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Committee of European Securities Regulators
11-13 Avenue de Friedland
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17 September 2004

Our Ref Rob Moulton/SM

Dear Sirs

CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments - Consultation Paper June 2004

This letter is addressed to CESR by Linklaters, an international law firm with EU offices in Amsterdam, Berlin, Bratislava, Brussels, Budapest, Cologne, Frankfurt, Lisbon, London, Luxembourg, Madrid, Munich, Paris, Prague, Rome, Stockholm and Warsaw. We provide regulatory and compliance advice to a variety of market participants. Our clients have actively followed MiFID's progress and, having advised a number of clients on the negotiations over the Directive, we continue to advise clients on the implications of CESR's consultation process.

We welcome the opportunity to provide written comments following CESR's successful open hearing in Paris on 8th and 9th July. We felt that the atmosphere of cooperation and openness which was displayed at that open hearing bodes well for the progress of the consultation, and we hope that our comments can play a constructive part in ensuring that the outcome of CESR's work leads to the best possible results in terms of, in particular, the resultant Conduct of Business Rules. Our comments on the Consultation Paper are based on our own experience of advising our clients on the implications of changes to regulations. Our response is, however, our own and not provided on behalf of any particular client.

Our comments are arranged in the order in which the relevant matter is raised in the Consultation Paper. Where relevant, we have highlighted the question to which the comment relates, although not all comments are directly relevant to a question raised by CESR.

We would be happy to discuss any of the points which we raise in more detail and, should you wish to do so, please call Rob Moulton on +44 207 456 4939.

Yours faithfully

Linklaters

1 Intermediaries

1.1 Compliance matters

Number	Page	Para or Q.	Comment
1	15	Para 2(d)(ii)	CESR proposes that the “budget and remuneration of the compliance function….[must be]…. linked to its own objectives and not the financial performance of the business line of the investment firm”. The fact that a business line operates compliantly ought to assist it to meets its competitive business objectives and therefore there is no automatic conflict between linking the remuneration of the compliance function with business performance. In particular, in order to attract high-calibre compliance officers, it may be necessary for their remuneration to be linked to the bonus pool of a particular business line of a firm. We would suggest that 2(d)(ii) be reworded as follows: The remuneration of the compliance function does not undermine its independence. In this way, the onus would be put upon the investment firm to demonstrate that the remuneration structure worked effectively. This is preferable to mandating inflexible remuneration structures in the way proposed by CESR.
2	15	Q1.1	In small investment firms, it may not be possible for the compliance function to comply with the requirement for independence from the business. In practice, in small firms the compliance function is often carried out by one of the business-line employees and requiring an independent compliance function may undermine the ability of small firms to enter the market. The degree of independence set out in CESR’s proposals should only be required where it is proportionate in view of the nature, scale and complexity of the business.
3	15	Q1.2	We do not consider that deferred implementation of the requirement for independence is required provided there is flexibility provided for small firms in line with question 1.1 (see point number 2 above).
4	15/16	Para 4(a)	CESR suggests that the compliance function should “ensure that the appropriate measures are taken in the event of non-compliance”. In fact, this is an obligation which ought to rest with the business line. The role of compliance should be to provide advice to the business line. Compliant performance is a business responsibility. This reference should be deleted.

Number	Page	Para or Q.	Comment
5	16	Para 5(a)(i)	CESR suggests that, when handling a complaint, an investment firm must inform clients in writing of any out of court complaint and redress mechanism and the methods for having access to it. It is not clear whether this information must be provided when the complaint is first received, but it is arguable that this would be the case as drafted. It would be helpful for CESR to confirm this is not the case as, in fact, complainants should be encourage to use the investment firm's in-house complaint resolution procedure before a complaint is addressed to an out of court mechanism such as an Ombudsman. The reference to access to the Ombudsman could be provided at the conclusion of the firm's own in-house complaint resolution procedure.
6	16	Para 5(c)	CESR recommends that firms should regularly verify whether complaints are effectively processed. In practice, firms are required to ensure compliance with regulatory requirements generally and it is inappropriate to mandate specific circumstances where particular records should be retained. Requiring firms to regularly verify whether complaints are effectively processed, and to keep a record of this verification, is an unnecessary documentation burden. The obligation should be on firms to handle complaints in accordance with their in-house procedures, and there is no need to require specific verification beyond that required to demonstrate general compliance. We would delete (c).
7	16	Para 6(d) and (e)	The requirement that investments firms establish a code of conduct for relevant persons which set out principles designed to promote professionalism and integrity is welcome. Adopting such a code of conduct ought to mean that regulators need less detailed and rigid procedures, as they will be able to look to the firm's code of conduct for high-level compliance. However, the requirement that the code of conduct should, as a minimum, contain the investment firm's conflicts policy is unnecessary. The conflicts policy is likely to be much longer than the general principles required to set out proper standards of conduct. Similarly, the requirement that procedures for carrying out personal account transactions are included seems unnecessary as these are not a high level principle but detailed procedures, which must be followed by the employees. Therefore, we would suggest that only (a) to (c) are retained and that (d) and (e) are deleted.
8	16/17	Para 7	CESR recommends that investment firms establish procedures to govern personal account dealing. However, it is inappropriate for CESR to conclude automatically that "traders, analysts, corporate finance personnel, portfolio managers and compliance personnel" are subject to conflicts of interest. For example, a "public side" trader who acts only on behalf of investment clients would not, automatically, be subject to any particular conflicts of interest. We would suggest that (a) be reworded as follows: "establish and operate mechanisms that take reasonable

Number	Page	Para or Q.	Comment
			steps to prevent relevant persons entering into personal transactions in circumstances where that transaction would give rise to a conflict of interest, or that relevant person has or is likely to have price-sensitive information that is relevant to the financial instruments to which that transaction relates”.

1.2 Internal Systems, Resources and Procedures

Number	Page	Question/ Para.no	Comment
9	19	Para 2(e)	CESR requires investment firms to operate, in respect of administration, accounting, and systems and controls, internal control mechanisms including “hierarchical controls, cross-checking and dual control”. This is far too rigid for small firms to be able to comply with. In practice, a firm comprising two persons is unlikely to be able to operate hierarchical controls. Further, either cross-checking or dual controls are likely to be used, not both. We would recommend the addition of the words “where appropriate” after the word “include” and before (a).
10	19	Para 4	CESR requires firms to adopt accounting policies which reflect a “complete, true, verifiable and timely view of its financial position”. These requirement may go beyond those imposed by applicable accounting standards and rules, and we suggest that they are deleted. Firms should have to comply with applicable accounting standards, and applicable rules, which are sufficiently well-developed and complex to make it inappropriate to impose an additional set of requirements. We would delete “which reflect a complete, true, verifiable and timely view of its financial position”.
11	20	Para 5(b)	It is not clear why the risk management policy of a firm should set out the level of risk tolerance of the investment firm. Firms should not be encouraged to mandate a “high” or “low” level of risk tolerance to the risks which they face. They should be encouraged to manage risks appropriately rather than to determine that they are a firm which is in generally prepared to accept a “high” or “low” level of risk. We suggest that 5(b) is deleted.
12	20	Para 6	CESR requires firms to have information processing systems which “guarantee the integrity and confidentiality of information”. This absolute standard is too high. Firms should be required to take reasonable steps. CESR’s requirement for firms contrasts with their approach to reporting channels which must ensure “sufficient data safety” (see page 104, box 15, 1(c)) and relevant authorities generally which are required to take “sufficient steps” (see page 129, 32(c)). We would delete the word “guarantee”.
13	20	Para 6(c)	CESR requires firms to develop back-up plans and procedures to enable firms to resume normal business capacity in the event of a

