain eligible financial instruments for the execution-only service under Article 19(6) which does not include derivatives clearly indicates the intention of the legislator not to extend this services to derivatives. Otherwise, the legislator would have included derivatives in the list under Article 19(6). CESR is therefore bound by the intention of the legislator on level 1.

The definition of a derivative may be an appropriate subject for work at Level 3 in order to provide further clarity about the question which kinds of financial instruments are allowed to be traded under Article 19(6) and which are excluded from this service.

At the initiative of the client

Question 5.2. *- Do you think that it is reasonable to assume that a service is not provided "at the initiative of the client" if undue influence by or on behalf of the investment firm impairs the client's or the potential client's freedom of choice or is likely to significantly limit the client's or potential client's ability to make an informed decision?*

Alternatively, do you think that the consideration of this overarching principle is not necessary because the use of undue influence could be subject to the general regulation under the UCPD and

that CESR should restrict its advice more strictly to Recital 30 or refer entirely to this Recital advising the Commission that it is not necessary to adopt Level 2 measures in this area?

Almost all respondents suggested that Recital 30 is sufficient to handle situations of undue influence. In this context it was argued that no additional level 2 measures are needed and that CESR should endorse Recital 30 entirely in its advice.

The underlying principle of Recital 30 seems to be that an investment service shall, on principle, be regarded as having been provided at the initiative of the client, unless specific circumstances are met.

Investment firms should be able to provide the service under Article 19(6) without unnecessary restrictions on advertising their business. Since the CESR advice under Article 19(2) includes detailed regulations on fair, clear and not misleading marketing communications, it should be clear to the client or potential client that, reacting upon such general communications, he has freely chosen to contact the investment firm for further inquiries about the execution-only service.

Considering that Article 19(6) does not require the firm to request client information as provided for in Article 19(5) and the client acts autonomously at his own risk, the notion of investor protection has been incorporated in Article 19(6) by the limitation that the investment service can only be provided "at the initiative of the client or potential client".

The provision of the execution-only service should therefore not be allowed if the own initiative of the client to use this service has been impaired by a personalised communication from or on behalf of the investment firm to that particular client and this communication contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction.

Furthermore, the client should not be influenced by the investment firm in such an extensive way that he is induced to use the execution-only service though this is not based on his free will (under "undue influence"). This general principle is derived from the Proposal for a Directive on Unfair Business to Consumer Practices in the Internal Market (Interinstitutional File 2003/0134 COD – the UCPD). CESR is aware that this principle will not be restricted to the provision of execution-only services, though it is obviously of particular relevance for a service that can only be provided "at the initiative of the client". Rather, the prohibition of "undue influence" under the UCPD will be a regulatory regime in the future covering all financial services. Hence, CESR is of the opinion that it is not necessary to incorporate the approach of "undue influence" in its advice relating to the provision of execution-only services.

Apart from that, CESR shares the opinion of market participants that Recital 30 already addresses very specific circumstances and provides concrete orientation for the question when a service is considered to be provided at the initiative of the client. The concept of Recital 30 is clearly outlined so that any additional criteria are likely to interfere with this concept agreed on level 1. We therefore provide the advice to the European Commission to exclusively rely on Recital 30, instead of implementing further measures.

Professional Client Agreement (Article 19(7))

In December of 2004 CESR issued a call for opinions on whether the Commission should be advised to propose a level 2 implementing measure of the Directive in relation to agreements between investment firms and their professional clients.

The results of the consultation showed a split on whether CESR should provide advice on this issue. Almost unanimously representatives of investment firms thought that a written client agreement with professional clients is necessary but the majority expressed the view that this should be left to

best practice and commercial considerations. A minority felt however that it would be desirable to harmonise practice and improve legal certainty in this area by adopting a level 2 provision.

For most of the respondents in favour of CESR providing advice on this issue, a written agreement for portfolio management was considered essential. Some of the respondents opposed to CESR providing any advice at all added that, should CESR decide to advise the Commission to propose such a requirement, it should apply only to portfolio management.

All respondents noted that CESR did not contemplate prescribing any content of the agreement and agreed with this position.

A few respondents were of the opinion that a mandatory written agreement should encompass all investment services and some ancillary services, in particular custody of client assets and the granting of loans. It is recalled that in its final advice under Articles 13(7) and 13(8) of the Directive, CESR proposed requiring a written agreement with all types of client where an investment firm holds client assets.

Having considered the arguments, CESR has decided not to provide any advice under Article 19(7) on the professional client agreement for any other investment services or ancillary services.

Best execution (Article 21 and 19(1))

Box 1: Application to Investment Firms that Provide the Service of Portfolio Management or Reception and Transmission of Client Orders.

General comments

Respondents disagreed about whether investment firms providing the service of portfolio management ("portfolio managers") or order reception and transmission should be required to comply with the obligations under Articles 21 and 22(1). Several respondents agreed in principle that these investment firms should be subject to a duty of best execution. However, they did also stress the need for a flexible application of the principles that could be tailored to the circumstances of those institutions. Some respondents also noted that they use affiliates as preferred execution venues.

Some respondents also indicated that they contract with investment firms not only to provide execution services but also to provide a range of other services. Therefore, they argued that in deciding whether to contract with these firms, they should be able to consider the quality of these firms' execution services as only one element of the decision. A few respondents argued that the Commission is not empowered to extend the obligations under Article 21 to the services of portfolio management or order reception and transmission.

Two respondents argued that CESR, as an alternative to its advice under Article 19(1), should permit firms to "outsource" actions required under the advice, for example, monitoring. CESR's advice on outsourcing permits firms to outsource material operational functions, including compliance functions, subject to the provisions in its advice. CESR does not see the necessity of further advice in this regard.

Many respondents argued that Article 21 should not apply to investment firms involved in merger and acquisition, private equity or other similar work, which may fall within the definition of reception and transmission of orders. To avoid this outcome where it would be inappropriate, CESR has slightly modified the advice to clarify that it only applies to portfolio management and order reception and transmission if they lead to the execution of orders on behalf of clients for financial instruments.

Several respondents had queries relating to the order execution chain and the subsequent required disclosure. One respondent stated that even if an investment firm using execution intermediaries were to undertake all the reasonable steps required to select intermediaries that would be most likely

to deliver the best possible result for the execution of its clients' orders, its task was not to actually execute orders directly. "The content of the best execution obligation should therefore be adapted to the specific business of portfolio managers, as well as to the specific agency and contractual obligations they are subject to." Another respondent seemed to think that CESR's proposed advice under Article 19(1) would *require* investment firms that use execution intermediaries to select the execution venues that their intermediaries should use to complete their client orders.

Respondents also raised questions relating to the application of the advice under Article 19(1) to CESR's Level 2 advice under Article 21 on disclosure. For example, some respondents expressed confusion about which parties in the order execution chain would be regarded as "execution venues" subject to the disclosure requirements.

CESR reiterates its view that investment firms providing the service of portfolio management or order reception and transmission play an important role in determining the quality of execution that their clients receive and therefore, should be subject to the obligations of best execution and the associated disclosure requirements in order to achieve the legislative purposes underlying Article 19(1) and Article 21.

However, respondents to the October consultation paper advised CESR that they may organise the execution of client orders in many different ways. For example, some may retain complete discretion over how orders are executed and exercise it on a case-by-case basis, others might develop an overall execution strategy only periodically, others might delegate some but not all discretion over how orders are executed to one or more intermediaries, who may be selected on a trade-by-trade basis or periodically and others still may delegate all of the day-to-day decisions about the execution of their client orders to an intermediary. Moreover, these four basic models represent only points on a wide spectrum of possible arrangements. CESR understands that investment firms may operate many other models.

Therefore, CESR has endeavoured to craft its Level 2 advice in such a way that it does not impose unreasonable burdens on investment firms that choose to use other firms to execute their client orders. Thus, CESR's advice does not require investment firms to duplicate the elements of execution that they have delegated to intermediaries. But CESR does expect firms to take all reasonable steps to select the best intermediaries, to monitor their own performance and the performance of an intermediary they use and to correct any deficiencies that the monitoring may reveal.

CESR wishes to emphasise that if an investment firm reserves decisions about execution to itself, it should be obliged to comply with the requirements in Article 21, even if it does not actually "execute" orders on behalf of its clients. Thus, if an investment firm instructs an execution intermediary about where or how to execute its client orders, then the investment firm should take all reasonable steps to ensure that its instructions are enabling it to obtain the best possible result for the execution of its client orders, it must monitor its execution arrangements to assess the success or failure of those instructions and it must correct any deficiencies in its order execution arrangements that the monitoring may reveal.

In CESR's view, both Article 21 and the proposed advice under Article 19(1) should be applied in a flexible and proportionate manner, allowing investment firms broad discretion in how they organise their business models and execution arrangements. For example, if an investment firm, as part of its business model, instructs execution intermediaries about how its client orders are to be executed, then it should be responsible for ensuring that those instructions have been formulated in accordance with execution arrangements that meet the requirements set forth in the advice. However, if an investment firm, as part of its business model, relies on an execution intermediary to decide how best to execute its client orders (or indeed, how best to transmit them for execution), then it will be responsible for ensuring that the selection of those intermediaries has been made in accordance with execution arrangements that meet the requirements of the advice. In both cases, the investment firm must take all reasonable steps to obtain the best possible result for the execution of its client orders but in each case, the specific steps depend on the firm's particular business model.

The definition of "execution venue" in the Level 2 advice is intended to include those entities to which an investment firm submits its client orders for execution. Thus, if an investment firm receives client orders and transmits them to another investment firm for execution, then the second

investment firm will be an "execution venue" for the first investment firm. Similarly, if a portfolio manager directs its client orders to another investment firm for execution, the second investment firm will be an "execution venue" for the first investment firm.

In its March consultation paper, CESR clarified that its advice is not intended to prevent portfolio managers from accepting research or other goods or services from execution venues or from investment firms that execute client orders. However, CESR noted that the offer of these goods or services could amount to an inducement, in which case CESR's advice on inducements would apply. Under that advice, investment firms may not accept inducements that interfere with the client's best interests. As a result, firms may not select execution venues that offer inducements unless they also meet the requirements of Article 21. CESR then asked the following questions.

30.	*Question for Comment: a) How do firms compare venues (or intermediaries) that offer inducements with those that do not?* *b) Where the fees and commissions that firms pay to execution venues or intermediaries include payment for goods or services other than execution, please indicate the circumstances in which firms might determine how much of these commissions represents payment for goods or services other than execution? Under what circumstances do firms consider the entire commission as payment for execution?*

Most respondents stated that the topic of inducements was too complex to address in the current paper. Many respondents referred to work being done on 'softing and bundling' within the UK asset management industry in collaboration with investors, brokers and the UK regulator. Some respondents representing portfolio managers did, however, say that they viewed the receipt of bundled services such as research to be, at times, more important than achieving best execution for their client orders.

CESR recognises that practices of "softing and bundling" present complex questions of application that it may need to address in its work at Level 3.

Box 2: Criteria for determining the relative importance of the different factors to be taken into account

The majority of respondents were content with the draft advice presented in Box 2 of CESR's March consultation paper. One trade association requested the introduction of a public benchmarking tool to allow clients and market intermediaries to assess execution quality. In its first consultation paper, CESR rejected the idea of a benchmark against which firms could assess best execution. CESR's views have not changed. The investment firm must take all reasonable steps to achieve the best possible result for the execution of its client orders. The Directive does not contemplate any loosening of that standard via "safe harbours."

CESR believes that each investment firm is best placed and should retain the flexibility to tailor its execution policy to its particular strategies and goals. However, the best execution requirements do not leave complete discretion to the investment firm to define whatever execution policy and arrangements it likes. The investment firm must devise arrangements (including an execution policy) that fulfil the best execution requirements, including the requirement to take all reasonable steps to achieve the best possible result when carrying out orders on behalf of their clients.

Box 3: Factors for selecting, monitoring and reviewing venues

Selection and Review

Responses to this section of the draft advice were generally positive, although a number of respondents criticised some of the specific detail. There was a split amongst those respondents that commented on the annual requirement imposed on investment firms to review their execution policy and arrangements.

A number of trade associations responded negatively to the proposal for a regulatory requirement on when to undertake the review required by Article 21, especially the minimum requirement for an

annual review. They argued that frequency of review should be a commercial decision that should not be enforced through regulations but rather should be left to the investment firm and competition. A few respondents took the opposite view, arguing that it was indeed necessary for an annual requirement to be imposed. However, most respondents were silent on this requirement.

CESR has decided to retain the annual review requirement in its final advice to the Commission. Compliance with the review requirement should not be especially burdensome for firms that comply with the Level 1 requirement to monitor their execution arrangements. This monitoring should provide firms with most of the information that they need to review their execution arrangements and policy on a regular basis and at least annually. Against this cost, CESR considered the cost to regulators if they could not supervise a firm's compliance with the best execution requirements because the firm, having determined (at least arguably) that an annual review had not been necessary, did not have the records necessary to facilitate supervisory review of its execution arrangements. On balance, CESR believes that the costs of annual reviews that would not otherwise be reasonably necessary are greatly outweighed by the added burden that would be placed on regulators and the consequent loss in regulatory effectiveness.

Respondents also questioned the reference to 'material change' in the draft advice as a trigger for the review requirement. Two trade associations argued that the reference in the advice should not be to when a material change occurs but to when an investment firm becomes aware that the material change has occurred. CESR agrees with this comment up to a point. The advice has been modified to require review when a firm becomes aware or reasonably should have become aware that a material change has occurred.

Respondents also commented on the list of factors that an investment firm may take into account in considering whether to maintain or include execution venues in its order execution policy, noting a number of inconsistencies and duplications. For example, respondents pointed to the fact that firms may consider the same factors whether they are evaluating execution venues or execution intermediaries. Therefore the text has been revised to reflect only one list of factors. Several factors have been deleted because, upon further reflection, CESR realised that they do not add meaning to the Level 1 text. For example:

- "quality of service" does not add anything substantive to the overall Level 1 requirement to select execution venues (and intermediaries) that enable the investment firm to obtain the best possible result for the execution of client orders on a consistent basis;
- immediacy may be equated with speed;
- order volume may be equated with size;
- price is in the Level 1 text; and
- client preference may be equated with client instructions.

Other factors have been deleted because, upon further reflection, CESR judges them to be too broadly drafted (reputation, access costs).

CESR also has modified the drafting to emphasise that the lists of factors and costs that the final advice expressly permits investment firms to consider is not intended to be exhaustive. Investment firms are expected to consider all factors relevant to their specific business models to ensure that the execution venues included in their execution policies and enable them to obtain the best possible result for the execution of their client orders on a consistent basis and that their execution arrangements otherwise meet the requirements of Article 21.

CESR may consider further work at Level 3 to help Member States develop convergent views regarding application of the best execution requirements to non-equity markets.

Monitoring

In the March consultation paper, CESR reviewed the response to the October consultation and decided not to propose any Level 2 advice on monitoring. Respondents that addressed this decision supported it. Accordingly, there is no Level 2 advice on monitoring.

