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CESR LEVEL 2 Directive on Markets in Financial Instruments
Response to Consultation Paper

I. INTRODUCTION

We welcome the opportunity to provide comments to CESR's consultation paper on the first mandate from the European Commission on implementing measures on the Directive on Markets in Financial Instruments (MIFID). As a financial institution with operations via branches or subsidiaries in almost all EU Member States this Directive and its future implementing measures are of utmost importance.

We have carefully studied the proposed implementing measures and have tried to answer to the specific questions presented by CESR taking into consideration our experience in different markets and our own compliance systems and procedures. While we can agree with many of the proposed measures we have to admit that we are overwhelmed by the detail of the paper and at the same its lack of ambition in terms of harmonisation in some areas. We would like to note that both approaches are not contradictory, as some seem to consider[1]. We provide further explanations below.

We therefore would like to propose that CESR take full consideration of the following guiding principles in the subsequent redrafting of its advice to the European Commission:

1. *Undertaking a cost-benefit analysis should be a regulatory duty not a firms' duty*

During the public hearing on this consultation paper in July the lack of a cost-benefit analysis was one of the most recurring criticisms from the audience. CESR argued that respondents should try to quantify those costs, particularly any marginal cost, in order to argue their case. Although we understand that good arguments are better justified with a good cost explanation, we would also like to note that good regulation is also better justified with a good cost-benefit explanation, which in the case of CESR's advice is lacking.

Although for the time being only the European Commission has to undertake an impact assessment for their own regulatory proposals, accompanied with an explanation about compliance with the principle of proportionality and subsidiarity, we would expect CESR to draw from its members' experience and justify its rules in terms of cost-benefit. This would be in line with the recommendations of the Expert Group on Securities[2].

Furthermore, according to the mandate of the European Commission CESR should "*pay particular attention to striking the right balance between the objective of establishing a set of harmonised conditions for the licensing and operation of investment firms and regulated markets and the need to avoid excessive intervention in respect of the management and organisation of the investment firms. 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".*

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[1] "Others favoured detailed and specific provisions conducive to real harmonisation at EU level". Annex 2, summary of responses to the call of evidence and the consultative concept paper, CESR consultation paper, page 143.

[2] "Where new rules are introduced, the underlying policymaking must be evidence-based. The new rules must bring benefit and not simply increase costs". Recommendations from the Post-FSAP Forum Group on Securities.

2. *CESR should adopt a principles-based approach relying in a more extensive way on the firms' duty of care and the firms' tailor-made compliance rules*

It seems to us that in some parts of the advice, CESR does not want to rely on the overriding principle of duty of care of investment firms towards their customers and the firms' own compliance rules and has decided instead to adopt an overprescriptive rule-based approach. This CESR's approach may entail the following risks:

- firms would be discouraged from enacting tailor-made compliance rules since the current level of detail and "one rule fits all" approach leaves little margin of manoeuvre for firms to convert principles into internal compliance rules for different scenarios. Thus, firms may simply choose to replicate the level 2 conduct of business rules into their own internal compliance book.
- this in turn may encourage a more contentious environment and possibly less protection for customers. In the case of a dispute, a rule-based framework would generally tend to benefit firms, which could prove they have complied with all the details established in the rule-book and should thus not be held accountable.
- firms would pass onto customers the costs of complying with some of the rules, for example, mailing costs of providing the customer with the specific information required in CESR's advice, could entail up to €1,000,000 annually for a retail customer base of 800,000.

An example may illustrate better the need for a principles-based approach:

Situation

A client decides to call its account manager to buy shares in the stock market. According to CESR's advice the conversation should be taped since this is a telephone order. The account manager is obliged to tell the client that the conversation will be taped. The account manager should also inform the client, because of privacy considerations, that the tape would be retained for one year (as proposed by CESR). The client understands that the conversation is taped to sort out any transaction disputes but the client objects to having the personal data retained for one year. The account manager explains that this is a regulatory requirement. The client further argues that what is being taped is his voice and that he has a right to object from this data being retained. The account manager explains that he cannot do anything about it and encourages the client to give him the securities' order. The client does not wish any longer to place an order unless the question of retention of his data is resolved. The account manager is unable to provide an immediate solution and thus encourages the client to write a letter explaining his concerns.

What has happened?

The client wanted to conclude a transaction and the account manager wanted to serve his clients' needs. None of these objectives have been achieved as a result of a rule that does not seem to fit a specific scenario. Not only the transaction was not concluded but also the firm now has to deal with a complaint from a client, which is not justified on a wrong-doing from the firm.

What should have happened?

In a principles-based approach, the firm would retain the data as long as it is necessary to satisfy a specific and justifiable objective such as enabling the client to contest any problem with the transaction. The account manager could tell the client that the conversation is taped and the data will be retained for one month so as to enable the client to contest the transaction. The client would ask why the data is retained for one month. The account manager would have explained that under the firms' policies the client has one month after the confirmation note is received to contest the transaction in case there has been a mistake from the part of the firm. The client understands the purpose of retaining the data and is satisfied. The transaction is concluded. Both parties are satisfied.