Number	Page	Question/ Para.no	Comment
			disruption or a disaster. This standard is too high. Firms should be required to have back-up plans to enable them to meet their regulatory obligations. For example, a broker/dealer is under no obligation to enter into transactions with its clients. Commercial considerations should determine whether the firm puts in place disaster recovery plans to resume normal full business capacity or temporarily to operate at a lower capacity where this is consistent with the firm's regulatory obligations. We would delete "to normal business capacity".
14	21	Para 8(b)	CESR recommends that firms must establish an independent risk control function. This is in addition to internal audit and compliance. Even given the "where appropriate" and "proportionate" wording which proceeds (b), it is not clear why a separate risk control function should always be required to overlay a number of other functions whose job includes the management of risk, such as finance, audit, compliance, etc. Risk control is, essentially, a management responsibility and management is advised by these support lines on how to manage business and operational risk. The benefits of generally requiring firms to have a separate independent risk control function have not yet been established by CESR.

1.3 Outsourcing

Number	Page	Question/ Para.no	Comment
15	23	Para 1	CESR defines an outsourcing to be a situation where reliance is placed on a third party to provide a service that "could" otherwise be undertaken by the investment firm itself. Materiality in relation to outsourcing is a difficult matter and "could" is a very broad way of defining the tasks which could fall within an outsourcing arrangement. If "could" was replaced with the word "would" then this would help to define properly the types of outsourcing which should be captured. For example, firms "could" hire in expertise in order to develop software. The fact that they use third party providers to develop software should not mean that they are outsourcing this requirement. (This is given as an example of the difference between the word "could" and "would" and, whilst we think that the examples set out in paragraph 5 are helpful, using the word "would" helps to define the scope of outsourcing without having to consider whether paragraph 5 may assist.)

1.4 Records

Number	Page	Question/ Para.no	Comment
16	27	Para 4.1	We welcome CESR's openness on the debate relating to the reversal of the burden of proof. In our opinion, it is a fundamental principle of law that the onus to prove a case rests with the "accuser". If no evidence is brought, then the case has not been established. Reversing the burden of proof would create a great deal of dissatisfaction amongst firms. In practice, regulators set out record keeping requirements and failure to keep the records mandated itself can be a breach of a rule and this should be sufficient comfort for regulators that they will be able to monitor a firm's compliance performance.
17	28	Para 2(b4)	There is no evidence of any cost/benefit analysis having been carried out on requiring firms to keep records of telephone orders on a voice recording system for one year. In practice, some jurisdictions require telephone orders to be recorded and some do not. All firms have to keep a record of one type or another and to send sufficient information to customers for each customer to be able to ascertain whether their order has been executed correctly or not. There is no particular reason why an "order" should require a voice record to be kept when other types of services, for example, investment advice, do not require records of all calls giving advice to be kept. Indeed, the taping of telephone lines was originally carried out by firms to protect themselves and their clients from claims over the detail of the transaction executed. Records were generally kept until shortly after the confirmation had been received, at which point it was presumed that both parties were satisfied with the details of the transaction. It would be unfortunate if this background were to be ignored and a one-year requirement were to emerge. Further, there is no evidence of a cost benefit analysis having been undertaken as to the order being retained for at least one year. In practice, as a record of the transaction is sent to a customer, there is likely to be a much shorter period required in order to determine whether there is a dispute relating to an order. Requiring firms to keep records for at least one year will not only increase the capacity of the record system required but also make it more difficult to investigate queries relating to orders. We hope that an open debate with firms will enable a proper cost/benefit analysis to be undertaken before this proposal is adopted or amended.

Number	Page	Question/ Para.no	Comment
18	28	Para 2(d)	CESR proposes requiring that firms keep records in a manner whereby amendments from earlier versions of that record can be ascertained and records cannot be altered. In practice, this would require all records to be produced perfectly first time to a first draft, in order that any subsequent amendments could be identified. This is unrealistic. In practice, whether a record has been manipulated or altered is likely to be a matter of fact and, indeed, the record kept in order to demonstrate that a document had not been altered could itself be tampered with. We recommend the deletion of (d).

1.5 Clients' Assets

Number	Page	Question/ Para.no	Comment
19	33	Q5.4	CESR has asked whether firms should be prohibited from purporting to exclude or limit responsibility for losses directly arising from their failure to exercise due skill, care and diligence in the selection of a depositary, and to accept full responsibility for a depositary that is a member of its group. We do not think that CESR should recommend any such requirement. The terms upon which liability are accepted should be a matter for negotiation between the parties. Regulations should be designed to regulate the conduct of investment firms, not mandate the terms upon which they can compete for client business. Standardising terms of business can be anti-competitive and firms that accept responsibility in the way suggested by CESR should be rewarded commercially.
20	38	Para 15	CESR proposes that external auditors must report to the competent authorities on a firm's compliance with the client asset requirements. It is inappropriate to require this report to be provided to the competent authority. The requirement to comply with the client asset rules should be a burden placed upon senior management at an investment firm and any review of compliance with those requirements should be provided to senior management for action. Circumventing this process by requiring reporting directly to the competent authority is likely to encourage firms to intervene during any validation of their processes by external auditors. We would delete (15).

1.6 Conflicts of Interest

Number	Page	Question/ Para.no	Comment
21	40	First para	In its explanatory text, CESR points out that "Nothing in the level 2 advice [on conflicts] is intended to derogate from any specific obligation…that an investment firm may be under for any other reason of any other provision of the Directive, or under any other Directive."