The March consultation paper also asked the following question:

87.	*Question for Comment: How do you assure that your execution arrangements reflect current market developments? For example, if you do not use a particular execution intermediary or venue, how would you know whether they have started to offer "better execution" than the venues and intermediaries that you do use?*

In response to this question, several respondents explained that intermediaries have a vested interest in securing order flow. Virtually all respondents who replied to this question were content that they receive frequent and appropriate information from the intermediaries they use regarding material changes to their business. Several argued against imposing further regulatory obligations in this area.

Box 4: Information to the clients on the execution policy of the firm.

General Comments

The majority of respondents disagreed with CESR's approach to disclosure as generally being too prescriptive and likely to overwhelm clients with information that would not be helpful to them. Respondents also reacted negatively to the questions for comment within the March consultation paper. Respondents questioned whether CESR intended to introduce more obligations in response to the questions. However, two trade associations supported maximum transparency as vital to establishing a unified approach to disclosure across Member States.

Detailed Provisions

There were a number of less controversial elements of the disclosure proposals. Respondents were, on the whole, content with the proposals that would require firms to provide clients with a description of:

- the relative importance the investment firm assigns to the factors cited in Article 21(1) or the process by which the firm determines the relative importance of these factors;
- an investment firm's practices where it executes orders itself, arranges cross transactions between its clients or between its clients and clients of its affiliates, or directs client orders to its affiliates for execution or receipt and transmission and how it manages the related conflicts; and
- a description of the investment firm's process for selecting, monitoring and reviewing its execution arrangements and the execution venues in its order execution policy, including a description of how deficiencies in the investment firm's execution arrangements are identified and addressed.

CESR continues to believe that the above proposals form part of the appropriate information to clients on an investment firm's execution policy and will retain them in the final advice to the Commission.

The rest of the disclosure proposals generated varying degrees of discontent from respondents. Each proposal is dealt with in turn below.

Disclosure to retail clients regarding price and costs

CESR proposed that in the case of a service provided to a retail client, if the investment firm gives or might give a factor other than price or cost more importance than price or cost for the purposes of Article 21(1) of the Directive, it must provide an explanation of why this is in the best interests of its retail clients. A number of trade associations believe there is no grounding in the Level 1 text for this proposal and that it would duplicate the requirement to describe the investment firm's execution policy. However, other respondents believed that price and cost were indeed very important criteria and should be included.

Some of the respondents who agreed with this proposal stated that this disclosure should not be given for each transaction, but rather should be included as part of a firm's execution policy. CESR wishes to clarify that its advice does not require that this disclosure be provided on a trade-by-trade basis. Rather, the advice requires that this information be provided in good time before the commencement of investment services.

129.	Question for Comment: Should investment firms that do not consider speed to be an important factor in the execution of retail orders be required to highlight this judgement?

Respondents were split on this question. CESR has decided not to add speed to this paragraph in the advice because it does not wish to confuse or dilute the required disclosure regarding price and costs.

Finally, one shareholder association argued that 'reliability' is as important for retail clients. CESR agrees that this factor is important, however, it does not see a need to highlight this point in specialised disclosure.

Option 1: CESR Chairs retain proposal in final advice

CESR has chosen to retain the proposal in the final advice to the Commission. While the best execution obligations should not prescribe the relative importance of the factors in Article 21(1) of the Directive, it is appropriate to proceed on the basis that the majority of retail clients would expect investment firms to be take all reasonable steps to deliver the best prices at the lowest costs when executing their orders. The proposal does not limit an investment firm's ability to weight the relative importance of the factors in Article 21(1) of the Directive differently, it simply recognises the general expectation of retail clients and requires in cases where price and cost are not viewed as most important, that the investment firm highlights this fact and explains why is in the retail client's best interests.

Option 2: CESR Chairs delete proposal from final advice

CESR has decided to delete this requirement from the disclosure proposals in the final advice. CESR acknowledges that the Level 1 text provides an appropriate framework for investment firms to describe their execution policies in a way that makes it clear to clients and potential clients how they have ranked the relative importance of the factors in Article 21(1) of the Directive. CESR also credits the argument that this disclosure would go too far toward prescribing the relative importance of the factors, which CESR is not authorised to do.

Warning on client instructions

CESR proposed that where an investment firm accepts specific client instructions, it should warn clients that such instructions may prevent the firm from taking the steps that it has designed to obtain the best possible result for the execution of its client orders on a consistent. A few trade associations argued that this provision should be deleted from the advice as it violates the Level 1 text, which gives precedence to client instructions. One respondent stated that business models currently exist, particularly for internet-based investment firms, which allow clients to choose from amongst a list of execution venues, the one where they want their orders to be executed and that this proposal equates to a warning against that business model.

Other respondents were content with substance of the proposal, but argued that the requirement should not be applied on a transaction-by-transaction basis, as this could delay execution. These respondents believed that including the warning in the terms of business or the execution policy would be appropriate. Two respondents asked CESR to clarify whether the provision would be limited to retail clients only. There was also a call for CESR to confirm that an investment firm should not be obliged to accept any instruction that contradicts the order execution policy of the firm.

CESR believes that clients should be informed if their specific instructions could impede or prevent the firm from achieving the best possible result for their orders. Therefore, CESR has retained the warning on specific client instructions in its final advice to the Commission. CESR also wishes to

caution investment firms against attempting to evade their obligations under Article 21 or under the Level 2 advice under Article 19(1) by encouraging clients to provide instructions that violate their execution policy or arrangements, whether as part of the firm's general terms of business or otherwise.

CESR stands by its judgment that this provision should apply to both retail and professional clients. This is consistent with the Level 1 text which applies the requirements for disclosure and consent to both types of clients. CESR also observes that such instructions are more likely to come from professional clients.

However, CESR has modified the advice to clarify that a warning is required only if the investment firm accepts instructions that conflict with its execution policy or arrangements. Therefore, a warning would not be required for client instructions that are contemplated as part of a firm's execution policy and arrangements.

CESR also wishes to clarify that the advice does not require investment firms to provide this warning on a transaction-by-transaction basis.

Finally, CESR believes it is a judgement for investment firms as to whether or not they accept specific client instructions. Article 21 imposes obligations on investment firms only once a client order is accepted.

Execution venues not included in the execution policy

The proposed draft advice included a requirement that investment firms state whether they may use execution venues not included in their execution policies and if so, how they make the determination to use such venues. Although this specific provision did not generate much comment, CESR acknowledges respondents' general comments that the total package of disclosure requirements would result in information to clients being too lengthy.

Therefore, CESR has, in its final advice, modified this requirement to require that an investment firm provide clients with a statement that this information is available upon request.

Execution venues

The proposal for investment firms to disclose each execution venue that they access directly came under intense criticism. Respondents stated that a list of execution venues would not be useful to and was not desired by most clients, would require constant updating, bringing the integrity of the information into question, and could be potentially a long and overwhelming list. Other respondents believed that implementing new systems to produce and maintain the list of execution venues would be too costly, especially for small investment firms. One trade association said that the list in its present form carries the risk of obscuring those relationships that are material to the end investors' interests. Respondents also pointed out that this disclosure could be misleading if an investment firm arranged for most of its client orders to be executed indirectly. Finally, a number of respondents stated that in the case where some of the information would be available on request, the costs associated with compiling this information would be borne by all clients not only those requesting it.

A minority of respondents agreed with the proposal. One investment firm believed that its clients should be provided with this information, while two other respondents stated that the list of execution venues was acceptable as long as the information was of a general nature.

CESR has considered these comments carefully and decided that this proposal should be revised. CESR's final advice now requires that investment firms disclose to clients each execution venue on which they place significant reliance in meeting their obligations to take all reasonable steps to obtain the best possible result for the execution of their client orders. Taking note of the point that some firms may rely more on intermediaries than on ultimate execution venues, CESR has eliminated the distinction between direct and indirect execution. CESR's advice also will require investment firms to include a statement with this information that a complete list of execution venues in the investment firm's execution policy is available upon request.

Client consent and communication of material changes

The provisions requiring investment firms to describe their processes for obtaining client consent, both to the execution policy and to executing orders outside a regulated market or an MTF, and for how the investment firm will communicate material changes to clients did not receive a great deal of specific comment. However, respondents did raise interpretive issues concerning the concept of express consent to execute orders outside a regulated market or MTF within market structures that do not have a regulated market or MTF, most notably some of the non-equity markets. There was also concern noted as to what will constitute a material change such that clients will need to be informed.

Option 1: CESR Chairs retain proposal in final advice

CESR has chosen to retain this provision in its final advice to the Commission. There was little specific objection to it. Furthermore, the required disclosure needs only to be made once and would usefully be part of an investment firm's general terms of business or order execution policy. CESR also believes that it would be helpful for clients to have a description of the process for communicating material changes to their execution policy.

Option 2: CESR Chairs delete proposal from final advice

Although there was little specific comment on this proposal, many respondents commented generally that the draft advice was overly prescriptive and contained too much information. In response to this general concern, CESR has reconsidered this proposal and decided to delete it from the final advice to the Commission because, for the great majority of clients, it will not tell them anything they do not know.

Permitted Inducements

The CESR draft advice proposed that investment firms explain to their clients how information about their policies on inducements will be provided if it is not contained within the same documents as the information required under Article 21(3) of the Directive. The majority of those respondents who commented on this provision stated that investment firms should be able to cross-refer to the inducements policy, that the information appears out of context under Article 21 of the Directive and that inducements are not a significant element of execution venue evaluation and therefore, very rarely play a part in the investment firm's decision whether or not to access that execution venue.

CESR has decided against including this provision in its final advice to the Commission. This information will be provided by investment firms through the conflicts obligation under Articles 13 and 18 of the Directive. As a general matter, CESR has not taken the approach of prescribing the manner or order in which firms must present required disclosure and it has decided not to depart from that policy here. Furthermore, CESR does not want to require that this disclosure appear twice in the same set of client documents.

Voice telephone communication

In paragraph 126 of the March consultation paper, CESR asked a number of questions regarding voice telephone communications. Some respondents stated that current money laundering and other obligations would negate the ability of a firm to open an account over the phone in any case and did not believe it to be a practical option. Others believed that the view CESR was expressing in the explanatory text was too complicated and impractical. Other respondents offered some practical solutions, such as recording the telephone communications and subsequently providing the required disclosures in a durable medium.

CESR has included a paragraph in the final advice which allows investment firms to communicate the required information by voice telephone provided that these communications are recorded on a taped line, any express consent is recorded on a taped line and the investment firm provides the information on paper or in a durable medium immediately after starting to provide the service.

Further information to clients on execution venues

In paragraph 110 of the March consultation paper, CESR asked a number of exploratory questions regarding further information that could potentially be useful to clients. The questions probed subjects including disclosure of historical order flow for each execution venue and the cost associated with compiling this information, how information on execution venues could be focused and how the information should be disseminated to clients.

Most respondents resisted further prescription in these areas. A number of trade associations believed the information suggested in the questions would be difficult and costly to compile and maintain. Some also argued historical order flow information would not be useful and that it should not be taken as a basis for determining future trading decisions that investment firms may take. A few respondents also noted that this information may result in commercially sensitive or price sensitive information being revealed to the market, thereby damaging a firm's ability to act optimally on behalf of its clients.

Taking note of the comments received and after further discussion, CESR has decided not to progress with further proposals in the final advice. However, CESR may consider giving further consideration to these proposals in the future.

Other issues

The March consultation paper included the following question.

56. Question for Comment: Please suggest situations and circumstances in which a firm might satisfy the requirements of Article 21 while using only one execution venue.

There was general agreement amongst respondents that the concept of one venue should be acceptable and compatible with Article 21 of the Directive. There was particular note of the market structure within OTC non-equity markets, where using one venue was a common practice. A significant number of respondents from jurisdictions where investment firms use inter-group 'specialists' to execute client orders, argued that this practice should be allowed to continue.

Respondents, particularly those operating in the non-equity markets, also raised a number of interpretive issues, in particular, how the detailed provisions of Article 21 of the Directive will be applied to market structures that operate differently from exchange-based, liquid markets.

CESR wishes to confirm that Article 21 of the Directive does not necessarily preclude investment firms from using only one execution venue. However, investment firms are reminded that the detailed provisions of Article 21 of the Directive require the firm to ensure that if it uses a single execution venue, that the execution venue allows it to obtain the best possible result on a consistent basis. So those investment firms that use a single inter-group specialist to execute client orders must ensure that the specialist is enabling them to provide the best possible result for the execution of their client orders on a consistent basis. The monitoring and review requirements in Article 21 should aid investment firms in confirming that the execution venues they use do allow them to obtain the best possible result on a consistent basis.

Error Correction and Order Handling

In the March consultation paper, CESR asked the following:

115. Question for Comment: With respect to the fourth disclosure suggested by respondents, CESR requests further comment on whether investment firms that execute client orders directly or indirectly should be required to disclose information about their error correction and order handling policies.

A few respondents did argue that understanding the firm's error correction policy would be central to understanding its order execution policy. However, most respondents who addressed this question saw no need for this type of disclosure, explaining that while it was important to implement such policies, disclosure would not accomplish much because the policies are driven by

regulatory requirements and therefore are unlikely to vary much from firm to firm. After reflection, CESR has decided not to proceed with advice on this topic because it is persuaded that the resulting disclosure is not likely to help clients and potential clients compare different firms.

CESR acknowledges the many interpretive questions respondents raised and, in particular, the need to ensure that the obligations and detailed requirements of Article 21 of the Directive are applied in a flexible manner so as to accommodate different market structures and financial instruments. CESR may consider these issues further at Level 3.

Client order handling (Article 22(1))

General

CESR consulted on its draft advice on client order handling as part of its June 2004 consultation document on the first round mandates. With the agreement of the Commission, CESR has delayed its final advice on this subject to its advice on the second round of mandates because of the relationship between this subject and best execution.

Question 1: *Do you agree with the definition of prompt, fair and expeditious execution of an order from a client? Do you think that it is exhaustive? If not, can you suggest any elements to complete this concept?*

On the whole respondents argued against the inclusion of additional requirements or specifications in the advice. Indeed, most respondents who commented on this section of the advice argued that it was too detailed.

CESR agrees that it is not necessary to provide additional detail at level 2 in relation to the concept of prompt, fair and expeditious execution. Also, as noted below, CESR has rationalised its advice in certain respects. However, in general, it believes that the principles set out in the consultation document are necessary and appropriate.

Details of orders

Question 2: *Do you think that the details of the orders included under paragraph 2 of the draft technical advice should apply also to professional clients?*

Responses were split on this point. A number of respondents also argued that there was a significant overlap with the draft advice on the record to be maintained of orders received (paragraph 18 of the consultation document). These respondents also pointed out that there were a number of differences between the detailed information required under each obligation and the reasons for these differences were not necessarily apparent. A number of respondents also argued that it is not possible for a firm to ensure an order is "clear and precise".

In response to the last comment, CESR has amended the advice to require an investment firm to ensure that it has obtained the information that is necessary to carry out an order. CESR also agrees that the detailed contents of the requirements to confirm the details of orders and to maintain a record of those orders should be aligned and has done this by bringing the two requirements more closely together in paragraphs 1 and 2 and including a cross reference in paragraph 2 to the contents specified in paragraph 1.