3. *Maximum Harmonisation should be the general rule and not the exception*

The Financial Markets and Instruments Directive is in general a maximum harmonisation Directive thus not allowing Member States to impose further measures beyond what is agreed in the Directive and its implementing measures. We believe that this is one of the benefits of the revision of the 1993 Investment Services Directive so as to facilitate a real single passport for investment firms. We are therefore surprised that some parts of CESR advice seem to ignore a maximum harmonisation approach. This is particularly the case in relation to transaction reporting.

We would therefore like to encourage CESR to take into account the objective of maximum harmonisation when redrafting its advice. As mentioned above we believe that a maximum harmonisation objective is not incompatible with a less overprescriptive approach. In our view maximum harmonisation is not synonymous to putting together all the current 25 national rules so that every single country is satisfied.

We believe that those 25 national rules can be listed and compared and a principle can be extracted, taking into consideration the objective of the Directive to be achieved, the cost for firms of complying with that objective and the benefit for customers.

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II. EXPERT GROUP ON INTERMEDIARIES

1. COMPLIANCE AND PERSONAL TRANSACTIONS – BOX 1

1.1 General Provision - Paragraphs 1 a) and b)

We disagree with CESR's advice in relation to giving the possibility to competent authorities to decide that the supervisory function is as responsible as senior management for the compliance function and deciding that the supervisory function should receive the same reports on compliance as senior management.

Firstly, as we have outlined above, we are supportive of a maximum harmonisation approach therefore avoiding differences at national level as far as possible. The maximum harmonisation approach should also be seen in the context of avoiding establishing national discretions for competent authorities.

Secondly, there seems to be a contradiction between CESR's intentions as reflected in the explanatory statement on Box 1 and the contents of the draft advice in paragraph 1. CESR argues in its explanatory statement that the draft advice is intended to be sufficiently flexible to adapt to the different organisational structures within investment firms (e.g. companies having a two-tier board structure or an unitary board structure). CESR further argues that the application of the different national provisions should be left to the Member States in order to reflect the possible differences per Member State and per firm in relation to the structure and functions of such supervisory function. We agree with this statement particularly because this is a matter of corporate governance, which goes beyond not only the mandate of the European Commission but also the scope of the MIFID.

However, paragraph 1 is allowing competent authorities (e.g. regulators) to require that investment firms ensure that the supervisory function is as responsible as senior management for compliance and receives exactly the same reports as senior management[3]. If the intention of CESR as reflected in the explanatory statement is to leave this to the national level, then there is no need to include this paragraph.

Thirdly, and besides the argument that this is a question of corporate governance, paragraph 1 is indeed seemingly disregarding the fundamental difference between the role (in two-tier Board structures) of the Managing Board (day-to-day management of the company and/or direction of the business of the investment firm) and the role of the Supervisory Board (supervision of the Managing Board) [4]. The proposed text would change the role of the Supervisory Board in making it operationally (jointly) responsible for compliance, which should not be the case.

Finally, we would not disagree with the idea that in certain circumstances it would be necessary to inform the Supervisory Board about compliance issues but it should be up to senior management to decide when this necessity arises.

We thus disagree with the general discretion given to the competent authority to decide that the supervisory function should receive exactly the same reports about compliance than senior management. As stated before, such discretionary obligation fails to consider the different roles of the supervisory function and senior management, and risks to overwhelm the supervisory function with reports on issues which may not be relevant in order to perform their supervisory tasks.

We therefore believe that the entire paragraph 1 is unnecessary and should be deleted.

[3] We acknowledge that paragraph 1 states that this should be within the limits of the supervisory function's powers, which strengthens our argument about the desirability of having this paragraph.

[4] This was acknowledged by CESR in the section I "Definitions", page 7 of the draft technical advice.

If CESR insists on making a reference to the supervisory function **we recommend that the paragraph 1 is redrafted** as follows:

"*Where the advice under article 13 states that investment firms must ensure that responsibilities are placed upon senior management and that reports are made to senior management, this should be read without prejudice to national corporate governance provisions requiring or recommending a specific role for the supervisory function in relation to the compliance function".*

1.2 Policies and Procedures to ensure Compliance – Paragraphs 2 to 4 and Question 1.1

We generally agree with CESR's advice on policies and procedures to ensure compliance. However we believe that certain paragraphs would benefit from further refinements:

Paragraph 2 c)

We think that the requirement imposed on the investment firms to demonstrate an effective implementation of policies and procedures is too open-ended as well as it aims to reverse the burden of proof. Indeed, according to this provision an investment firm could be requested by every interested person, at any time and in any circumstances to provide such evidence.
We therefore believe that the rule should be redrafted as follows:

"be able to demonstrate to its home competent authority it has effectively implemented such policies and procedures, including the code of conduct referred to in paragraph 6 when requested by the home competent authority and within the powers granted to it by virtue of law".