Number	Page	Question/ Para.no	Comment
			CESR does not go on to say whether this advice is intended to make entirely inapplicable all national law provisions relating to the management of conflicts of interest by investment firms. For example, the UK has, over hundreds of years, evolved a series of responsibilities which apply to fiduciaries when acting for principals. For example, fiduciaries must not make a secret profit through their relationship with their principal, fiduciaries must act in the best interest of their principal, fiduciaries must maintain the confidentiality of information which is provided to them by their principal in circumstances giving rise to such a duty. In Italy, similar provisions are contained in the Civil Code, Article 1703. In many respects, these requirements are similar to those set out in CESR's proposals relating to conflict management. However, given the approach set out in the Directive which makes it clear that Member States cannot go beyond the scope of the Directive in relation to matters covered by the Directive, there may be unintended consequences to repealing all such responsibilities which apply to investment firms, in particular issues that might arise affecting competition with non-investment firms. It does not seem to be appropriate that, for example, a credit institution should be subject to the UK's requirements relating to fiduciaries, whereas investment firms should not. Therefore, clarity as to whether this is what is intended would be appreciated.
22	43	Para 1	CESR proposes that firms must identify conflicts of interest arising whenever the firm stands to profit to the detriment of the client, as the firm has an incentive to favour the interests of one client over another, or the firm has an incentive to favour its own interests over those of its clients. In practice, the identification of conflicts is more difficult than it sounds. Some conflicts are well known and easily identified (for example, the fact that, when it deals with a client on an internalised basis, the firm is selling its own shares to the client). In other cases the conflict may be much harder to identify. Linklaters have undertaken a substantial amount of work throughout 2004 with sophisticated, integrated investment firms in order to assist them with the identification of conflicts. New potential conflict situations are regularly identified. The proposal that firms should be required to identify conflicts of interest in advance should be subject to a rigorous cost-benefit analysis, which does not yet appear to have been the case. We do not see any clear benefit in identifying conflicts in advance. What is much more appropriate is that conflicts are properly managed when they arise. For example, a firm might decide to use a policy of independence whenever it cannot put in place, for example, a Chinese wall to manage a potential conflict. This policy would require an employee to disregard the interests of the firm and to give priority to the interests of the client. This is an entirely appropriate way to manage a conflict when it arises, and it is certainly more efficient than trying to identify the conflict in advance.

Number	Page	Question/ Para.no	Comment
			We do not see the benefit of trying to identify all such conflict situations in advance. Our suggestion is that senior management should be mandated to manage conflicts of interest when they arise, rather than to identify them in advance.
23	43 and 44	Para 2 and 8	CESR proposes that firms must pay special attention to proprietary trading and separate out proprietary trading functions behind a Chinese wall (see paragraph 8(a)). This gives rise to a fundamental question - what is meant by proprietary trading? Although one might imagine that it is straightforward to say that proprietary trading is trading undertaken on behalf of a firm, rather than with or for its clients, in practice, the distinction is not as easy to make. In order to internalise trades, firms are required to position their books to anticipate customer flow. There is a very fine distinction between (i) a client trader deciding that he is likely to see considerable client flow in a security and that therefore he needs to acquire stock in advance in order to be able to meet the risk of trading against that client flow and (ii) the client trader deciding that a price is likely to rise and therefore that they will take a position in that security and trade out of it later in order to make a profit from the price rise. Further, firms manage firm-wide risk by taking proprietary trading decisions based upon the customer-facing positions which the firm has accepted. It is essential that firms can do this in order that large exposures (to a particular security, sector, country etc.) across trading desks can be properly managed. In order to do this, those executing the proprietary transactions on behalf of the firm need to be aware of the trading positions held by the firm with clients. Segregating them behind a Chinese Wall would prevent investment firms from managing their risk. Therefore, we think it will be very difficult for CESR to adequately define a distinction between proprietary trading undertaken for a firm's own account and trading in order to facilitate client business. Further, even if such a distinction can be drawn, entirely segregating those sections will have important and unintended consequences for the ability of firms to manage their risk. Therefore, we do not think that CESR should go beyond high level principles requiring firms to manage potential conflicts of interest in this area. We would therefore delete proprietary trading from the list contained in paragraph 2 in box 6.

Number	Page	Question/ Para.no	Comment
24	45	Para 8(c)	CESR proposes making the remuneration of persons principally engaged in one activity independent of the remuneration earned by persons principally engaged in another activity. This is a very blunt, unsophisticated requirement which will have unintended consequences. For example, it may be appropriate, from a conflict management perspective, to segregate research functions from investment banking and trading functions. It may also be appropriate to require the remuneration of researchers to be determined according to the quality of their research. However, it is not appropriate to prevent researchers being paid remuneration from a bonus pool generated by firm-wide performance. Indeed, allowing employees to participate in firm-wide profit making should be seen as pro-competitive. We would delete 8(c).
25	45	Q6.1	We think that CESR should retain maximum flexibility and keep to a minimum the list of examples of methods of managing conflicts of interest. It is preferable to require firms to take sufficient steps to manage their conflicts rather than providing such detailed recommendations as to amount to a mandated course of action.
26	45	Q6.2	Any measures for managing the conflicts of interest which are listed should be stated to be examples of arrangements that may be taken. Requiring firms to include certain pre-defined measures in their conflict policy is a recipe for the conflict policy to be too rigid, and become out of date. The onus should be put on senior management to manage conflicts of interest, as conflicts will differ between firms, and, even within a firm, will change over time. It will not be possible helpfully to mandate the appropriate policies or steps that must be taken by all firms all of the time.
27	45	Para 11(b)	CESR proposes that, once a year, firms must send relevant details of inducements to their clients. We do not know whether a cost-benefit analysis has been carried out on this point, but, if it were, we see a doubtful benefit (indeed, we think many clients would prefer not to receive such information and we do not know what they would do with it if they did receive it) and a considerable cost (being the cost of maintaining a list of inducements and providing it to clients). In particular, the definition of inducement is not limited to any extent by materiality, and this would require firms to engage in an expensive process of attempting to track every possible “inducement” which was provided, even if the “inducement” could have no material bearing on the performance of the firm in question. We would delete 11(b).

Number	Page	Question/ Para.no	Comment
28	46	Para 13	CESR proposes that the “frequency” of the disclosures required to be made should take into account the nature of its recipients. We do not see why any recipient would want to receive a conflict disclosure more than once, or what the benefit of so doing would be. If a client is happy with the conflict of interest disclosure at the outset of a relationship, and is happy to continue to trade, we do not see why the client should be bothered by repeating the disclosures. We would delete (13).
29	46/47	Q6.3	CESR has asked whether it is appropriate for a firm that publishes research to maintain information barriers between analysts and its other divisions, and if so, which divisions should be separated? It may be appropriate for an investment firm to segregate researchers, but it should be the responsibility of senior management to determine whether this is the best way of managing the conflict of interest and, if so, which divisions should be segregated. There is no need for CESR to provide further guidance, which is likely to be inflexible on this point. No two firms are organised in an identical manner and, therefore, inflexible requirements are likely to be difficult to apply to all firms.
30	47/48	Q6.4	We consider that any derogation should apply if the firm complies with the second option. Firms should be permitted to disclose that their investment research is not objective if that is, in fact, the case. If it is clear that a reasonable person would not think of the research as objective, the firm should not be forced to attempt to prepare the research in accordance with requirements relating to impartiality. Indeed, differentiated research can be seen as pro-competitive.