However, CESR still believes it is necessary to separate the requirement for the firm to ensure it has obtained the necessary information to carry out an order and the requirement to immediately record its essential elements. As these two separate requirements represent two steps in the order handling process, CESR believes the scope of the first requirement should be aligned with the scope of the second requirement and should therefore also apply to the carrying out of orders on behalf of professional clients.

Information

A number of respondents argued that a specific disclosure of the fact that the investment firm may act as principal is unnecessary, especially in markets and for clients where this is likely to be a common occurrence (for example, the OTC derivatives market). Some respondents argued that this requirement should be limited to business with retail clients while others argued that it should be limited to a disclosure in the client agreement.

CESR believes it is appropriate to require this disclosure for both retail and professional clients. However, CESR notes that the disclosure is only required to cover the possibility that the investment firm may act as principal in relation to an order. Therefore, a general disclosure would be sufficient, including a disclosure in the client agreement.

The reporting requirements concerning orders that are executed in multiple tranches and inability to carry out an order are now addressed in paragraphs 4 and 15 of the advice under Article 19(8), which was issued by CESR in January 2005.

Question 8: *Do you think that paragraphs 15 and 16 of the draft technical advice should only apply to retail clients?*

Responses were divided on this point. As noted above, CESR has already dealt with aspects of these requirements in its advice under Article 19(8) of the Directive. Those requirements only apply to business with retail clients. However, CESR believes that it is appropriate to apply the remaining requirements to business with both retail and professional clients.

Front running and dealing ahead

There were comparatively few comments on these sections of the consultation document. One group of respondents questioned the need for this requirement in view of the requirements under MAD. However, CESR believes it is appropriate to maintain this requirement in view of the focus of MiFID on the general operating conditions for investment firms, rather than on specific cases of market abuse.

One respondent questioned whether the requirements concerning dealing ahead of investment research would be appropriate where an investment firm segregates its trading and investment research functions. CESR notes that the advice only concerns improper dealing ahead and has clarified in the explanatory text that this would not be the case where an information barrier is maintained between the persons involved in the decision to effect the transaction and the persons involved in the preparation of the investment research.

A discussion of the changes CESR has made to the definition of investment research is contained in the section of this feedback statement on the advice under Articles 13(3) and 18.

Prompt and sequential execution and transmission of orders

Question 3: *Which arrangements should be in place to ensure the sequential execution of client's orders?*

Respondents offered time stamping and the use of a register of orders as examples of procedures that could be used to ensure the sequential execution of orders. However, a number of respondents argued that it is not necessary to add further detail to the draft advice on this area in the consultation document.

CESR notes the general requirement in paragraph 7(a) of the advice under Article 13(2) of the Directive, which was issued by CESR in January 2005. This provides that an investment firm must establish and maintain policies and procedures that are designed to ensure compliance with its obligations under the Directive. CESR does not believe it is appropriate or necessary for the level 2 measures to go beyond this level of detail.

Question 4: *Do you agree with the reference in paragraph 7 of the draft technical advice to prevailing market conditions that make it impossible to carry out the orders promptly and sequentially?*

Only a very small number of respondents disagreed with the need for this reference. Respondents gave illiquid markets, execution of orders at the open and execution in a periodic auction as examples in which sequential execution may not be in accordance with the best interests of the client. A number of respondents suggested amendments to this paragraph, which would have extended the scope of the derogation from the principles of prompt and sequential execution.

CESR believes it is appropriate to retain the principle as set out in the consultation document. In view of the wide range of markets and instruments covered by the Directive, it is not necessary or appropriate for level 2 measures to set out the specific cases in which this principle would apply.

Question 5: *Do you agree that the possibility that the aggregation of client orders could work to the disadvantage of the client is in accordance with the obligation for the investment firm to act in the best interests of its clients?*

Question 6: *Do you think that the advice should include the conditions with which the intended basis of allocation of executed client orders in case of aggregation should comply or should this be left to the decision of each investment firm?*

The majority of respondents argued that the aggregation of client orders is consistent with the obligation to act in the best interests of clients, even though it could, in some cases, work to the disadvantage of individual clients. Only a small number of respondents argued that aggregation should be prohibited if it could possibly work to the disadvantage of any particular client.

On the whole, respondents felt that investment firms should have fair allocation policies. But that the detail of those policies should be left to the firms or to the market. They did not believe that further conditions were required, provided clients are made aware of the possibility of disadvantage resulting from aggregation.

Provided that appropriate disclosure is made of the risks of aggregation and that it is likely that the aggregation will not work to the disadvantage of any client whose order is to be aggregated, CESR believes the potential benefits of aggregation for all clients (especially over a number of orders) outweigh the risk that aggregation may, on occasion, work to the disadvantage of a specific client. However, in line with comments about the importance of a proper allocation policy where orders are aggregated, the advice states that firms that aggregate orders must establish and effectively implement an order allocation policy that provides for the fair allocation of such orders and transactions.

Question 7: *Do you consider that CESR should allow the aggregation of client and own account orders? Do you think that other elements (i.e. in respect of the arrangements in order to avoid a detrimental allocation of trades to clients) should be included?*

The majority of respondents were in favour of allowing the aggregation of client and own account orders, although a few respondents argued against this. CESR believes it is appropriate to allow such aggregation, provided proper safeguards are maintained.

There was general agreement among positive respondents that the normal position should be for priority to be given to client orders where such an aggregated order is only partially filled. However, a number of respondents argued that client and own account orders should be given the same status for such a reallocation where the order could not have been executed, or could not have been executed on such favourable terms if they had not been aggregated with the own account transaction.

CESR believes it is important to maintain the general principle of priority to client orders in the allocation of partial fills, especially because of the risk of abuse. However, it accepts that this risk needs to be weighed against the benefits of allowing clients to benefit from the aggregation of their

orders with own account transactions, which may be lost if clients are provided with priority in all cases. CESR has therefore introduced an exception from the principle of client priority along the lines suggested. However, this should only be available where the investment firm is able to demonstrate on reasonable grounds that without its own participation, it would not have been able to carry out the order on such advantageous terms or at all. This should reduce the risk of this provision being abused.

Record keeping of orders carried out

There were only a limited number of comments on CESR's proposed record keeping requirements for orders that have been carried out. Some respondents observed that it was not possible to record the exact time of execution where an order is carried out on an open outcry market. Consistent with these comments, CESR has indicated that a time period may be recorded instead if an order is carried out on an open outcry market where it is not practicable to record the exact time of execution and this is in accordance with the rules of the market.

Transactions executed with eligible counterparties (Article 24)

CESR received some support for its proposals regarding eligible counterparties and the procedures for the opting-in and opting-out regimes. It follows from Article 24 that an eligible counterparty relationship will only be applicable in relation to:

- transactions brought about or entered into by an investment firm in the course of executing orders on behalf of clients, receiving and transmitting orders and/or dealing on own account, and

- any ancillary services directly related to those transactions.

Respondents commented on specific topics as follows.

In respect of the proposed requirement to notify a client about classification as an eligible counterparty, some respondents commented that such information was unnecessary, burdensome and that it may raise precedents of information on law. CESR considers that, under the powers granted by the mandate, the proposal of requiring information on classification as eligible counterparties is a necessary first step of the procedure. CESR also points out that eligible counterparties should be considered as clients (recital 40 of the Directive clearly states that) and therefore, even if Article 24 provides for disapplication of Articles 19, 21 and 22 (1) it does not prevent application of other relevant provisions of the Directive (such as, for example, the rules on holding of client financial instruments).

Other respondents suggested that this information duty be limited to those eligible counterparties that are not investment firms or credit institutions as these entities have enough knowledge of the law. CESR considered these proposals but on balance, came to the conclusion that the information requirements should be maintained, as these contributed to the certainty of the regime applicable and also because they are not that demanding, as no written communication is required.

Some respondents suggested retaining agreements on classification of clients as retail or professional that were in force at the time the Directive comes into force. CESR considered this suggestion but decided that this might be inappropriate and has therefore not retained this suggestion.

As the category of "per se" eligible counterparties is very close to the one set out in Annex II I (1) of the MiFID for the professional regime, CESR has also aligned the wording of the advice to the wording used in the Annex.

Respondents also commented that there was no need to classify investors and the differences between professionals and eligible counterparties should be established at Member State level. CESR

points out that the Directive itself is based on a classification of clients and that harmonization on this matter is necessary in order to achieve uniform application of the Directive throughout the EU.

One respondent commented that the Directive did not impose a legal duty on investment firms to treat eligible counterparties as such. CESR reflected upon this comment and came to the conclusion that this was an accurate interpretation of the Directive. The advice was therefore redrafted to make it clear that investment firms were not under legal duty to treat eligible counterparties as such.

On the issue of whether the classification of eligible counterparties should refer to specific products (paragraph 5 of the draft advice, box 11), one respondent commented that clients could not be classified as professional for some sort of products and eligible counterparty for others. CESR points out that this might be quite relevant in some circumstances (one can be considered eligible in relation to shares and professional or retail in relation to derivatives) and retained the requirement. CESR has clarified its thinking on this in the advice.

In respect of what concerns the opt-out regime, consultees commented that CESR should to address the issue of non-response from a client. CESR considers that in absence of such a response, the investment firm cannot treat the client as eligible counterparty. Other respondent commented that the written confirmation obligation was more demanding than required by the Directive. CESR considered this comment but decided to retain its previous proposal as this ensures that clients are made aware of the consequences of the opt-out.

In respect of the thresholds for undertakings to be treated as eligible counterparties, the vast majority of respondents agreed with CESR's proposals.

One respondent suggested that the thresholds should be subjective. CESR considered this approach, but decided to retain its proposal as it believes that the eligible counterparty regime should not be left that open.

Another respondent suggested that the levels of the Directive should be lower. As these have already been set and cannot be changed by level 2 legislation, CESR has retained the proposal.

A minority of respondents proposed that the thresholds should be different from the ones of the Directive. Some proposed lower and others proposed higher thresholds. Due to the differences of the thresholds, CESR decided to retain its proposal as it strikes an appropriate balance between higher and lower thresholds and will ensure consistency with the Directive requirements.

CESR has also reorganized the advice in order to make it more streamlined and easy to read. The advice now starts with "policies and procedures", dealing with the opting-in and opting-out regimes and the transitory measures. The two previous boxes were merged into one single box.

SECTION II – MARKETS

Pre-trade Transparency requirements for Regulated Markets (Article 44) and MTFs (Article 29)

1. CESR's first consultation paper on implementing measures for Articles 29 and 44 of MiFID approached the requirement to make public pre-trade information advertised through the systems of the RM or MTF as referring only to the information RMs and MTFs actually advertise through their system under their rules. Following consultation with the Commission and within CESR, the advice has been modified to take into account what type and amount of pre-trade information in general RMs and MTFs should advertise through their systems and make public.

2. Several respondents in the first consultation suggested that CESR should take a more principles-based approach when considering which orders large in scale compared with normal market size could be waived from the pre-trade transparency requirement. CESR considered this approach but concluded that it would not create the necessary harmonization and legal certainty.

3. On the issue of the content of pre-trade transparency, a majority of responses to the first consultation paper argued that the approach of defining an exhaustive list of trading mechanisms would restrict the scope of possible market models to electronic open auctions, continuous order book trading and continuous quote-driven trading. That was considered too prescriptive: it would hamper innovation, limit the ability of RMs to adapt their services to the needs of their users and reduce the competitiveness and flexibility of European markets. It would also increase costs without any obvious benefit, in turn causing a decrease in utilisation of RMs and MTFs which would diminish liquidity and, thus, also pre-trade transparency. CESR has changed its approach in light of the comments and in its final advice proposes a non-exhaustive list of trading mechanisms complemented by a general clause which is designed to accommodate hybrid and new market models.

4. CESR's original proposal of requiring all bids, offers and quotes in all different market models to be made public was widely criticised by the consultees. This requirement was seen as especially unsuited to periodic auctions, where the structuring of the auction and extent of the information made public was seen as best left to the RMs and MTFs themselves. Additionally, the requirement to make public the full depth of the order book was seen as unnecessary because there is no demand for this information beyond a limited number of order-book levels. CESR's final advice reflects these comments.

5. In its first consultation paper, CESR also proposed that all bids, offers and quotes should be made available by an RM or MTF to all members, participants, investors or other interested parties alike, thus ruling out the incentivisation of liquidity provision based on access to privileged information. CESR's final advice in this regard requires a minimum level of pre-trade information to be made available to the general public but no further guidance is proposed at Level 2 on the information that should be made available to members and participants.

6. CESR's proposal in respect of updating and withdrawal of quotes was criticised as inappropriate for Level 2 legislation. CESR decided to drop these proposals as it considers updating and withdrawal of quotes to be covered by the fair and orderly market requirements of Art.39.

7. Respondents´ opinions were divided in relation to the granting of a waiver from the pre-trade transparency obligations for crossing systems. CESR has further considered the matter and proposes to maintain the waiver, primarily because the requirement to publish the orders, especially in less liquid shares, might increase the incentive to manipulate the continuous market before the reference price has been fixed.

8. There was wide support among consultees for a waiver for iceberg-type orders. However respondents were concerned about similar order types which they considered should also qualify for a waiver. Therefore, CESR has decided to change its approach by noting that certain facilities provided by the RMs and MTFs for the management of orders may be exempted from the pre-trade transparency obligations.

9. CESR´s proposal on the introduction of a waiver for negotiated trades was widely supported. There were mixed views on the desirability of providing specific advice on the relationship between negotiated trades and transactions by systematic internalisers under Article 27. Some saw it as desirable in order to ensure that systematic internalisers should not be able to avoid their Article 27 obligations; others considered this approach as problematic and potentially anti-competitive.

10. In the second consultation there where different views on the proposed table regarding the waiver for trades large in scale compared with the normal market size. Most supported CESR´s proposal for a single threshold for each four groups of shares, banded by average daily trading levels. However, several expressed a preference for an individual stock related approach, based on the order size that captured 95 % of order book trades. CESR has maintained its proposal, but made a number of changes to the table to make it more sensitive to less liquid shares.

Definition of Systematic Internalisation (Article 4)

11. CESR´s first consultation paper proposed that the definition of "organised, systematic and frequent" in relation to systematic internalisers should be defined solely by qualitative criteria. In general, this approach was welcomed by consultees. Some respondents were concerned that the proposed criteria were too broad and could potentially capture too wide a range of firms. A number of consultees suggested additional indicators that they considered would help to tighten the definition. CESR has concluded that the best way of removing the risk of its advice capturing a wider range of forms than appropriate is to tighten the wording used in the criteria (to refer specifically to "the activity" rather than internalisation generally, make more of the evidential provisions cumulative and introduce two quantitative indicators. Additionally, CESR has concluded that the word "marketed" proposed for the third qualitative criteria should be removed and that this should read "c) The internalisation activity is made available to clients on a regular and continuous basis"

12. In its first October 2004 CP on the issue, CESR had difficulty defining the concept of "frequent". It had reservations about recommending a quantitative route. Instead, it suggested that any firm that invested in the infrastructure needed for systematic internalisation would normally only do so if they intended to conduct the activity on a frequent basis.