1.7 Marketing information to be fair, clear and not misleading

31	50	Box 7	Box 7 sets out CESR’s standards that apply to firms when they provide information to clients. In our opinion, box 7 goes into far too much detail for a clause which generally requires absolute compliance (rather than indicating factors which might be relevant to assessing compliance). For example, having established that communications must give a fair and adequate description of benefits balanced against risks, it is unnecessary to go on to state that key items (whatever this might mean) contained in the information must be given due prominence (3(b)), that warnings must be given in a way that does not disguise them (3(c)), and that the communication does not omit information required to ensure it is fair, clear and not misleading (3(d)). All of these requirements are unnecessary embellishments on the requirement that the communication must give a fair balance between benefits and risks. We recommend deleting all of (3). Further, we do not understand what (4) means or what firms might do to ensure compliance with it.

32	50	Para 3(a)	CESR proposes requiring that information must be "likely to be understood by the average member of the group to whom the communication is directed or addressed". First, this requirement should be without prejudice to any of the other mandated requirements related to communications. As an example of the importance of this caveat, in our opinion, explanations of the potential credit risks of any guarantor (required by box 8, paragraph 10) are either unlikely to sufficiently describe the risk as to be fair or are unlikely to be understood by the average member of any widely-drawn group if they are fair. Second, we do not understand why the communication must be likely to be understood by the average person in the group to whom the communication is directed. It could be that a communication relating to a particularly sophisticated product is widely distributed, on the basis that the suitability requirements set out elsewhere in MiFID would require the firm only to deal with investors for whom the product was suitable (or who were otherwise exempt from this requirement). If the average member of the group to whom the communication is directed must be able to understand it, this would prevent any widespread communication related to any sophisticated product. We recommend deleting 3(a) and think that the Directive's objectives will be better served by the broad fair, clear and not misleading requirements than any "average recipient" requirements.
33	51	Para 7(b)	CESR proposes that the competent authority may consider factual claims as inaccurate if the evidence demanded by the competent authority is not furnished or is "deemed insufficient" by the competent authority. It is not appropriate for a breach to be established because information provided is deemed insufficient by the competent authority. To do so would mean that, even if the competent authority was wrong in considering the information insufficient, a breach would have occurred. In fact, firms should have recourse to an appeals process to consider whether the information is sufficient or not. We would recommend redrafting (b) as follows: Consider factual claims as inaccurate if the evidence demanded in accordance with (a) is insufficient to outweigh any evidence of inaccuracy.

34	51	Para 8	Paragraph 8 sets out a detailed list of requirements for communications. These may not all be appropriate in all circumstances. For example, describing the absence of a right of withdrawal may not be appropriate when the financial instrument is not of a type where a right of withdrawal exists. Only 8(a)(ii) is limited by “unless such a reference would be inappropriate” wording. We suggest similar wording at the start of 8. We would redraft 8 as follows: (8) Where appropriate taking into account the financial instrument and/or investment service involved, when an investment firm makes…..”
35	52	Para 13	We do not understand why it is automatically inappropriate for a firm to use simulated historic returns as part of the information provided to retail clients. Simulated historic returns may be an appropriate part of the information to be provided to a retail client. Investment firms would still be under an obligation to ensure that the communication as a whole was clear, fair and not misleading, notwithstanding the inclusion of a simulated historic return. We would delete (13).
36	52	Para 14(b)(iv)	It is not appropriate to require firms to state figures in the local currency in all circumstances. For example, if a UK-based client entered into a €/US$ currency swap, there would be no point in setting out the figures in £, nor including any reference to local currency risk. We would delete 14(b)(iv).

1.8 Information to Clients

Number	**Page**	**Question/ Para.No.**	**Comment**
37	55	Sixth Para	CESR states that Member States may impose additional requirements in relation to the subject matter of this advice. It is not clear why this area should not be harmonised or what additional requirements might be necessary.
38	55	Para 1	CESR proposes that retail clients must be provided with certain information by the firm before the firm starts to provide services. It is not clear why this is required for products where the customer has a right to withdraw. If a customer has a right to withdraw, then firms should be able to provide the information after dealing with the client, who would then be able to exercise the right of withdrawal if unhappy with the information provided. We would delete the remainder of paragraph (1) starting with the words “in good time…” and replace this section with “at an appropriate time”. In paragraph (2) we would replace “meaning of ‘in good time’” with “meaning of ‘an appropriate time’”.
39	57	Para 6(h)	Please see out comments at 5 above relating to complaints handling procedures and the timing of the reference to an Ombudsman scheme.

Number	Page	Question/ Para.No.	Comment
40	57	Para 6(j)	It is unnecessary to require firms to set out the language in which documents will be supplied to the customer in circumstances where this is obvious to the customer. For example, this would require a UK based firm dealing with a UK-based customer to state that documents will be supplied to the customer in English. We do not understand why this might be necessary if it is quite clear to both parties at the outset of the relationship which language will be used. There should therefore be a derogation from this requirement.
41	58	Para 7(f)	Please see our comments (point 34 above) in relation to 8(b) on page 51 of CESR's Consultation Paper above. Reference to a right to withdrawal is not appropriate in all cases.

1.9 Client Agreement

Number	Page	Question/ Para.No.	Comment
42	60	Box 9	The requirements relating to client agreements are a relevant point at which to consider the need for transitionals generally. This is because client agreements are an excellent example of an occasion when transitional provisions are helpful to firms without lessening the protections afforded to customers. Many countries already require agreements to be sent to customers in certain circumstances. CESR proposes a requirement that they do so, and sets out detailed content requirements. These content requirements are unlikely to be identical to the requirements in any particular member state. Therefore, without transitional provisions, all investment firms will be required to write to all of their customers to provide them with an updated client agreement. We do not consider that an adequate cost benefit analysis of this proposal has been carried out. In particular, many of the protections are likely to be in place in existing client agreements. Firms risk being in breach of CESR's proposals if even minor matters are omitted once the Directive comes into force. We would welcome a transitional provision for use by firms who already have a client agreement in place where the firm agreed to act in accordance with CESR's proposals even if it did not document that fact with the customer.

Number	Page	Question/ Para.No.	Comment
			For example, CESR proposes that the retail client agreement must include the languages in which the client can communicate with the firm (see 4(r) on page 62). Provided that a firm could adequately communicate with its customer, it should not be required to send out a revised client agreement simply to document this new requirement. Similarly, it is possible that an existing client agreement would set out the basis upon which reports would be provided to the client. If CESR's proposals required reports to be supplied on a different basis, then provided this basis was no less advantageous to the client, the firm should be able to report on the basis of CESR's proposals without needing to enter into a new client agreement to formally agree to do so. In practice, where there is already a client agreement in place, clients are likely to misunderstand any attempt by a firm to put in place new terms as an attempt by that firm to alter the basis of the client agreement for the benefit of the firm. Firms will then need to deal with the follow up enquiries/complaints in accordance with CESR's proposals. This cannot be advantageous for firms or investor protection. We would add a transitional provision as a new paragraph. 16. Firms need not comply with the requirement to enter into a client agreement where the firm had an agreement in place prior to the coming into force of the Directive and where the firm acts in accordance with that agreement or, where relevant, in accordance with the requirements set out in [Box 8] other than the requirement to enter into a client agreement.
43	61	Para 1	Please see our comment 38 above. We do not see why the client agreement must be provided in advance for services where there is a right to withdraw or where it is not in the best interests of the customer so to do.

Number	Page	Question/ Para.No.	Comment
44	61	Para 1(b)	CESR proposes that retail client agreements must be signed (or equivalent). Presumably, equivalent provisions means electronic signatures, rather than agreement by course of conduct. Under English law, and many other jurisdictions, clients can enter into an agreement through a course of conduct. That is the basis upon which terms of business operate. We do not see any reason from an investor protection point of view why the investor should be required to sign a client agreement. This creates an administrative burden for the firm (in order to obtain the signature and retain evidence of the signature of the client) without any corresponding investor protection benefits. Clients should be encouraged to read all documents provided by an investment firm, whether the client is required to sign them or not. The ability for firms to provide terms of business which are unsigned has not raised significant investor protection issues in the UK or other markets where this practice is the norm. We would prefer CESR to identify particular types of product or service which might be considered so risky as to require the customer to sign a risk warning, rather than to secure a signature to be obtained from retail clients in all cases.
45	61	Para 3	CESR proposes that the retail client agreement must be "clear and easily understandable by the client". This is a very subjective measure. Given the relative complexity of the client agreement mandated by CESR, we doubt that it will be <u>easily</u> understood by many clients. For example, we wonder whether the requirement to include an adequate indication of the rights and obligations of the parties relating to corporate actions (see paragraph 6 on page 62) will be easily understood by all clients. We think it would be much more effective for CESR to require firms to use straightforward and plain language when describing their services to clients. We would reword (3) as follows: The retail client agreement should, to the extent possible, use plain and straightforward language.
46	61	Para 4(c)	CESR proposes that all retail client agreements must include the identity and geographical address of any relevant representative of the firm established in the client's Member State of residence. This seems to suggest that, in order that the client agreement can be in "standard form", the firm would need to include a list of all overseas branches, whether or not the client was conducting business with the branch established in its local Member State. We would propose rewording 4(c) as follows: Where relevant to the financial instrument or service to be provided, the identity and geographical address…

Number	Page	Question/ Para.No.	Comment
47	61	Para 4(d)	CESR proposes that the retail client agreement must include the "address and/or other contact details that are to be used by the investment firm to contact the client". We do not understand why the client would be interested in the contact details that would be used by the investment firm to contact the client. The firm is already required to include its address (see 4(b)) and we suggest that 4(d) is deleted.
48	61	Para 4(e)	CESR proposes that the retail client agreement must include the names of any persons authorised to represent the client for the purposes of the agreement. Presumably this would mean that only those persons stated would be able to bind the client. In our opinion, whether a "mandate" arrangement should be put in place ought to be agreed between the investment firm and the client rather than required by CESR. For some types of service, it may be entirely inappropriate. For example, when a firm is dealing in financial instruments, the use of mandate systems requires the investment firm to telephone the client back on a stated telephone number on each occasion that the client contacts the investment firm to conduct a transaction. This delay may not be in the interests of the parties and it would be common for the parties to agree that the investment firm can act in relation to instructions it reasonably believes to have come from the client. There is no need for CESR to harmonise requirements in this area across all types of service. Clients who want the investment firm only to be able to deal on receipt of instructions from certain persons would be free to negotiate this with the investment firm. Further, we think that the reference to natural persons authorised to represent a client who is a legal entity is entirely unnecessary. Most jurisdictions have public lists of directors of corporations who are entitled to bind the corporation, and it makes no sense to repeat that list in the client agreement. We would delete 4(e).
49	61	Para 4(l)	CESR proposes that full details of the firm's fees must be set out in the retail client agreement. Further, CESR proposes that amendments to the client agreement must be agreed using a pre-defined process. In our experience, it is not always possible to determine the fees for particular services in advance, and it will be unduly burdensome to keep them up to date in a client agreement or by amendments to that agreement. Firms should be free to agree the price for services at the time they are provided. Therefore, we suggest adding the following wording to the end of 4(l): "… or the fact that fees and prices are available on request or may be as agreed between the parties."

Number	Page	Question/ Para.No.	Comment
50	61	Para 4(m)	CESR proposes that the retail client agreement must set out the “competent national jurisdiction” relating to the contract. This appears to contemplate only one jurisdiction, and therefore that the parties would need to state an exclusive jurisdiction. This might not be appropriate. It is common for non-exclusive jurisdiction clauses to be included, and (less commonly) to agree to more than one jurisdiction. We would reword 4(m) as follows: “The law applicable to the contract and any agreement relating to jurisdiction;”
51	61	Para 4(o)	Please see our comments at 5 and 39 above relating to the inappropriateness of an early reference to the Ombudsman procedure.
52	62	Para 4(r)	Please see our comments at 40 above relating to the inappropriateness in some circumstances of a requirement to state the language.
53	62	Para 8	CESR proposes that the investment firm must provide a copy of the signed agreement back to the retail client. It is unclear why this requirement is thought to be necessary. The client would, presumably, have a blank copy and it is an unnecessary burden on the firm to provide a copy of the signed agreement to the client, with no corresponding benefit to the client. Please also see our comments at 44 above relating to the appropriateness of requiring the customer’s signature to be obtained.
54	63	Para 11	CESR proposes that, in relation to portfolio management, the retail client agreement must define a specific reporting requirement in the event of losses exceeding a stated percentage. Given that a portfolio management is, relatively, a long term proposition for clients, it is unclear why short term variations should need to be notified in this way given the periodic reporting obligations already incumbent upon investment firms. In particular, it would be possible for a portfolio to have declined beyond the percentage but still to be outperforming the market in general and to be outperforming any specific targets set for that portfolio, and any notification in those circumstances would be unsuitable and inappropriate. We recommend the deletion of (11).
55	63/64	Para 13	CESR proposes that retail portfolio management agreements can only be terminated “on terms that are fair and reasonable for both parties”. It is unclear why this requirement might apply to portfolio management in particular, but as a general response, we do not understand what there is to be fair and reasonable about when a contract is terminated. The contract should set out the consequences and procedures to be followed upon termination, and an additional responsibility to act “fairly and reasonably” is entirely inappropriate.