13. However, following comments on the lack of definitional certainty provided by purely qualitative criteria, the second consultation included two quantitative indicators for the term "frequent". CESR considered that this offered a way to tighten the qualitative criteria and to avoid encompassing other activities that, although carried out on firms´ own account, should not be included within the scope of the systematic internalisation regime. The proposed indicators that a firm was likely to be a systematic internaliser were:

    (a) a ratio of the value of client orders executed on own account outside the RM or MTF to the total value of executed client orders for each share of more than 20 % on an yearly basis;

    OR

    (b) a ratio of the value of client orders executed on own account outside the RM or MTF to the total value of trading in a share on the most liquid market (in the meaning of Article 25) on a yearly basis of more than 0,5%.

14. A significant number of respondents criticised the quantitative criteria proposed, especially (b). The main reasons for opposing quantitative criteria focused on the implied costs for firms, on the "threshold effect" and the potential differences in their practical application. It was argued that criterion a) discriminated against less diversified firms. Regarding criterion b), several respondents pointed out that the ratio was dependent on circumstances outside the control of the firm.

15. In CESR´s opinion, cost should not be a significant issue because at least part of the information required to evaluate the criteria should be available in the firms as part of their business controls. The threshold effect is unavoidable in any quantitative approach and it should be capable of being adequately dealt with by competent authorities in their practical application of the requirements.

16. In CESR´s opinion, the first quantitative indicator does not discriminate against less diversified firms as the threshold refers to the percentage of orders internalised compared with the rest of the activity of the firm as a whole no matter the level of diversification. The second ratio is considered relevant and necessary in order to capture big firms that might otherwise fall outside the definition if the first criterion alone was used.

17. The issue of whether the various criteria should be cumulative or alternative attracted many comments. Some considered that the qualitative and quantitative criteria should be fulfilled cumulatively, to avoid capturing too broad a range of firms; others thought they should be non-cumulative, to prevent systematic internalisers finding ways to avoid the definition. CESR has concluded that since most members favour a rule-based rather than indicative regime, it is more appropriate to adopt a largely cumulative approach, covering both the qualitative criteria and the (negative) quantitative indicators. Thus, qualitative criteria will be used to define "organised" and "systematic" and quantitative ones will define "frequent".

18. Some consultees also stressed the need to exclude the transactions in compliance with Recital 53 from the definition of SI. Some proposed that it should be expressly mentioned it in the advice. CESR had already mentioned this point in the explanatory text (paragraph 8) and concluded that it was not appropriate to introduce the point into level 2 advice as it is part of the level 1 text.

19. The proposal for making public any decision to cease he internalisation activity was also commented on by some respondents. One firm pointed out that this requirement goes beyond level 1. Nevertheless, CESR considers it important for investors to aware when an SI is going to cease the activity in one or more stocks. It has maintained the position that a systematic internaliser´s intention to cease the activity should be made using the same publication channel used to publish quotes or, where that is not possible, an alternative but equally effective channel.

Scope of the rule (Article 27.1)

20. Respondents expressed a variety of views on CESR´s proposals for determining what shares should be considered liquid for the purposes of Article 27. Some consultees suggested higher thresholds, some suggested lower; others suggested that the thresholds should be applied cumulatively. CESR has decided to maintain the structure of the second consultation draft advice but has adjusted the free-float definition in line with some proposals made by respondents.

Key Issues

21. Some consultees argued that the free-float criterion does not provide a correct measure of liquidity. CESR recognizes that free-float is not a perfect liquidity measure in that it is not focused on the more traditional liquidity dimensions (tightness, immediacy, depth, breadth, resilience, etc). Nevertheless, it considers it to be a valuable proxy variable (and more useful than straight market capitalisation) to identify the top liquid shares and to be used as a complement to the number of trades and turnover criteria.

22. Other consultees criticized the calculation method proposed by CESR, especially regarding the proposed exclusion of holdings exceeding 5% of the voting rights, as defined in the Transparency Directive. During the consultation, a clear majority of respondents pointed out that this proposal would imply the exclusion of holdings held by investors who are willing to sell them at any time without restriction, namely mutual and pension funds. CESR acknowledges this point and has amended its advice so that investment fund holdings in excess of 5 % should not be excluded from the free float calculation.

23. Regarding the free float threshold, the majority of consultees asked for a lower threshold. They said that the proposed 1 billion Euro threshold could exclude several liquid shares from Article 27 which systematic internalisers will probably wish to systematically internalise. Following additional fact-finding, CESR is proposing a free-float threshold of 500 million Euro.

24. A limited group of consultees proposed that there should be a transitional period during which only a small number of the most liquid EU shares should be subject to Article 27. This would enable the market impact of the Article to be assessed and provide guidance as to how far it could then be rolled out without harming market liquidity. CESR considers transparency to be fundamental to facilitating competition between trading venues. Its proposals also provide for some later roll-out, albeit from a considerably wider starting point. It has recommended initially the number of trades and turnover thresholds should be based on the order book data on Regulated Markets. Subsequently it should be based on the data-set of all trades (All Regulated Markets, MTF trades, Systematic Internalisers and other OTC trades), once this become available under the provisions of Article 25.The number of liquid shares may then increase further.

25. Several consultees criticized CESR because the advice allows Member States to choose one of the criteria for determining liquid shares: number of trades or daily turnover. They argued that this optionality does not establish a level playing field and would not support the objective of creating a single market in European shares. The majority of these consultees asked for cumulative criteria without a discretionary judgement by Member States. CESR partly agrees with this criticism. However it has proved difficult to find common thresholds that could be used cumulatively. Market structures across the EU are different. CESR considers that the advantages of a "one size fits all" approach would not compensate for the constraints that would cause the majority of European securities markets to experience. It considers that allowing some flexibility in implementation would still enable the goals of the Directive to be met.

Other Comments

26. Some consultees suggested that competent authorities should be permitted to specify their top liquid shares as liquid for the purposes of Article 27. They argued that CESR's proposed criteria would result in some markets having no liquid shares (within the meaning of Article 27). CESR considers however that a national approach to the definition of liquid shares does not accord with a level playing field in the European market and it has therefore maintained its advice on this issue. CESR considers that its proposed options already provide some flexibility for identifying liquid shares for the purposes of Article 27.

The determination of the standard market size / classes of shares (Article 27.1 and 2)
The publication of the quotes (Article 27.3)
Multiple quotes (Article 27.1 and 3)
Withdrawal, updating and protection against multiple hits (Article 27.3 and 5)
Transactions exempted from the quote firmness (Article 27.3)
Retail size orders (Article 27.3)

Calculation of the average order value

27. CESR suggested that the period used for calculation of the average value of orders executed in an Article 27 share should be long enough to guarantee the statistical representativeness of the result and discount temporary changes in trading patterns. On the other hand, it should adequately reflect more permanent changes in the average order values for each share. In its first consultation paper (CP), CESR therefore suggested that the calculation period should cover the calendar year and should be reviewed annually. This attracted a large support from respondents and has been kept as the final advice.

Basis for calculations

28. In order to calculate the average size of orders executed in Article 27 shares, the Directive requires the calculation to exclude orders executed which are large in scale compared to normal market size. Since Article 27 is different in scope from Articles 29 and 44 (covering RM and MTF pre-trade transparency) and refers to orders executed rather than transactions, an argument could have been made for defining an order large in scale compared to normal market size in Article 27 in a different way from the way recommended under the other two Articles. However, in the interest of consistency and simplicity, CESR asked in its first CP whether it could be appropriate and feasible to use the same "block regime" as for other provisions in the Directive. This was overwhelmingly supported by the respondents. In its second CP, CESR refined its approach and suggested using the same "pre-trade transparency block regime" for the calculations of SMS as for Articles 29 and 44, while a separate "post-trade block regime" would be implemented under Article 30 and 45. Again, respondent strongly supported the proposal for a unified "block regime", provided that appropriate methodology was applied.

29. A clear majority of responses to the first CP supported CESR's proposal that the average value of trading in an Article 27 share should, for the sake of practicability, be based on 'transactions' rather than 'orders executed' as specified in the Directive. However, contrary views were also expressed by some market participants, stressing that there was no legal basis for such an interpretation of the Level 1 text and that this interpretation challenged the political agreement reached during the negotiation of the Directive and would lead to lower Standard Markets Sizes than intended. They also argued that at least some Regulated Markets could readily provide information on orders executed and that, alternatively, a proxy multiplier could be used. CESR noted that, although some Regulated Markets could provide information on orders executed, this was not universally possible and that, as a consequence, there was no room for a harmonised implementation of Article 27 based on order executed. CESR has therefore decided to retain the "transaction approach" in its final advice, although some CESR members disagree with this approach

30. Furthermore, Article 27 requires the average value of orders to be calculated based on "all orders executed in the European Union in respect of that share", which includes Regulated Markets, MTFs, systematic internalisers and other OTC transactions. However, CESR noted that the first calculation of the average value of executed transactions will have to be completed at the latest when the Directive comes into force. Information on transactions based on Article 25 will not be available at that time. It will therefore not be possible at the outset to calculate the average value of transactions on the basis of EU-wide data. For this reason, CESR concluded that a transitional period would be necessary during which the calculations should be carried out on the basis of the data of the most relevant regulated market under Article 25, and more precisely, on the order book data of that

market. The order book data of regulated markets appears to be the most harmonised and consistent set of data available today across Member States, taking into account the variety of existing market structures. Some minority responses challenged this use of order book data and required that the advice provide for the explicit revision of the basis for calculation when the wider set of data will be available. CESR has accordingly amended its advice to specify that this transitional period for the calculation of the average order of value will cease at the end of calendar year 2008.

Definition of SMS classes and the SMS for each class of shares

31. Rather than allocate an individual standard market size to each share, the Directive provides for groups of shares that will share the same SMS. In its first CP, CESR suggested that the classes should fulfil the following criteria :

    - Their number should be low enough to enable the market participants to properly manage the quote disclosure rule ;
    - Their number should be high enough in order to achieve a representative SMS for the shares with both the lowest and highest average values of executed orders within each class.

32. The first CP attracted a range of answers as to the appropriate number of classes. Some respondents considered that the number of classes should not exceed 5 or 6 to remain manageable. On the other hand, some argued that the number of classes was not a real issue as the systems could easily be adjusted and accommodate a large number of classes.

33. CESR has considered several possible solutions to this issue. In the second CP, CESR proposed a simple tiering in bands of € 10,000 up to € 100,000 and in € 20,000 bands above that figure. A majority of respondents considered that this banding would lead to too high a number of classes. CESR has reflected those comments in its final advice in proposing to have bands of € 10,000 up to € 50,000 and of € 20,000 above that figure. Some respondents also supported a view expressed by CESR in the CP that the most precise solution would probably be to base the bands the shares on a logarithmic scale. However, CESR also recognises the importance of simplicity and an approach that is readily understood. In addition, CESR did not fully see the benefit of using a logarithmic scale: the calculation of average order values published during the second consultation shows a distribution that is rather linear and does not demonstrate that the benefit of using a logarithmic scale would outweigh its complexity. Therefore, CESR´s final advice does not recommend using a logarithmic scale.

34. In its second CP, CESR also recommended that the determination of the SMS for each class of shares should be simple and suggested that the SMS should be set at the mid-point of each band. Although respondents supported this approach, some suggested a higher threshold for the first class in order to take into account its specific distribution characteristics (i.e. more weighted to the top end of the range than with other classes) and to ensure more consistency with the size of orders customarily undertaken by retail investors. CESR therefore recommends that the SMS for the first band (0-€9.999) be set at € 7,500.

35. Although Article 27.1 requires shares to be grouped in classes on the bases of the arithmetic average value of the orders, CESR has also considered whether there might be significant advantages in converting the monetary SMS for an issue into a number of shares. The responses to the first and second CP on this issue attracted opposite views but with a slight majority in favour of the use of monetary value. The respondents supporting converting the SMS into number of shares stressed that this approach would be more practical because most quote systems were automated and the number of shares could be set for the whole of the quotation period. If the system were set by a fixed value, this would need to be reset everyday as the value of the shares goes up and down. On the other side, a majority of respondents were of the opinion that the SMS should be fixed as a the monetary value as shares prices can fluctuate quite dramatically over time and a SMS expressed in number of shares could be affected by many events, including shares splits. Based on the comments received, CESR decided to recommend that SMS should be express in monetary value as this is both simpler and closer to the provisions of Level 1.

Revision of a share's group allocation and revision of SMS groups

36. In order to take into account changes in trading patterns, certain calculations will need to be revised periodically. According to the Directive, competent authorities will be responsible for revising the calculation of average order size for a share as well as for its subsequent re-classification. In the interest of legal certainty and the stable functioning of systematic internalisers, CESR suggested establishing annual revision cycles for the re-grouping of shares. This was supported by the respondents to the CP who nonetheless asked for more harmonization as to timing. In its final advice CESR has therefore specified that the revision cycle should coincide with the calendar year and that the competent authority should make public the new grouping of shares by March 1st.

37. The Directive makes no provision for the updating of the parameters of the different classes and the SMS for each class, suggesting that frequent revisions were not envisaged. In its advice, CESR recommended that they should at least be reviewed (if not necessarily altered) at no more three-yearly intervals. This proposal attracted few comments from consultees and CESR has kept it unchanged. Its wording provides flexibility for the Commission to review and, where appropriate, revise the classes and the SMSs at intervals of less than 3 years if it considers it necessary.

38. The respondents to the CPs supported the proposal that the arrangements for determining the SMS for each share should provide both for adjustment or review processes in light of changed circumstances that would significantly and durably alter a transaction's average value. While review and reallocation should be held to a minimum, the respondents agreed that competent authorities should retain the discretion to view a share's SMS in exceptional circumstances without providing an exhaustive list of those circumstances.

39. The IPO issue attracted far more divergent views. CESR proposed in its CP that when a share (deemed likely to be liquid) was admitted to a Regulated Market for the first time and had no historic trading data, it should be allocated an initial SMS on the basis of known information about the size of the issue, likely trading interest and the SMSs of any "peer group" shares. A majority of consultees supported this approach, some pointing out that several RMs already took this approach in allocating a provisional block sizes to a share before it starts trading. However, some respondents considered that Level 1 text did not offer any other possibility than to wait for minimum period of trading in order to be able to calculate a SMS though there was no clear view as to whether systematic internalisation should be permitted or not pending the allocation of a SMS to the share. CESR has decided to retained its CP proposal in its final advice, but with one change. In response to consultee suggestions, it is recommending that the initial SMS should be reviewed after a three months trading period, rather than the six months in the original proposal.

Coming into force

40. Respondents to the CPs asked for more precise and detailed previsions regarding the coming into force of the SMSs for Article 27 shares to ensure a harmonised procedure across Members States. In its final advice, CESR has recommended that annual revisions should be communicated to the markets on March 1st each year.

41. CESR first suggested that the SMS should come into force two weeks after its publication by the competent authority. Taking into account the comments of some respondents, who said they would need more time to adjust their systems, the final advice extends this time period to four weeks, so that the new average size and the new classification of a share into the relevant class will come into force on April 1st each year. As underlined by some consultees, four weeks is not considered as relevant or necessary for ad hoc revisions. CESR has therefore suggested that in the case of ad-hoc revisions the new average value and the potential new classification of the share should become effective on a date specified by the competent authority.