1.10 Client Reporting

Number	Page	Question/ Para.No.	Comment
56	67	Para 3	CESR proposes that, if an order from a retail client is not executed within one business day of receipt, the investment firm must send a written confirmation of the order to the retail client. It is not clear why it is thought that a retail client would need such protection. Presumably, the requirement to send a written confirmation should not apply to transactions where the order is intended to lapse within one business day of receipt (for example, a "good for the day" order) and therefore to make this clear the first sentence should read "If an order from a retail client is not executed within one business day of its receipt, and remains unexecuted, an investment firm must….". If this is CESR's intention, our concern is that investment firms will agree, in their terms of business, that no limit order can remain unexecuted for more than one business day (in order to avoid this reporting requirement) and therefore this proposal will be counter-productive from a client protection point of view, in that retail clients will lose the ability to place limit orders which are good for more than one business day.
57	68	Para 12	CESR proposes that statements relating to open positions in contingent liability transactions must be sent monthly to retail clients. It is not clear what analysis of the needs of retail clients has been undertaken in this case, but we think that retail clients should be able to agree to receive statements on a different basis if, in fact, they do not want to receive them monthly. It may be that they want to receive them more often than monthly. It may be that they want to receive them less often than monthly. This should be left to the agreement between the investment firm and the retail client.
58	68	Para 13/14	CESR proposes that, if an investment firm does not accept an order from a retail client or decides not to carry one out (i.e. a conscious decision) it must notify the client immediately, whereas if the firm is unable to carry out an order (presumably, this means other than through the conscious choice of the investment firm) it must notify the client as soon as possible. Presumably, this is putting a higher burden on investment firms where they consciously refuse to accept an order for a retail client. It is not clear why this should be the case, and we would propose that 13 and 14 be merged into a single obligation to notify the client as soon as practicable. Our drafting would be: If an investment firm does not or cannot accept an order for a retail client, it must notify the retail client as soon as reasonably practicable.

Number	Page	Question/ Para.No.	Comment
59	68	Para 16(d) and 18	CESR proposes that periodic statements which are sent to retail clients must include information on any remuneration received from a third party. The requirement in 16(d) is replicated in 18 and therefore paragraph 18 should be deleted.
60	69	Para 21	Please see our comments at 57 above in relation to the inappropriateness of requiring such statements to be provided on a monthly basis.

1.11 Best Execution

Number	Page	Question/ Para.No.	Comment
61	73	Q1-4	CESR sets out examples of the criteria that should be taken into account when considering the best execution obligation. CESR asks how the advice should determine the relative importance of the factors included in article 21(1). In our opinion, the advice should not aim to determine the relative importance of the factors included under article 21(1). The factors should be left as indications to be taken into account by firms, and CESR should give firms the ability, on a case by case basis in relation to particular clients and in light of the terms upon which the investment firm has agreed to act for the client, to determine the importance of the factors. The investment firm will agree with the client the services to be provided, the type of client with whom it is dealing, the instruments and markets with which it is prepared to deal, and CESR should retain an element of flexibility for investment firms and clients to agree how these factors will be taken into account. In practice, in relation to professional clients, firms tend to prioritise the speed of the transactions. In other words, a very careful analysis of the relative cost and benefit to using time to seek better prices is undertaken. In our opinion, this can be the case even if prices generally are not moving quickly. If the price only moved occasionally, it still might be that speed is important as there would be no way for the investment firm or the client to know whether the price was about to move. Therefore, we would redraft as follows the indication next to **speed** on page 72: The client or the firm may wish to ensure that a transaction is carried out at the currently available price, and in such a situation, the immediacy of execution can be more important than seeking better prices.

Number	Page	Question/ Para.No.	Comment
62	75	Q1-9	In our opinion, the factors set out are generally relevant in relation to exchange traded products. However, the execution requirement applies much more broadly and many of the questions (and therefore many of the answers provided to them) will be inappropriate for OTC markets. CESR should provide clear guidance in relation to the extent to which firms can take into account the factors described in the best execution consultation in relation to OTC products.
63	78	Para 1	CESR is considering requiring that an investment firm discloses to clients the number and names of trading venues to which it has direct and indirect access. Many larger investment firms would consider themselves to have indirect access to all markets. If a customer had a request to execute a transaction on a particular market, the firm would find a local broker. Therefore, CESR's proposal would require the investment firm to disclose to its clients a list containing the names of all trading venues in the world. Then, on each occasion that: (i) trading venues merged (on the basis that this would reduce the number and change the name of the trading venues); or (ii) a trading venue changed its name; or (iii) a new trading venue opened somewhere in the world, the firm would need to resend the list. We do not see why a firm should be required to disclose to clients all of the trading venues to which it has direct or indirect access. We think it would be far more beneficial to clients to receive focused information in order to explain the basis of the execution policy (for example, that the firm might route orders to the most liquid venue, and to give examples of which venues are typically used).
64	78	Para 1-5 incl.	Article 21 requires investment firms to provide appropriate information to their clients on their order execution policy. The mandate requires CESR to provide advice on the information to be provided to the client. CESR proposes relatively detailed information to be provided (for example, see 63 above). In our opinion, requiring such a level of detail is entirely inappropriate for most clients. This is because any explanation of an order execution policy is only likely to be understood by sophisticated clients who do not, in fact, need an explanation of the policy. Clients who may not understand the basis upon which orders are executed already are likely to find it difficult to comprehend a full explanation of the execution policy in the way suggested by CESR. In our opinion, firms should be encouraged to provide "appropriate information" to clients, and provided with indicative factors by CESR, without any firm requirement to specifically cover any given factor.

1.12 Client Order Handling

Number	Page	Question/ Para.No.	Comment
65	81	Para 5	CESR proposes that an investment firm that publishes research must not effect transactions on its own account until clients have had a reasonable opportunity to act upon the research. CESR has also proposed, in relation to conflict management, that research functions should be segregated from trading activities. If this segregation is undertaken, and therefore traders within an investment firm do not see investment research until it is also published to clients, we do not understand why traders should need to delay acting, and give clients a reasonable opportunity to act upon the research first. If research is properly segregated from trading, all parties that receive the research, including traders within the investment firm that produced the research, should be able to react to it immediately. We would delete (5). We consider that this paragraph is inappropriately included given that this ground is already covered in the Market Abuse Directive, and inclusion in MiFID would either be repetitive or inconsistent.
66	81	Para 6	CESR proposes that investment firms must carry out orders for clients sequentially. This is far too simplistic an approach and does not take into account the nature of orders received, particularly from professional clients. For example, it might be that an order is received to "work" a particular volume of a security over the course of the day. A second order might come in for immediate execution. As currently drafted, the investment firm would not be able to carry out the order for the second client as it would not yet have completed the order for the first client. In practice, firms are likely to alert their clients to this situation and to get permission to act for both clients. We consider that this paragraph is inappropriately included given that this ground is already covered in the Market Abuse Directive, and inclusion in MiFID would either be repetitive or inconsistent. This approach is also inconsistent with (and arguably ultra vires) the Directive, which states that client orders shall be handled in a "prompt, fair and expeditious manner". In paragraph 7 on page 82, firms are given a carve out from this strict requirement if, bearing in mind the characteristics of the order and prevailing market conditions, it is impossible to do so or the interests of the client require otherwise. In the example set out above, it would not be impossible to delay executing the second order until completion of the first, nor would the characteristics of the order require otherwise in the interest of the client. Therefore, we would propose that 6 is reworded as follows: The sequence in which investment firms carry out orders (which may be concurrently) must be fair.