Publication of the class of shares to which each share belongs

42. Competent authorities are responsible for publication of the SMS class of all shares for which they are responsible for allocating the SMS. However, it is also important that this information can be readily accessed across EU countries. In the CP, CESR asked whether in addition to the release of the required information by each competent authority (at least on its web page) there was also a need

for the consolidation of all this information at a single access point. All the respondents agreed with the need for such a single access point. The advice has been amended accordingly to recommend publication of the consolidated list of Article 27 shares and their SMS classes on the CESR website.

Systematic internaliser obligations

43. In its October consultation paper, CESR proposed that "on a continuous basis" should be interpreted to mean that a systematic internaliser should publish a quote throughout 100% of its normal trading hours as a systematic internaliser. Many respondents were supportive of this proposal, although they sought clarification that the requirement referred to the normal trading hours of a firm's systematic internalisation business.

44. In light of these comments, the proposed advice remained unchanged in the March consultation paper, but the explanatory text was amended to make clear that the obligation applied throughout the normal trading hours of a firm's systematic internalisation activity, rather than the business hours of the firm as a whole. A few respondents to this consultation remained unhappy with the proposal. They considered that it would impose an unreasonable burden on those firms that have subsidiary branches in other global locations and may wish to provide a service during a time frame in which they could not lay off their risk in the relevant (EU) market. CESR has considered these comments and believes that the advice proposed is sufficiently flexible as it allows firms to define the normal trading hours for their systematic internalisation activity and presumes that in doing so they will take into account the times of day when they are able to lay off their risk.

45. CESR has however made a minor modification to the final advice in order to accommodate the situation where a firm has different trading hours for systematically internalising different shares - for instance, if the normal trading hours of its systematic internalisation activity in German shares are 9am to 5pm (CET) and 10am to 6pm in Finnish shares (CET). The final advice is therefore formulated in such a way that the obligation applies throughout 100% of the normal trading hours of the firm's systematic internalisation activity in a given share.

46. In respect of the accessibility of systematic internalisers' quotes, CESR's initial consultation on Article 27 did not provide advice on the criteria for determining when a quote is easily accessible. Instead, CESR chose to await the outcome of the June consultation, and in particular, the responses to CESR's concerns about the possibility of investment firms publishing trade data via proprietary means, including websites. As discussed below, although some respondents to the consultation expressed reservations about publication solely via a website, the majority noted that the Level 1 text expressly permitted publication via proprietary means. The final advice has therefore been modified to make it clear that information may be published by any of the means mentioned in the directive, as long as the publication arrangements chosen are, amongst other things, accessible to all interested parties on a reasonable commercial basis.

47. CESR's proposal in respect of its mandate from the Commission to specify the criteria for determining when a quote published by a systematic internaliser reflects prevailing market conditions was to require quoted prices to be close to comparable quotes on other relevant markets. This qualitative approach was supported by the majority of respondents to the October consultation who did not believe more specific criteria were necessary. Therefore, CESR's final advice and explanatory text in this area remain the same as that proposed in the October consultation.

48. In the first consultation on Article 27 in October 2004, CESR proposed that a systematic internaliser should be able to update its quotes whenever market conditions changed or it came across new information that changed its view of the relevant share, i.e. whenever it was able to justify a change. Consultees were generally supportive of this proposal and did not wish to see more specific criteria. However, some pointed out that there was no need to regulate the updating of quotes at Level 2 as it is clearly stated in the Level 1 text (Article 27.3) that systematic internalisers shall be entitled to update their quotes at any time. Taking into account these comments and in order to be consistent with CESR's approach in respect of the updating of quotes on RMs and MTFs, CESR has not proposed any Level 2 measures in its final advice. Nevertheless, CESR has felt it important to note in the explanatory text that while a firm should be unhindered in its ability to update its quotes, it should not do so in a capricious or discriminatory manner.

49. CESR's proposals in respect of the withdrawal of quotes was viewed by a large number of respondents to be anti-competitive in that it permitted systematic internalisers to withdraw quotes only following a decision by a competing execution venue to suspend trading. On reflection, CESR also has doubts whether its original proposal is consistent with the Level 1 text, not least because a Regulated Market may suspend trading for reasons other than exceptional market conditions. Therefore, CESR has decided that it is preferable not to provide any Level 2 measures in this area. However, as noted in the explanatory text, CESR expects that in practice, a systematic internaliser which withdraws its quotes will be required to justify its decision to do so against the Level 1 requirement that quotes must only be withdrawn under exceptional market conditions.

50. The advice proposed by CESR in the October consultation in respect of limiting the number of transactions received by a systematic internaliser from different clients was endorsed by the vast majority of respondents to the consultation; they considered it to be proportionate and workable. CESR has therefore not provided more detailed recommendations in this area and the advice originally proposed has remained unchanged.

51. In the October consultation paper, CESR proposed draft advice defining a transaction where execution in several securities is part of one transaction as one comprising 10 or more shares. This proposal was generally accepted by consultees, although there were a small number of comments regarding the minimum number of securities. In particular, some respondents felt that it was not necessary to specify a figure, preferring a qualitative approach, whereas others felt the figure should be higher. In an attempt to balance these concerns, CESR modified its proposal in the March consultation to include a minimum value for the transaction of €3 million (as suggested by one of the consultees) but retaining ten as the minimum number of securities, something CESR considered important in order to prevent the waiver being misused to circumvent the price improvement constraint. The introduction of the monetary value provoked strong criticism from several respondents (more than had objected to the original proposal) on the grounds that it is the nature and not the value of a portfolio that requires an exemption from the price improvement restriction. CESR has taken these comments on board and reverted in the final advice to the original definition as proposed in the October consultation.

52. The proposed advice in respect of orders that are subject to conditions other than the current market price has largely remained unchanged since the initial consultation in October, aside from a minor modification to reflect the definition of a limit order in the directive. However, there remain a number of consultees who object to CESR's proposal that orders subject to conditions other than the current market price should not include limit orders, on the grounds that, by definition, all orders other than market orders must be subject to conditions other than the current market price. However, CESR, having also discussed the issue with the Commission, has taken the view that the exemption for systematic internalisers to execute orders from professional clients at prices other than those quoted should be limited to complex orders from professionals, for instance, those where the price is determined as an average of prices throughout the day (e.g. volume weighted average price or VWAP orders). Where a systematic internaliser receives a limit order executable only at a more competitive price than its current quote, it should be required to modify its quote if it wishes to execute the limit order. CESR has therefore not modified its approach in this area.

53. In the first consultation on Article 27, CESR explained its decision to provide no advice in respect of the manner in which a systematic internaliser should handle client orders in the event that it publishes multiple quotes in different sizes. This decision was supported by the overwhelming majority of consultees who agreed that it was not necessary to provide Level 2 measures in this area over and above the requirements at Level 1 and Level 2 in respect of client order handling. As a result, CESR's final advice to the Commission makes it clear that it does not believe that implementing measures are necessary in this area.

54. In CESR's first consultation on Article 27, CESR discussed possible approaches to specifying the criteria for determining the size customarily undertaken by a retail investor but stopped short of making any concrete proposals. Having considered the comments of consultees, CESR opted to propose a single EU-wide figure for customary retail size (CRS) as this approach was endorsed by most respondents, largely on simplicity and ease of implementation grounds.

55. In terms of the level at which to set the CRS, several respondents called for CESR to base this decision on data from markets and intermediaries. CESR members therefore collected information from a range of intermediaries in their countries, including traditional broker dealers, retail banks and internet brokers. Analysis of this data showed that the typical size of a retail order differs from one Member State to another, as well as according to the type of retail investor and the channels by which their orders arrive at the market. Taking into account the spread of data received, CESR members agreed that €7,500 seemed a reasonable approximation for CRS. Although this figure was criticised by a small number of respondents to the March consultation (some calling for a higher and others for a lower figure), several respondents registered their support for the figure proposed by CESR. Given the spread of views, CESR has kept the figure of €7,500 unchanged.

Publication of pre and post-trade information

56. In its consultation papers, CESR expressed concern about whether publication of pre- and post-trade information solely on a firm's own website, or on a third-party website where only a few firms' data is published, would be sufficient to meet the 'easily accessible' test. Investment firms in particular criticised CESR's comments as being in contradiction to the Level 1 text and argued that it was not CESR´s task to intervene in the consolidation area. Regulated Markets and data vendors, on the other hand, stressed the need for CESR to ensure the quality of information and suggested that publication solely via a firm's website would lead to a lack of overall visibility and accessibility, depriving the market of valuable price formation information.

57. CESR supports the Directive's intention to provide for a genuine choice of reporting arrangements for investment firms and accepts that, as pointed out by consultees, the Level 1 text explicitly allows for publication via proprietary arrangements such as websites. In its March 2005 consultation, CESR therefore proposed an alternative whereby investment firms making pre and post-trade information public under Articles 27 and 28 may do so through any of the means explicitly mentioned in the directive subject to conditions that must be met by any publication mechanism chosen by a RM, MTF or investment firm. They include conditions designed to promote the accurate publication of information and prevent data being deliberately hidden or made difficult to consolidate.

58. There was broad support for these conditions. However, a number of respondents, notably the data vendors, requested CESR to make it clear that RMs, MTFs and investment firms should make pre and post-trade information available on both a reasonable and non-discriminatory commercial basis. As a result, CESR has introduced this wording. One respondent felt the requirement to 'ensure' information published is reliable is too high a standard, whereas one of the exchanges suggested that monitoring this information for accuracy is imperative and the requirement should be extended to occur in real-time. CESR felt that it would be overly burdensome to require monitoring in real-time but has modified its advice to introduce the wording "without delay".
59. CESR believes that only if data published through these different publication mechanisms can be brought together in a way which facilitates consolidation and comparison between the prices prevailing in different trading venues can the true benefits of broad-based post-trade transparency requirements be reaped by investors and the market as a whole. CESR has therefore recommended to the Commission, with strong support from consultees, that work be undertaken in conjunction with the market (involving investment firms, data publishers, exchanges, etc) to consider how barriers to consolidation could be reduced, in particular, those created by the current lack of data standardisation. This work will commence when the Level 2 advice has been finalised

DISPLAY OF CLIENT LIMIT ORDERS (Article 22.2)

60. Article 22.2 requires firms to "take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants".

61. In the CP, CESR proposed that, in the context of Article 22.2, "easily accessible" should meet two tests. First, the non-executed limit order should be displayed so as to reach the largest possible audience of market participants ("visibility test"). Secondly, as the aim is to facilitate the "earliest possible execution of the order", the "visibility test" or the order should be supplemented by the ease and speed with which the order is accessible and executable, i.e. capable of being traded once new market conditions allow for its execution. The disclosure of the order and its accessibility are two different concepts but would need to be taken into account jointly.

62. Respondents were generally supportive of CESR's approach to limit order display arrangements, including of the "visibility" and "accessibility" tests. However, several respondents expressed diverging comments on some details detailed aspects of CESR's proposal.

Post-Trade Transparency requirements for Regulated Markets (Article 45) and MTFs (Article 30) and for Investment Firms (Article 28)

Inclusion of the name of the investment firm

63. In the second consultation paper, CESR proposed that the name of the investment firm which executed the trade should be included in the post-trade information. Several respondents objected to this requirement. They said this would create a non-level playing field between investment firms and RMs or MTFs.

64. CESR has changed the wording of the advice by requiring this publication only in case of systematic internalisation. CESR is of the opinion that in the case of internalisation publication of this information is relevant for the public in order to be able to compare the different trade execution venues.

Indicator explaining the reason for deviation from the current market price

65. In the second consultation paper, CESR proposed that when a transaction deviated from the current market price, there should be an indicator explaining the reason for the deviation.

66. Several respondents opposed this on grounds that it might not be possible to achieve within a three minute publication deadline and would also require that the various possible reasons for deviation would have to be categorised and predetermined.

67. CESR has accommodated the comments by deleting the requirement for specifying the reason for the deviation from the current market price.

Publication of post-trade information no later than 3 minutes after the transaction was completed

68. The second consultation paper proposed that post-trade information should be made public as close to real time as possible but always within 3 minutes of the completion of the transaction.

69. Several respondents stated that it was not clear when the three minute started to run. Some of them suggested that it should start only after trade confirmation. This would reduce the possibility that erroneous information would be published and the market misled.

70. CESR has changed the wording of the advice by substituting a reference to the completion of the trade by a reference to the execution of the trade to make clear that the obligation starts from the point of execution. CESR is of the opinion that using confirmation as a starting point would not adequately fulfil the level 1 requirement for real time publlication.

Out of hours trading

71. In the second consultation paper, CESR proposed that an investment firm should have mechanisms available to publish post-trade information throughout the firm's normal trading hours. If an investment firm used the facilities of a RM or MTF to publish trades and the normal trading hours of the firm extended beyond the opening hours of the market, then the firm should have third party or proprietary arrangements in place for trading that took place within the firm's normal trading hours but outside the market's opening hours.

72. Several respondents objected to these requirements. They claimed that it is not reasonable that the publication obligation extends to all the time the firm is trading. As an alternative, publication before or within a short time period (15 minutes) after the opening of the most relevant market was put forward.

73. CESR has concluded, that it should be sufficient for investment firms that the arrangements are available throughout a firm's normal trading hours. Where an investment firm executes occasional trades outside these trading hours, it should publish the required post-trade information before the next opening of the most relevant market.

Publication of post-trade information on a reasonable commercial basis.

74. The second consultation paper noted that post trade information was required to be made available, as required in level 1 text, on a reasonable commercial basis. A number of respondents to the consultation asked for CESR to make it clear that RMs, MTFs and investment firms should make pre and post-trade information public not only on a reasonable but also on a non-discriminatory commercial basis. As a result, CESR has introduced an additional requirement that the information must be made available also on a non-discriminatory basis.

Deferral of post-trade information: thresholds and delay

75. In table number 2 of the second consultation paper, CESR set out proposals for time delays for the publication of large principal trades (for customers) and the minimum size of trades that should qualify for those delays.

76. CESR's proposal received a mixed feedback. Many consultees were of the view that the proposed thresholds were too high and the delays too short, in particular (but not exclusively) for less and mid-liquid shares. However, this view was not shared by other consultees. Several respondents also pointed out that trading volume is not spread evenly over the day and that unwinding a risk is not possible in a linear way (a larger position needing relatively more time to unwind than a smaller one).

77. Several respondents also suggested that the category for the mid-liquidity shares should start with shares with a turnover of 5 million euros and the one for less liquid shares should encompass the shares with a turnover of less than 5 million euros. In addition several consultees suggested that transactions should be published as soon as an investment firm has unwound the major part of its risk position, for example 80% of it.

78. CESR has tried to accommodate the concerns raised in the consultation by extending the original 120 minute delay to 180 minutes and lowering the fixed thresholds in the most liquid band. This accommodates the concerns related to the non-linearity of unwinding the risk.