Number	Page	Question/ Para.No.	Comment
67	82	Para 12	CESR proposes that where orders for own and client accounts have been aggregated, priority must be given to the client. This does not take into account the fact that an allocation to the client may only have been received at all because the investment firm had also included its aggregated order. For example, in relation to primary market activity, it may be that the clients of an investment firm would, in aggregate, have requested 1% of a new issue. This number on its own might be insufficient for the firm to receive any allocation at all, as the manager of the offer might not include such a small order in its book. However, if the investment firm itself, for its own purposes, decides to place an order for 4% of the offer, then it might be that the aggregated order of 5% would be accepted into the book. If this order was scaled back because the book was over-subscribed, it would not be appropriate to give priority to clients as, without the order from the investment firm, there would have been no allocation to the clients at all. We would reword 12 as follows: Where orders for own and client accounts have been aggregated, the investment firm must treat its own and its client orders equally, or give priority to its clients, if the investment firm cannot satisfy all aggregated orders.
68	83	Para 18(b), 19(d), 20(d)	CESR proposes that an investment firm that carries out an order should record the date and exact time of receipt of the order or decision to deal. It is not clear how this would work in relation to open outcry markets. In such markets, the exact time of the order is commonly not recorded, although typically a "trading period" would be recorded. Such a period might be of several minutes duration. We would reword, for example, 19(e) as follows: Date and exact time or time period of execution.

2 Markets

2.1 Introduction – Pre-trade transparency requirements for RMs and MTFs

Number	Page	Question/ Para.No.	Comment
69	87	Para 2 and 4	When quoting on a Regulated Market or a Multilateral Trading Facility, firms are required to include the price at which the market participant is willing to buy (or sell). CESR also proposes that the "bids/offers/quotes…shall be firm ones" and "firm" is defined to mean "the actual terms upon which market participants are committed and obliged to trade". The use of the word "firm" is inappropriate for the quotation obligation because the price may not be the price at which the market participant is committed to trade. When quoting on a regulated market, there is no restriction on a firm offering price improvement

Number	Page	Question/ Para.No.	Comment
			similar to that imposed when a firm deals as principal. Even when dealing as principal, there are circumstances where price improvement is permitted. Further, there are circumstances where firms are permitted to withdraw quotes. Requiring quotes to be firm in all circumstances when the quote is provided on an RM or MTF will be a major disincentive to quotation and affect liquidity. We would advise that 2 is reworded: Indicative price at which a market participant is willing to buy or sell. and that the first line of paragraph 4 is redrafted as follows: The bids/offers/quotes as referred to in paragraphs 1-3 need not be firm prices.
70	87/88	Para 6	CESR proposes that RMs and MTFs shall have rules governing the conditions and circumstances in which designated market makers may update their quotes to ensure that this is not so frequent as to intentionally deprive market participants of trading against the quotes displayed. This seems to suggest that firms might be permitted only to update their quotes periodically (for example, every minute). This does not reflect the fact that markets can move quickly. Firms should be permitted to update their quotes at any time and as often as they wish. This does not mean that a firm would be able to deal at anything other than the price quoted at the time that an order was received. If firms are held to the price they display at the time that an order is received, there should be no need to have any rules relating to how frequently they can update their quotes.
71	88	Para 7	CESR proposes that RMs and MTFs make available all bids and offers in the order book. We do not see the benefit of making available all bids and offers and think that RMs and MTFs should be given some flexibility in the number of bids and offers they make available, and be given an ability to ensure that "outliers" are not displayed. Providing the right amount of high quality information to investors may be preferable to providing more low quality information.
72	88	Para 10	CESR proposes that RMs and MTFs must make available the same degree of pre-trade information to all its members, participants, investors and other interested parties. We do not understand why RMs and MTFs should be required to operate in this way. It may be that some market participants would like to receive less information than the RM or MTF makes available to other participants and this should be a matter to be decided between those parties.

Number	Page	Question/ Para.No.	Comment
73	88/89	Para 15, Q12.6	CESR is still considering how to define the block size that will qualify for a waiver from the pre-trade transparency requirement and, separately, in each case for deferred post-trade transparency. First, we do not consider that the block size needs to be the same level in each case. MiFID clearly envisages different levels. Article 27 covers the extent to which firms are required to put their own capital at risk and the definition of standard market size should be calculated to take this into account. In relation to articles 25 and 29, the post-trade reporting requirement is addressing a different issue, which CESR acknowledges. That issue is highlighted on page 85 in the introduction to the market section of CESR's Consultation Paper where CESR states that "The provision for deferred publication of trades in the Directive is an acknowledgement that there is also a trade-off between transparency and liquidity. In some cases, immediate post-trade transparency may have an adverse effect on liquidity, especially through the negative effects that full disclosure could have on the ability and willingness of liquidity providers to put their capital at risk for big orders and to provide liquidity to the market. Therefore it is necessary to facilitate delayed publication for large trades where the intermediary ends up with a risk position." Therefore, in answer to question 12.6, we think it important that the calculation of standard market size for the purposes of article 27, and for articles 29/44, are kept separate as the cost-benefit will be different in each case. We welcome CESR's comment that "It is necessary to facilitate delayed publication for large trades where the intermediary ends up with a risk position". Our comments on how this should be calculated must be read in accordance with our comments at 78 below relating to the "one minute" proposal. That is because one minute would not allow firms any time to take any action in relation to managing the risk of providing liquidity to customers. Therefore, if that time period is indeed to be one minute, we think that delayed reporting would be appropriate for a larger number of transactions than if, for example, the one minute time period was extended to (say) five minutes to permit firms to take straightforward hedging action to manage the risk.

Number	Page	Question/ Para.No.	Comment
			However, on the basis that the typical transaction reporting time limit will be one minute, we prefer the "market impact method" of measuring when delayed reporting is appropriate. That is because the delayed reporting requirement is in place because firms needs to manage the risk of their trading having an impact on the markets before they can offset their risk, and therefore it makes sense for the market impact to govern whether a trade is entitled to delayed reporting or not. Presumably, trades which have a market impact would be entitled to delayed reporting to give the firm time to hedge the risk of providing that liquidity.