Admission of financial instruments to trading (Article 40)

Requirements for instruments to be admitted to trading on a regulated market

Scope and structure of the CESR proposal

79. During the preparation of this advice CESR received many comments on what exactly is and should be the scope of the proposals. These comments focused in particular on the relationship between Article 40 of the MiFID and the requirements of other directives in the securities and financial instruments field (The Prospectus, Market Abuse, Transparency, UCITS and the Consolidated Listing directives).

80. Respondents commented that issues provided for by the other directives (e.g. disclosure for issuers of negotiable securities) should be covered by those directives only and that MiFID should concentrate on issues relating especially to the characteristics of the instrument.

81. CESR broadly agrees with those comments in principle and the final advice concentrates primarily on issues not covered by those directives. However, CESR has also concluded that in several areas it is desirable to align the requirements for admission of transferable securities, and, in particular, shares rather more closely with the requirements of the Consolidated Listing Directive (which will remain in force, though Regulated Markets will not be obliged to operate a top tier "officially listed" segment if they do not wish to do so.

82. The first CESR proposal grouped the instruments covered by the MiFID in a different way from the way they are classified in the level 1 text. Consultees found this confusing and said that in several cases it was unclear whether CESR was simply providing no advice or saying that no level 2 measures were needed.

83. In the second consultation document CESR changed the structure to follow the classification of financial instruments as laid out in Annex I, Section C of the MiFID. Although several comments were put forward regarding the content of the specific proposals for some of the instruments, the structure itself was seen as a positive change that improved clarity. This structure has been retained in the final advice.

Requirements for different instruments

Shares

84. The proposal in the first consultation document proposed three requirements for shares - sufficient free float, sufficient expected trading activity and an appropriate trading mechanism. In the second proposal, CESR withdrew the requirement for sufficient expected trading activity, recognising that this could not be predicted, but, following further discussions on the potential scope of Article 40, proposed to supplement the proposed free float and appropriate trading mechanism requirement for shares, with a requirement that the issuer should have an appropriate financial history.

85. Respondents commented on all these proposals during the consultation processes. One of the main areas of criticism, particularly by market operators, was the proposal that an RM should have an adequate trading mechanism for any instrument it wished to admit to trading. Following these comments, CESR notes that the need to have an adequate trading mechanism for different instruments is a fundamental requirement for all RMs. However, this seems to be more directly linked to the issues of organising the operations of the market, as addressed by the Article 39 of the MiFID. Since there is no provision for Level 2 measures in respect of Article 39, CESR´s final advice has dropped the requirement for an adequate trading mechanism as a precondition for admission to trading.

86. Regarding the requirements of having an appropriate level of historical financial information, respondents had several critical remarks, both in terms of the requirements overlapping with the Prospectus Directive and the substantive need to include such a requirement in the Level2 proposal.

87. CESR does not consider its proposal to overlap with the Prospectus Directive. Its objective, clarified in the final advice, is to require RMs normally to admit shares only of issuers with an established business and appropriate track record. This leaves a RM with considerably more flexibility than the 3-year track record provided for in the CLD. The advice is not intended to preclude RMs from admitting start-up companies and, like the CLD, provides for RMs to admit the shares in issuers with no track record – such as investment companies – provided that there are satisfactory information and/or other arrangements to ensure that the shares can be traded in a fair, orderly and efficient manner.

Bonds and other securitised debt instruments

88. CESR proposal not to propose additional level 2 measures for bonds was generally supported by consultees. CESR has kept the proposal in the final advice. However CESR recognises that there is other work undertaken (especially by the Commission and IOSCO) regarding bonds. Based on the outcome of that work, the advice should be reviewed and revised, if necessary.

"Other" securities

89. CESR´s proposals regarding securitised derivatives attracted a few comments from respondents. CESR recognises that although such instruments often can be compared with a derivative, that is not always the case. Additionally, not all the requirements are appropriate for all securitised derivatives. The advice now clarifies that the requirements should be applied according to the nature of the security in order to focus the requirements on the specific characteristics of different instruments.

Money market instruments

90. CESR´s proposal for money market instruments with less than one year's maturity (and therefore outside the scope of the Prospectus Directive) was that there should be sufficient information available on the structure and terms of the instrument Following general approval in the consultation, the proposal has been kept unchanged.

Units in collective investment undertakings

91. CESR´s proposals on units in collective investment undertakings (CIS) were criticised by several respondents. CESR has clarified the proposal to limit its scope expressly to issues relating to the admission to trading of such instruments. All other issues relating to the distribution and marketing of such instruments as well as issues relating to eligible assets for UCITS are regulated in the relevant special legislation and should be treated separately.

92. CESR is however of the view that it is important to set some basic requirements which these instruments have to fulfil before they are admitted to trading on a RM. In the final proposal, a precondition for admission is that the CIS meets the applicable requirements for distribution as specified in the advice for separate types of CISs. The advice includes a possibility for a Member State to waive the requirement if they do not see the requirement necessary.

93. Regarding the additional requirements for open end funds and closed end funds, CESR has clarified its original proposals on the need for the arrangements for trading to be capable of creating a viable market. The requirement has been re-drafted to recognise different ways to comply with the requirement. Additionally, there is a requirement for the periodic publication of net asset value to ensure that the value of the units is sufficiently transparent to investors. CESR has not, however, recommended what that period should be, recognising that the appropriate period may be affected by a number of circumstances.

94. In the second consultation document CESR noted that it has requested the comments of the CESR expert group on Asset Management. Several respondents asked for a possibility to have an additional

consultation period to comment on those proposals. CESR notes that the changes which were made on the basis of the comments from the Asset management group did not alter the advice materially. Therefore CESR has not considered additional consultation necessary.

Derivatives

95. CESR's proposals fr derivative contracts were generally welcomed. However, several respondents in the commodity derivative markets pointed out that the price of the future sometimes provided the most transparent indication of the price of the underlying commodity. CESR recognises this possibility and has modified its advice accordingly.

RM´s obligation to verify issuer's compliance with disclosure obligations

96. Article 40 of the MiFID establishes a requirement for RMs to verify issuers´ compliance with their disclosure requirements. Respondents criticized CESR´s proposals in the first consultation paper as being too detailed and leaving the respective responsibilities of issuers, competent authorities and RMs unclear.

97. CESR has noted the comments and recognises that the main primary responsibility for complying with disclosure requirements lies with the issuer itself. Second, as provided in the main disclosure directives there is a designated competent authority with a primary responsibility for supervising compliance by issuers. Nonetheless, it is clear that the MiFID sets an independent requirement for RMs. In order to balance the roles of different participants and the needs of markets, CESR proposal concentrates on RMs having an adequate process for managing its obligation.

RM´s obligation to facilitate its members or participants in obtaining access to information which has been made public under Community law

98. Respondents criticized CESR´s proposals in the first consultation document as being too detailed and as overlapping the provisions of the Transparency directive. They suggested that the advice should make clear that the responsibility for complying with disclosure requirements lies with the issuer and the supervision on the competent authority.

99. CESR agrees with these comments on the responsibility of the issuer and the role of the competent authority. However, Article 40 of the MiFID especially establishes a role for RMs in the process. In respect of the information to be made public on the basis of the established processes for disseminating the information in the MAD and the TOD, CESR has concluded that the level 1 requirement should be enough and that no more detailed provisions are needed at level 2. However, in the case prospectuses, the situation is more complex. Although the Prospectus Directive requires the publication of all prospectuses, there is no mechanism similar to that provided by MAD and TOD for dissemination of the information. CESR has therefore CESR retained the proposal of requiring an RM to inform all its members of a new prospectus. In order to concentrate on the most relevant information, the requirement is limited to prospectuses relating to new issues on that market.

ANNEX 1
PROCESS AND WORK PLAN

1. On 20 January 2004, the European Commission published its first set of provisional mandates requesting CESR's technical advice on possible implementing measures for the MiFID by 31 January 2005 (Ref. CESR/04-021).

2. The second set of mandates requesting CESR's technical advice on possible implementing measures for the MiFID by 30 April 2005 was published by the European Commission on 25 June 2004 (Ref. CESR/04-323) containing specific criteria to be followed by CESR in the preparation of its advice (see Introductory section).

3. CESR decided to establish three Expert Groups in order to be able to deliver CESR's technical advice to the Commission in an appropriate and timely way:

   Expert Group on intermediaries' issues: The expert group has been chaired by Mr Callum McCarthy (Chairman of the UK's Financial Regulator, The Financial Services Authority [FSA]); rapporteur of the group is Mr Carlo Comporti. This expert group covered the provisional mandates related to: organisational requirements; conflicts of interest; conduct of business obligations when providing investment services to clients; best execution; prompt, fair and expeditious execution of client orders and client consent prior to executing orders outside the rules and systems of a regulated market or MTFs.

   Expert Group on market issues: This expert group has been chaired by Mr Karl-Burkhard Caspari (Vice President at the German Regulator, the Bafin); rapporteur of the group is Mr Jari Virta. This Expert Group covers the mandates relating to admission of financial instruments to trading, post-trade transparency disclosure by investment firms, pre-trade transparency requirements for MTFs, post-trade transparency requirements for MTFs, pre-trade transparency requirements for Regulated Markets and post-trade transparency requirements.

   Expert Group on cooperation and enforcement issues: This expert group has been chaired by Mr Michel Prada (President of the French Securities Regulator, the Autorité des Marchés Financiers [AMF]); rapporteur of the group is Mr Alexander Karpf. This expert group covered the provisional mandates related to transaction reporting between competent authorities and exchange of information for which CESR delivered its advice by 31 January 2005.
   A Steering Group has been established to consider horizontal issues and to ensure overall consistency in the advice prepared by each Expert Group. This Group is composed of the three chairmen of the experts groups and chaired by CESR's Chairman, Mr Arthur Docters Van Leeuwen.

4. In line with CESR's commitment to transparent working procedures and in order to have the technical input for the Expert Groups from external experts already at an early stage, CESR formed a specific Consultative Working Group of market participants drawn from across the European Markets. They were not intended to represent national or a specific firms' interest and do not replace the important process of full consultation with all market participants. The Consultative Working Group met four times with the Expert Groups and provided most valuable assistance to them for developing drafts of the final technical advice.

5. CESR has undertaken to consult widely all interested parties according to the principles set out in the Final Report of the Committee of Wise Men and as set out in CESR's "Public Statement on Consultation Practices" (Ref.: CESR/01-007c). The detailed steps of the consultations conducted by CESR for each mandate under MiFID is given in the work plan (see page …).

6. CESR published a Call for Evidence for each for the two set of mandates on 20 January 2004 (Ref.: CESR/04-021) and on 29 June 2004 (Ref.: CESR/04-323) seeking input on the respective key issues which it should consider in dealing with the first set of mandates. The

deadline for responses was respectively 19 February 2004 and 29 July 2004 and more than 40 responses were received in both occasions.

7. On 17 June 2004 CESR published its first consultation paper on the first set of mandates under the MiFID (Ref.: CESR/04-261b). The public consultation closed on 17 September, except for mandates on best execution obligation and market transparency obligations (see the next paragraph). The deadline for these mandates has been postponed to end of April 2005.

8. On 21 October 2004 CESR published its first consultation paper regarding the second set of technical implementing measures for the MiFID (CESR-04/562). The public consultation closed on 21 January 2005. CESR received a high number of responses (more than 90) concerning this first consultation on the second set of mandates.

9. On 17 November 2004 CESR published a second consultation paper on the first set of mandates (Ref.: CESR/04-603b) which include areas covered in the current advice. This consultation, which closed on 17 December 2004, focused on key issues of policy identified in the responses to the first consultation and the practical aspects of implementation. CESR received 34 responses to the consultation.

10. By addendum of 29 November 2004 to the formal request for technical advice on possible implementing measures on the MiFID of 29 November 2004 the European Commission decided to accept the request formulated by CESR and extended the deadline granted to CESR for preparing advice on client order handling rules (Article 22.1) to 30 April 2005.

11. On 22 December 2004 CESR released a Call for Opinions (Ref.: CESR/04-689) regarding a single subject: advice to the Commission under Article 19.7 in relation to agreements between the investment firms and their professional clients. The period for responses to this call for opinions closed on 20 February 2005. More than 25 responses were received

12. On 3 February 2005 a second consultation paper regarding admission of financial instruments to trading on regulated markets (Article 40) was released (Ref: CESR/05-023b) for a period of one month CESR received almost 30 responses.

13. Concerning the second consultation paper on the second set of mandates (CESR/05-164) this was released on 3 March 2005. The paper covered the general obligation to act fairly, honestly and professionally in the best interest of the client (Article 19.1), definition of "investment advice" (Article 4.1), best execution (Article 21) and market transparency (Article 4, 22.2., 27 to 30, 44 and 45). Almost 70 submissions by interested parties were received during the one month consultation period.

14. By addendum of 11 March 2005 the EU Commission decided to accept the request formulated by CESR to extend the deadline granted for preparing advice on professional client agreement (Article 19.7), investment research (Article 13.3 and 18) and admission of financial instruments to trading (Article 40) by the end of April 2005.

Public hearings

15. Three public hearings on MiFID took place at CESR. On 8 and 9 July 2004, the first public hearing on Intermediaries, Markets and Cooperation and Enforcement covered aspects on first set of mandates. On 19 November 2004, a public hearing was held by CESR on the second set of mandates on investment advice, commodities, derivatives, general obligation to act fairly, honestly and professionally and in the best interest of the client, suitability and appropriateness tests and transaction executed with eligible counterparties. A third public hearing covering aspects of the last consultation document, such as market transparency, lending to retail clients, generic and specific investment advice and best execution took place on 23 March 2005. More than 100 participants attended the three hearings.

Consumer Day

16. Since the representatives of consumers and retail investors, with few exceptions, did not take active part to the process of public consultation conducted by CESR, CESR decided to organise a Consumer Day to attract the consumers' and retail investors' organizations into the consultative

process in order to have input on the key issues also from investors' side of the market. The Consumer Day on CESR work under MiFID took place on 22 March 2005 and 14 representatives of national and European consumer organisations and associations attended.

CESR Work Plan for the mandates under the MiFiD

As of 30th April 2005

Date	Activity
20 January 2004	Provisional mandates - 1st set of mandates
19 February 2004	Deadline for comments to the "call for evidence" for the 1st set of mandates
1 March 2004	Consultative Concept Paper on Transaction Reporting, Cooperation and Exchange of Information between Competent Authorities
12 April 2004	Deadline for responses to the Consultative Concept Paper on Transaction Reporting, Cooperation and Exchange of Information between Competent Authorities
17 June 2004	First consultation on the 1st set of mandates
29 June 2004	Formal mandates – 2nd set of mandates
29 July 2004	Deadline for comments to the "call for evidence" for the 2nd set of mandates
17 September 2004	Deadline for comments on the 1st set of mandates
4 October 2004	Deadline for comments on the 1st set of mandates (best execution and market transparency)
21 October 2004	First consultation on the 2nd set of mandates
17 November 2004	Second consultation on the 1st set of mandates
17 December 2004	Deadline for the second consultation 1st set of mandates
20 December 2004	Call for Opinions on Professional Client Agreement
21 January 2005	Deadline for comments on the 2nd set of mandates
31 January 2005	Final approval – 1st set of mandates
3 February 2005	Call for Opinions on Admission of Financial Instruments to Trading on Regulated Markets
20 February 2005	Closure of Call for Opinions on Professional Client Agreement
3 March 2005	Closure of Call for Opinions on Admission of Financial Instruments to Trading on Regulated Markets
4 March 2005	Second consultation on the 2nd set of mandates (investment advice, general obligation to act fairly, honestly and professionally and in the best interest of the client, best execution, market transparency)
4 April 2005	Deadline for the second consultation on the 2nd set of mandates (investment advice, general obligation to act fairly, honestly and professionally al and in the best interest of the client, best execution, market transparency)
30 April 2005	Final approval - 2nd set of mandates and some aspects of the 1st set of mandates

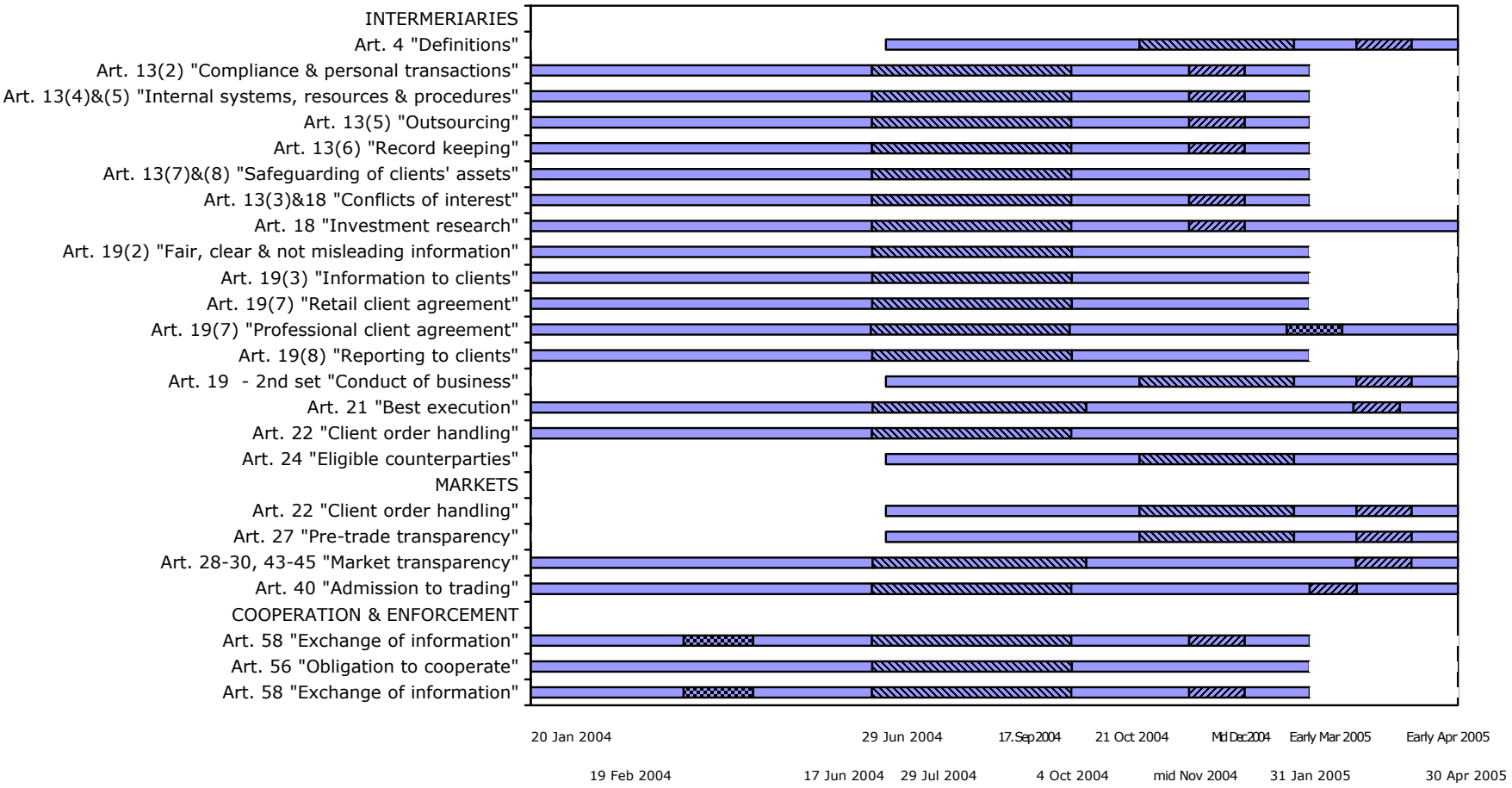
Completed

Consultative Concept Paper or Call of Opinions

Period of first consultations

Period of second consultations

CESR Work Plan for the mandates under the MiFiD



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ANNEX 2

LIST OF MARKET PARTICIPANTS OF CONSULTATIVE WORKING GROUP

The members of the Consultative Working Group are:

Dr Heiko Beck, General Counsel DekaBank Deutsche Girozentrale
Dr Michele Calzolari, Chairman of Assosim and CEO of CENTROSIM
Mr Jean-François Conil-Lacoste, CEO of Powernext SA
Mr Henri de Crouy-Chanel, Administrateur Délegué of Aurea Finance Company
Mr Peter De Proft, General Manager, Fortis Investments
Mr Mark Harding, Group General Counsel of Barclays Bank Plc
Mr Brian Healy, Director of Trading of the Irish Stock Exchange
Mr Henrik Hjortshøj-Nielsen, Senior vice president Nykredit
Mrs Marianne Kager, Chief Economist of Bank Austria
Mr Socrates Lazaridis, Vice-President of the Athens Stock Exchange
Mr Jacques Levy-Morelle, Secretary General of Solvay SA
Mr Gyorgy Mohai, Advisor to the Budapest Stock Exchange
Mr Peter Norman, Executive President of Sjunde AP-fonden
Mr Anthony Orsatelli, CEO of CDC Ixis
Mr Joao Martins Pereira, Compliance officer and Adviser to the Board of Directors of Banco Espírito Santo
Mr Frede Aas Rognlien, Head of Legal and Compliance, Enskilda Securities ASA
Mr Roger Sanders, Joint Chairman of FSA-SBPP Deputy Chairman of the Association of Independent Financial Advisers
Dr Jochen Seitz, Senior Associate at Norton Rose
Mr Juan Carlos Ureta, Chairman and CEO of Renta 4
Mr Renzo Vanetti, CEO of SIA S.p.A
Mr Jan-Willem Vink, General Counsel ING Group

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ANNEX 3

LIST OF RESPONDENTS TO VARIOUS CONSULTATIONS

3.1. Respondents to the call for evidence on the first set of mandates (Ref.: CESR/04-021)

Activity	Name
Banking	ABI
Banking	Association of German Banks (BDB)
Banking	Barclays Bank
Banking	BDB - dealings in securities
Banking	BDB - letter
Banking	BDB - staff transactions
Banking	British Bankers' Association
Banking	BVR
Banking	Danish Bankers' Association
Banking	DSGV
Banking	European Banking Federation (FBE)
Banking	European Savings Bank Group
Banking	FBE - Annex
Banking	Royal Bank of Scotland
Banking	VBA
Banking	VÖB
Banking	ZKA
Banking	ZKA - annex 1 and 2
Insurance, pension & asset management	Professional Insurance Brokers Association
Insurance, pension & asset management	Professional Insurance Brokers Association - Ireland
Investment services	APCIMS
Investment services	Association Française des Entreprises d'Investissement
Investment services	Assoreti
Investment services	Bank of Ireland
Investment services	British Venture Capital Association
Investment services	Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.
Investment services	Fédération Européenne des Conseils et Intermédiaires Financiers
Investment services	Fédération Européenne des Fonds et Sociétés d'Investissement (Fefsi)
Investment services	Fefsi - Annex
Investment services	Investment Management Association
Investment services	Investment Technology Group
Investment services	LIBA, on behalf of ISDA, ISMA, FOA, NFMF, BSDAI, DSDA, FASD and SSDA
Investor relations	Association of Independent Financial Advisers
Issuers	AFEP
Issuers	Futures and Options Association
Press	Reuters
Regulated markets, exchanges & trading systems	Borsa Italiana
Regulated markets, exchanges & trading systems	Euronext
Regulated markets, exchanges & trading systems	Federation of European Securities Exchanges
Regulated markets, exchanges & trading systems	London Metal Exchange
Regulated markets, exchanges & trading systems	London Stock Exchange
Regulated markets, exchanges & trading systems	the International Petroleum Exchange
Regulated markets, exchanges & trading systems	Virt-x

3.2. Respondents to the call for evidence on the second set of mandates (Ref.: CESR/04-323

Activity	Name
Banking	Banca Intesa SpA
Banking	Barclays PLC
Banking	BIPAR
Banking	British Bankers' Association
Banking	European Banking Federation
Banking	European Savings Banks Group
Banking	FBF
Banking	FOA - Futures & Options Association
Banking	HVB Group
Banking	italian banking association
Banking	The UK Emissisons Trading Group
Banking	WKO
Banking	Zentraler Kreditausschuss
Insurance, pension & asset management	Association of British Insurers
Insurance, pension & asset management	Investment Management Association
Insurance, pension & asset management	M&G Group
Investment services	AFEI
Investment services	AIFA
Investment services	Association of Private Client Investment Managers and Stockbrokers
Investment services	British Venture Capital Association
Investment services	Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.
Investment services	Danish Bankers Association
Investment services	Fédération Européenne des Fonds et Sociétés d'Investissement
Investment services	German Electricity Association (VDEW)
Investment services	ISDA acting on behalf of International Securities Market Association, Association of Norvegian Stockbroking Companies, Bankers and Securities Dealers Association of Iceland, Danish Securities Dealers Association, Finnish Association of Securities Dealers
Investment services	The Bond Market Association
Investor relations	Verband kommunaler Unternehmen e.V.
Issuers	Eurelectric
Press	Bloomberg
Press	Reuters
Regulated markets, exchanges & trading systems	BME Spanish Exchanges
Regulated markets, exchanges & trading systems	Borsa Italiana
Regulated markets, exchanges & trading systems	Euroepean Energy Exchange AG
Regulated markets, exchanges & trading systems	Euronext
Regulated markets, exchanges & trading systems	Euronext - complimentary response
Regulated markets, exchanges & trading systems	Federation of European Securities Exchanges
Regulated markets, exchanges & trading systems	ICAP - endorsed by the Wholesale Markets Brokers' Association
Regulated markets, exchanges & trading systems	London Stock Exchange
Regulated markets, exchanges & trading systems	Nordpool
Regulated markets, exchanges & trading systems	The International Petroleum Exchange of London Ltd.
Regulated markets, exchanges & trading systems	The London Metal Exchange
Sovereign Issuers	Becker Buettner Held, law firm

3.3. Respondents to the fist consultation paper on the fist set of mandates (Ref.: CESR/04-261b)

Activity	Name
Banking	ABN AMRO
Banking	Banca Intesa
Banking	Banco Popular Español S.A.
Banking	Barclays Capital
Banking	British Bankers' Assocation
Banking	Bundessparte Bank und Versicherung
Banking	Bundesverband der Deutschen
Banking	Bundesverband deutscher Banken
Banking	Danish Shareholders Association
Banking	Euroclear Bank
Banking	European Association of Co-operative Banks
Banking	European Association of Public Banks
Banking	European Banking Federation
Banking	European Savings Banks Group
Banking	Italian Bankers Association
Banking	Netherlands Bankers Association
Banking	The Central Securities Depository of the Slovak Republic
Banking	VAB
Banking	ZKA
Insurance, pension & asset management	Association of British Insurers
Insurance, pension & asset management	BVI Bundesverband Investment und Asset Management e.V.
Insurance, pension & asset management	FEFSI
Insurance, pension & asset management	Investment Management Association
Insurance, pension & asset management	Verband unabhängiger Vermögensverwalter
Insurance, pension & asset management	Vereinigung österreichischer Investmentgesellschaften (VÖIG)
Investment services	AFEI and FBF
Investment services	APCIMS
Investment services	APCIMS
Investment services	Asociacion de Sociedades Gestoras de Carteras Independiente(SPAIN)
Investment services	ASSIOM
Investment services	Association of Dutch Brokers
Investment services	Assogestioni
Investment services	ASSOSIM
Investment services	Bloomberg L.P.
Investment services	Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.
Investment services	BVCA
Investment services	Danish Bankers Association
Investment services	Deutsche Bank AG
Investment services	Febelfin
Investment services	ICAP
Investment services	ISDA, ISMA, IPMA, ANSC, BSDAI, BMA, DSDA, FASD, FOA, LIBA, SSDA
Investment services	Italian Association of Financial Analysts
Investment services	Raad van de Effectenbranche
Investment services	Society of Investment Professionals in Germany
Investment services	Teather & Greenwood
Investment services	The Association of Norwegian Stockbroking Companies

Investment services	UBS
Investment services	V/F/I/ Verband der Finanzdienstleistungsinstitute e.V.
Investment services	Van der Moolen Holding NV
Investment services	VBA
Investor relations	Verbraucherzentrale Bundesverband
Issuers	AFEP
Issuers	AFEP
Issuers	Association Luxembourgoise des Professionnels du Patrimoine
Legal & Accountancy	City of London Law Society Regulatory Committee
Legal & Accountancy	Clifford Chance LLP
Legal & Accountancy	Euro-associations of Corporate Treasures
Legal & Accountancy	Linklaters
Others	European Federation of Financial Analysts Societies
Press	Reuters
Regulated markets, exchanges & trading systems	BME
Regulated markets, exchanges & trading systems	Borsa Italiana
Regulated markets, exchanges & trading systems	Börse München
Regulated markets, exchanges & trading systems	Copenhagen Stock Exchange
Regulated markets, exchanges & trading systems	Deutsche Börse
Regulated markets, exchanges & trading systems	Euronext
Regulated markets, exchanges & trading systems	Federation of European Securities Exchanges
Regulated markets, exchanges & trading systems	HELEX
Regulated markets, exchanges & trading systems	Iceland Stock Exchange
Regulated markets, exchanges & trading systems	London Stock Exchange
Regulated markets, exchanges & trading systems	Nord Pool ASA
Regulated markets, exchanges & trading systems	Norex alliance
Regulated markets, exchanges & trading systems	OMX Exchanges
Regulated markets, exchanges & trading systems	Oslo Børs
Regulated markets, exchanges & trading systems	The London Metal Exchange
Regulated markets, exchanges & trading systems	TLX S.p.A.
Regulated markets, exchanges & trading systems	virt-x Exchange Limited
Regulated markets, exchanges & trading systems	Warsaw Stock Exchange

3.4. Respondents to the fist consultation paper on the fist set of mandates as to best execution and market transparency (Ref.: CESR/04-261b)

Activity	Name
Banking	Banca Intesa
Banking	Banco Popular
Banking	Bank and Insurance Division of the Aus-trian Federal Economic Chamber
Banking	Barclays Capital
Banking	British Bankers' Association
Banking	Bundesverband deutscher Banken
Banking	EACB
Banking	European Banking Federation (FBE)
Banking	French Banking Federation
Banking	Institut der Wirtschaftsprüfer in Deutschland
Banking	italian bankers association
Banking	Zentraler Kreditausschuss