2.2 Post trade transparency requirements for RMs, MTFs and investment firms

Number	Page	Question/ Para.No.	Comment
74	92	Para 21	CESR proposes that certain information, including price, should be made public for every trade. Some trades, such as stock loans, will have no price. Therefore, we propose rewording the introduction to paragraph 21, as follows: "The following information shall, where applicable, be made public…"
75	92	Para 21 and 29	CESR proposes that an indicator be included on every trade report to show whether the trade was done at a price other than the current market price. It is not clear whether this is intended to mean a "non-market price" transaction (i.e. a transaction which is clearly undertaken at a price which has no relation to the current market price) or whether it is intended to mean any transaction which is not executed at the best price currently available then in the market. If it is the former, we do not understand why this requirement should need to be included. Firms should have in place procedures to ensure that only in justifiable circumstances are transactions undertaken in this way. If it is the latter, this would be an unworkable proposal as firms would not be able to know whether the transaction was at the current market price without searching all execution venues in advance and the best execution requirements do not require this to be done. We would delete this indicator.
76	92	Para 22	CESR proposes that all systematic internalisers provide the following information: Opening price; closing price; maximum and minimum price during the session; weighted average price of the session; total traded volume. It is not clear why a systematic internaliser should need to provide this information. Why would it be relevant to any market participant to understand the highest and lowest prices at which any given systematic internaliser traded during the session? Further, it is not clear whether the weighted average price relates to transactions

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			undertaken by that systematic internaliser or transactions undertaken generally. The information provided would be dependent upon the incidence of trading by any particular systematic internaliser and the fact that one had traded at a different average price to a different systematic internaliser would not seem to be relevant information. Systematic internalisers report their transactions and therefore information on the totality of trading is available other than on a systematic internaliser by systematic internaliser basis.
77	92/93	Para 23	CESR proposes that trade reporting be undertaken by the seller, unless a seller is not an EU investment firm when it shall be undertaken by the buyer. It is not clear what the position would be where the seller is based in the EU (and therefore subject to the reporting requirements of MiFID) but is not an EU investment firm (because, for example, it is a branch of a non-EU entity). It des not make sense in those circumstances for the buyer to need to know whether each counterparty with which it transacts is or is not an EU investment firm and to take reporting decisions on that basis.
78	93	Para 24	CESR proposes that trade reporting should happen no later than one minute after the transaction took place. There does not appear to have been any cost-benefit analysis of this proposal undertaken. CESR does note that "where a broker-dealer facilitates a large transaction by taking the position…. onto its books before entering into offsetting trades to unwind a position, it is self-evident that other market participants might attempt to move the market against the risk-taking intermediary if they were aware as a result of immediate trade publication that the intermediary had taken on the position." Therefore, the time period for post-trade reporting can only be looked at in light of the ability of firms to offset their risk. If firms are allowed to delay transaction reporting for all transactions where they take a risk position which, if known, would have a market impact detrimental to that firm (meaning that it would be common for transactions to benefit from delayed reporting), then one minute trade reporting might be appropriate. However, if the exception to post-trade reporting applies only to transactions commonly referred to as being of "block" size, then one minute trade reporting would be wholly inappropriate. If block size was (for a given share), €10 million, then a presumption would have been made that a transaction for €10 million would put the firm at sufficient risk to justify a significant delay in reporting. However, if the firm entered into a transaction for €9 million, they would not be permitted to delay reporting, nor would one minute give the firm sufficient time to enter into any straightforward off-setting transactions (for example, a futures transaction). Therefore, there is the potential for a liquidity gap to appear for transactions just below block size extending down to the size at which transactions are not likely to

Number	Page	Question/ Para.No.	Comment
			have a market impact. CESR should investigate the length of time required to enter into straightforward off-setting transactions and ensure that post-trade reporting is not required within this period.
79	93	Para 27	CESR proposes that RMs, MTFs and investment firms should put in place arrangements to "correct wrong data". An absolute obligation is not appropriate in these circumstances. RMs, MTFs and investment firms should be required to take reasonable steps to ensure that incorrect data is corrected.
80	94	Para 40	Investment firms are required to make post-trade information available to market participants. The Directive in article 28 (2)(a)(iii) makes it clear that investment firms may comply with this obligation through proprietary arrangements. CESR states that publication solely on the firm's own website or a third party website where only a few firms' data is published is unlikely to meet the "easily accessible test". This appears to "ultra vires" the requirements of the Directive which allows firms to use proprietary arrangements, which presumably contemplates a mechanism for firms to make available information without requiring it to be consolidated with information provided by other firms. Paragraph 40 should be deleted.

3 Co-operation and Enforcement

3.1 Transaction Reporting

Number	Page	Question/ Para.No.	Comment
81	103	Para 5/6	CESR proposes certain minimum transaction reporting requirements, and directs competent authorities to approve any reporting channel that complies with the general minimum conditions. CESR goes on to state that differences could remain between member states to take into account national requirements. These statements are contradictory. CESR should work towards using existing systems to produce a common standard between countries.
82	104	Para 1(c)	CESR proposes that any transaction reporting channel must, as a minimum condition, have procedures on "sufficient data, including confidentiality of the data". This is another point where an absolute obligation to maintain the confidentiality of data contrasts with CESR's approach to data confidentiality obligations for regulators (see page 129 or the Consultation Paper, 32(E)), and a "reasonable steps" requirement should be included.

Number	Page	Question/ Para.No.	Comment
83	104	Para 2	The Directive permits four methods of reporting: by the firm; by a third party acting for the firm; by an exchange or MTF; or by an approved (by the competent authority) reporting channel. CESR appears to propose that all four methods should be subject to identical approval requirements. This is ultra-vires. Firms can report in accordance with the other three methods without requiring approval or being bound by the rules relating to approved reporting channels.
84	109	Box 16	CESR is to be commended on its use of proxies which will be a sensible way to generally decide the most liquid market. However, the proposals and proxies included do not take into account non-EU listed securities and CESR should be encouraged to develop a proxy which could be used for such securities.
85	115	Annex A Trading Capacity and Q17.A	CESR proposes that, as a minimum content of a transaction report, the trading capacity (whether a firm is "acting on an own account basis or is acting as an agent on behalf of a customer/client") should be included. This contrasts slightly with question 17.4 which reads "How would you define the field 'agent/propriety'?" (Presumably this means proprietary). Firms would be able to distinguish between the capacity in which they act (i.e. agent or principal as suggested in Annex A), but distinguishing between the reason for the transaction (i.e. client or proprietary as suggested by question 17.4) makes no sense. That is because there is a gap between agent and proprietary transactions (being commonly called principal transactions). It would not be clear where principal transactions would be covered by this definition. If there was to be an attempt to distinguish proprietary transactions from non-proprietary transactions, this would be undermined by the fact that it is very difficult to distinguish between the occasions when firms are acting on a proprietary and a non-proprietary basis. See in particular our comments relating to this distinction in at point number 22 above.