Banking	Zentraler Kreditausschuss
Individuals	Chris Pickles
Insurance, pension & asset management	Assogestioni
Insurance, pension & asset management	BIPAR
Insurance, pension & asset management	BVI
Insurance, pension & asset management	FEFSI
Insurance, pension & asset management	Investment Management Association
Investment services	AFEI
Investment services	APCIMS
Investment services	APCIMS
Investment services	ASSOSIM
Investment services	Danish Bankers Association
Investment services	Febelfin
Investment services	Investment Technology Group Limited
Investment services	ISDA, ISMA, IPMA, ANSC, BSDAI , BMA , DSDA , FASD, FOA, LIBA, SSDA
Issuers	MEDEF
Legal & Accountancy	City of London Law Society
Others	Software & Information Industry Association
Press	Reuters
Regulated markets, exchanges & trading systems	Bloomberg L.P.
Regulated markets, exchanges & trading systems	BME, Spanish Exchanges
Regulated markets, exchanges & trading systems	Börse Stuttgart
Regulated markets, exchanges & trading systems	Deutsche Börse AG
Regulated markets, exchanges & trading systems	Irish Stock Exchange
Regulated markets, exchanges & trading systems	RWE Trading GmbH ("RWET"), EDF Trading Ltd ("EdFT") and ICAP plc ("ICAP")
Regulated markets, exchanges & trading systems	virt-x Exchange Limited
Regulated markets, exchanges & trading systems	Wiener Börse AG

3.5. Respondents to the first consultation paper on the second set of mandates (Ref.: CESR/04-562)

Activity	Name
Banking	ABBL - Luxembourg Banker's Association
Banking	ABN AMRO Bank
Banking	Assogestioni
Banking	ASSORETI
Banking	Banca Intesa
Banking	BIPAR
Banking	British Bankers' Association
Banking	Bundesverband Öffentlicher Banken Deutschlands - VÖB
Banking	BVR
Banking	Danish Shareholders Association
Banking	EACB (European Association of Co-operative Banks)
Banking	EACT
Banking	European Association of Public Banks - EAPB
Banking	European Banking Federation
Banking	European Savings Banks Group
Banking	FDVA - French Financial Data Vendors Association
Banking	Fédération Bancaire Française
Banking	Financial Services Consumer Panel

Banking	Gaselys
Banking	German Electricity Association - VDEW
Banking	GL TRADE
Banking	HypoVereinsbank and BA/CA
Banking	Independent Adviser
Banking	Italian Bankers Association
Banking	London Energy Brokers Association
Banking	Norwegian Financial Services Association
Banking	Realkreditrådet
Banking	Spanish Banking Association
Banking	The Danish Consumer Council
Banking	Wholesale Markets Brokers Association
Banking	ZKA
Government regulatory & enforcement	Bank and Insurance Department of the Austrian Federal Economic Chamber
Individuals	Chris Pickles
Insurance, pension & asset management	AFIC

Insurance, pension & asset management	Association Luxembourgeoise des Fonds d'Investissement
Insurance, pension & asset management	Association of British Insurers
Insurance, pension & asset management	BVI Bundesverband Investment und Asset Management e.V.
Insurance, pension & asset management	Fefsi
Insurance, pension & asset management	Investment Management Association
Insurance, pension & asset management	Legal and General Investment Management Limited
Insurance, pension & asset management	M&G Investment Management Limited
Investment services	AFEI
Investment services	ANASF - Associazione Nazionale Promotori Finanziari
Investment services	APCIMS
Investment services	APCIMS
Investment services	Association of Members of the Athens Stock Exchange
Investment services	Assosim
Investment services	Barclays Capital
Investment services	Bloomberg L.P.
Investment services	BNP PARIBAS

Investment services	British Venture Capital Association
Investment services	Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.
Investment services	Danish Bankers Association
Investment services	EffasEuropean Federation of Financial Analysts Societies
Investment services	Febelfin
Investment services	Institut der Wirtschaftsprüfer in Deutschland
Investment services	Irish Association of Investment Managers
Investment services	ISDA, FOA, ISMA, IPMA, ANSC, BSDAI, BMA, DSDA, FASD, LIBA, SSDA, EFET, WMBA
Investment services	ISDA; ISMA; IPMA; ANSC; BSDAI; BMA; DSDA; FASD; FOA; LIBA; SSDA
Investment services	Prebon Marshall Yamane (UK) Limited
Investment services	The Chamber of Brokerage Houses, Poland
Investment services	The Finnish Association of Securities Dealers
Investment services	Tradition Group
Investment services	Weather Risk Managment Association
Investor relations	Verbraucherzentrale Bundesverband e.V. (vzbv)
Issuers	EURELECTRIC

Issuers	Ealic
Legal & Accountancy	Becker Büttner Held
Legal & Accountancy	City of London Law Society Regulatory Committee
Legal & Accountancy	Linklaters - Law
Press	Reuters
Regulated markets, exchanges & trading systems	APX
Regulated markets, exchanges & trading systems	BME, Spanish Exchanges
Regulated markets, exchanges & trading systems	Borsa Italiana
Regulated markets, exchanges & trading systems	Deutsche Börse AG
Regulated markets, exchanges & trading systems	Euronext
Regulated markets, exchanges & trading systems	European Energy Exchange
Regulated markets, exchanges & trading systems	Federation of European Securities Exchanges
Regulated markets, exchanges & trading systems	IPE
Regulated markets, exchanges & trading systems	London Stock Exchange
Regulated markets, exchanges & trading systems	OMX Exchanges
Regulated markets, exchanges & trading systems	The London Metal Exchange
Regulated markets, exchanges & trading systems	TLX SpA
Regulated markets, exchanges & trading systems	virt-x Exchange Limited
Regulated markets, exchanges & trading systems	Warsaw Stock Exchange
Regulated markets, exchanges & trading systems	Wiener Börse

3.6. Respondents to the second consultation paper on the fist set of mandates (Ref.: CESR/04-603b)

Activity	Name
Banking	ABN AMRO Bank
Banking	Banca Intesa
Banking	British Bankers' Association
Banking	Danish Bankers Association
Banking	EFFAS European Federation of Financial Analysts Societies
Banking	European Association of Cooperative Banks
Banking	European Association of Public Banks
Banking	European Savings Banks Group (ESBG)
Banking	FBE
Banking	FBE
Banking	FBF
Banking	Febelfin
Banking	Italian Banking Association (ABI)
Banking	Netherlands Bankers' Association
Banking	Realkreditrådet (The Association of Danish Mortgage Banks)
Banking	Spanish Banking Association
Banking	UBS Investment Bank
Banking	WKO
Banking	Zentraler Kreditausschuss
Banking	Zentraler Kreditausschuss - Annex
Insurance, pension & asset management	British Venture Capital Association
Insurance, pension & asset management	FEFSI
Insurance, pension & asset management	Investment Management Association

Insurance, pension & asset management	Morley Fund Managment
Insurance, pension & asset management	Parallel Ventures Managers Limited
Investment services	AFEI
Investment services	APCIMS
Investment services	Association of British Insurers
Investment services	Barclays PLC
Investment services	ISDA,ISMA,IPMA,ANSC,BSDAI,BMA,DSDA ,FASD,FOA,LIBA,SSDA
Issuers	MEDEF
Legal & Accountancy	City of London Law Society
Press	Bloomberg
Regulated markets, exchanges & trading systems	Association of Members of the Athens Stock Exchange
Regulated markets, exchanges & trading systems	BME Spanish Exchanges
Regulated markets, exchanges & trading systems	Budapest Stock Exchange
Regulated markets, exchanges & trading systems	Deutsche Börse AG
Regulated markets, exchanges & trading systems	Euronext
Regulated markets, exchanges & trading systems	FESE
Regulated markets, exchanges & trading systems	International Petroleum Exchange
Regulated markets, exchanges & trading systems	London Stock Exchange
Regulated markets, exchanges & trading systems	OMX Exchanges
Regulated markets, exchanges & trading systems	The London Metal Exchange
Regulated markets, exchanges & trading systems	virt-x Exchange
Regulated markets, exchanges & trading systems	Warsaw Stock Exchange

3.7. Respondents to the Call for Opinion on Professional Client Agreement (Ref.: CESR/04-689)

Activity	Name
Banking	ABN Amro
Banking	ALFI
Banking	Association of British Industry
Banking	Banca Intesa
Banking	British' Bankers Association
Banking	Bundessparte Bank und Versicherung
Banking	Calyon
Banking	Danish Bankers Association
Banking	EACT European Associations of Corporate Treasurers
Banking	European Association for Listed Companies (EALIC)
Banking	European Association of Co-operative Banks (EACB)
Banking	European Association of Public Banks - EAPB
Banking	European Banking Federation
Banking	Institutional Money Market Funds Association

Banking	Investment Management Association
Banking	ISDA, ISMA, IPMA, AFEI, ANSC, BSDAI, BMA, DSDA, FASD, FOA, LIBA, SSDA
Banking	Italian Banking Association
Banking	Zentraler Kreditausschuss
Insurance, pension & asset management	BVI Bundesverband Investment und Asset Management e.V.
Investment services	AFG
Investment services	APCIMS
Investment services	Association of Members of the Athens Stock Exchange
Investment services	Assogestioni
Investment services	Assosim
Investment services	Barclays PLC
Investment services	EFFAS European Federation of Financial Analysts Societies
Investment services	Febelfin
Investment services	Federation of Danish Investment Associations
Investment services	The Chamber of Brokerage Houses, Poland
Legal & Accountancy	City of London Law Society Regulatory Committee

3.8. Respondents to the consultation paper on admission of financial instruments to trading on regulated markets (Ref.: CESR/05-023b)

Activity	Name
Banking	Association of British Insurers
Banking	BRITISH BANKER'S ASSOCIATION
Banking	Danish Shareholders Association
Banking	Dublin Funds Industry Association
Banking	FOA, London
Banking	McCann Fitzgerald Listing Services Limited
Insurance, pension & asset management	Association of the Luxembourg Fund Industry (ALFI)
Insurance, pension & asset management	ASSOGESTIONI
Insurance, pension & asset management	BVI Bundesverband Investment und Asset Management e.V.
Insurance, pension & asset management	Investment Management Association
Investment services	Association Française des Entreprises d'Investissement (AFEI)
Investment services	Febelfin
Investment services	IPMA
Investment services	ISDA et al
Issuers	Medef
Legal & Accountancy	A&L Listing Limited
Others	Financial Services Ireland
Regulated markets, exchanges & trading systems	BME-Spanish Exchanges
Regulated markets, exchanges & trading systems	Borsa Italiana Group
Regulated markets, exchanges & trading systems	Euronext
Regulated markets, exchanges & trading systems	FESE
Regulated markets, exchanges & trading systems	International Petroleum Exchange
Regulated markets, exchanges & trading systems	ISE
Regulated markets, exchanges & trading systems	London Stock Exchange
Regulated markets, exchanges & trading systems	Luxembourg Stock Exchange
Regulated markets, exchanges & trading systems	OMX Exchanges Ltd
Regulated markets, exchanges & trading systems	TLX SpA
Regulated markets, exchanges & trading systems	virt-x Exchange Limited

Regulated markets, exchanges & trading systems	Warsaw Stock Exchange

3.9. Respondents to the second consultative paper on the second set of mandates (Ref.: CESR/05-164)

Activity	Name
Banking	ABN AMRO Bank
Banking	AFI
Banking	APB (Portuguese Bank Association) and APC (Portuguese Brokers Association)
Banking	ASSORETI
Banking	Banca Intesa
Banking	Barclays
Banking	Becker Büttner Held, law firm
Banking	British Bankers' Association
Banking	Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)
Banking	Danish Shareholders Association
Banking	Deutscher Sparkassen- und Giroverband e.V.
Banking	EACB (European Association of Co-operative Banks)
Banking	European Association of Public Banks - EAPB
Banking	European Savings Banks Group
Banking	Fédération Bancaire de l'Union Européenne
Banking	Fédération Bancaire Française
Banking	German Electricity Association (Verband der Elektrizitätswirtschaft - VDEW)
Banking	Groupe Credit Agricole
Banking	HVB Group
Banking	Italian Banking Association
Banking	La Société Générale
Banking	Realkreditrådet
Banking	SEB
Banking	Spanish Banking Association
Banking	the Swedish Shareholders' Association
Banking	Zentraler Kreditausschuss
Insurance, pension & asset management	Association Française de la Gestion financière (AFG)
Insurance, pension & asset management	Association of British Insurers
Insurance, pension & asset management	Association of the Luxembourg Fund industry (ALFI)
Insurance, pension & asset management	ASSOGESTIONI
Insurance, pension & asset management	BVI Bundesverband Investment und Asset Management e.V.
Insurance, pension & asset management	European Fund and Asset Management Association
Insurance, pension & asset management	Fidelity Investments
Insurance, pension & asset management	Investment Management Association
Insurance, pension & asset management	Irish Association of Investment Managers
Insurance, pension & asset management	M&G Investment Management Limited
Investment services	AFEI
Investment services	ANASF - Associazione Nazionale Promotori Finanziari
Investment services	APCIMS
Investment services	Association of Members of the Athens Stock Exchange
Investment services	Assosim
Investment services	BNP PARIBAS
Investment services	British Venture Capital Association
Investment services	Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V. - also on behalf of BÖAG Börsen AG,

Investment services	Danish Bankers Association
Investment services	DIF Broker
Investment services	EFFAS
Investment services	EURELECTRIC
Investment services	Joint response by ISDA, ISMA, IPMA, ANSC, BSDAI, BMA, DSDA, FASD, FOA, LIBA, SSDA
Investment services	Millenium BCP Investimento
Investment services	The Chamber of Brokerage Houses
Investment services	VFI
Investor relations	Federation of German Consumer Organisations
Legal & Accountancy	City of London Law Society Regulatory Committee
Legal & Accountancy	Institute of Chartered Accountants in England and Wales
Legal & Accountancy	Law Firm - Linklaters
Others	European federation of Energy Traders, EFET
Others	Febelfin
Others	Financial Services Consumer Panel
Press	Reuters
Regulated markets, exchanges & trading systems	Bloomberg L.P.
Regulated markets, exchanges & trading systems	BME Spanish Exchanges
Regulated markets, exchanges & trading systems	Borsa Italiana
Regulated markets, exchanges & trading systems	Deutsche Börse
Regulated markets, exchanges & trading systems	Euronext
Regulated markets, exchanges & trading systems	Federation of European Securities Exchanges
Regulated markets, exchanges & trading systems	London Energy Brokers' Association
Regulated markets, exchanges & trading systems	London Stock Exchange
Regulated markets, exchanges & trading systems	OMX Exchanges
Regulated markets, exchanges & trading systems	Opex
Regulated markets, exchanges & trading systems	TLX S.p.A.
Regulated markets, exchanges & trading systems	virt-x Exchange Limited
Regulated markets, exchanges & trading systems	Warenterminboerse Hannover
Regulated markets, exchanges & trading systems	Warsaw Stock Exchange
Regulated markets, exchanges & trading systems	Wholesale Markets Brokers' Association