Paragraph 2 d)

We support the obligation imposed on the investment firms in to ensure the independence of the compliance function. However, we believe that both of means presented in CESR draft advice in order to ensure the independence of the compliance function should be stated as <u>examples</u> and not as two exclusive methods to ensure independence of the compliance function. This would be <u>firstly</u> in line, with allowing different degrees of independence depending on the complexity, nature and scale of the investment firm's business (thus we favour the **second option in relation to question 1.1 as well as the positive response to question 1.2**) and <u>secondly</u>, with the **second option in relation to conflicts of interests and independence in paragraph 8** (page 44).

We therefore propose the end of the paragraph 2 d) to be redrafted as follows:

"The following are examples of mechanisms to ensure the independence of the compliance function".

However, if CESR do not wish to redraft the paragraph 2 d) as proposed, they should at least introduce some changes in paragraphs 2 d i) and 2 d ii):

Paragraph 2 d i)

This paragraph should not prohibit the individuals in the compliance function to be involved in the performance of services they monitor. Indeed, from the very realistic point of view, there may be situations where such an involvement can not be evitated. Thus, even if in our point of view such a prohibition is necessary, this should be less rigid.
Therefore we propose to add the following wording at the end of the paragraph 2 d i):

"except where this is necessary to fulfil appropriately their functions".

Paragraph 2 d ii)
CESR's requirement providing that the budget and remuneration of the compliance function must be linked to its own objectives and not to the financial performance of the business lines of the investment firm should be redrafted in order to adopt a more realistic approach:

- the independence of the compliance function is not necessarily threatened when the remuneration of the compliance function depends on the financial performance of the investment firms` business
- in order to attract highly knowledgable compliance officers, it may be necessary for investment firms to link their remuneration to the bonus pool of a particular business line.

Therefore we suggest to add at the end of the paragraph 2 d ii) the following wording:

"unless the investment firm can reasonably ascertain that no risk exists for the independence of the compliance function."

Paragraph 3 e)

The requirement imposed on the investment firms to promptly notify the competent authority about the appointment and ceasing of the head of the compliance function is too excessive for the Level 2 measures and **therefore should be deleted.**

1.3 Complaints Handling – paragraph 5

General Comment

In our opinion, this section should relate just to retail clients. As we state throughout our advice, different types of clients require different levels of protection and a highly prescribed and standardised level of protection is neither appropriate nor desirable for professional clients.

Paragraph 5 a ii)

As to the obligation to have procedures for handling complaints including paying compensation, given that certain jurisdictions prohibit the reimbursement (considered as bribes) for disputed transactions in case of errors, **we think that it will be appropriate to add** to the current paragraph 5 a ii):

"*and where permitted by local law*".

Paragraphs 5 c) and b)

We think that requiring firms to regularly verify whether complaints are effectively processed and to keep a record of this are unnecessary documentation burdens. The obligation should be on firms to handle complaints in accordance with their internal procedures and therefore we see no need to require specific verification beyond the obligation to demonstrate general compliance.
For that reason we propose to delete these two paragraphs.

1.4 Personal Transactions – paragraphs 7 and 8

We disagree with CESR's choice of excluding transactions in instruments issued by national governments from the definition and rules on personal transactions. We see no reason for this exclusion since conflicts of interests can also arise in these instruments. Furthermore, this exclusion may also conflict with the basic EU competition rules applying to the same extent to the private and public persons when engaged in business activities and not in exercising sovereign powers.

Paragraph 7 a)

We agree with the general principle stating that the investment firm must have mechanisms to prevent its relevant persons entering into personal transactions where they are likely to conflict with the investment firm's duties under the Directive. However we think that the paragraphs 7 b) to 7 e ii) should be listed as <u>examples</u> of different mechanisms to be used in complying with the principle. This would be more in line with CESR's statement in the explanatory text about the need to ensure an appropriate calibration.
Thus, the following sentence should be added to the current paragraph 7a):

"The following are examples of mechanisms to prevent the relevant persons from entering into a personal transaction when it is likely to conflict with the investment firm's duties under the Directive"

Paragraph 7 b)

We do not agree with the requirement upon to which investment firms must make a record of any notifications, authorisations of the execution of any personal transaction.
Given the high quantity of orders investment firms must deal with each day, it would be difficult and too onerous to comply with this rule.
Therefore we think that the paragraph 7 b) should be deleted.

1.5 Outsourcing – paragraph 9 and question 1.3

We support a less prescriptive approach (option 3 in CESR explanatory statement) to outsourcing of investment related services since the firm remains liable vis-à-vis the client. Therefore, in relation to the specific question 1.3 **we would prefer that paragraph 9.b) is deleted** and thus reliance is placed on the status and responsibilities of the outsourcing investment firm.

2. INTERNAL SYSTEMS, RESOURCES AND PROCEDURES – BOX 2

1.1 Accounting policies and procedures – paragraph 4

We would like to insist on the fact that investment firms must already comply with a number of accounting standards rules. Therefore, CESR's requirement to adopt accounting policies which reflect *a "complete, true, verifiable and timely view of its financial position"* is not necessary in MIFID Level 2.
Therefore, we propose to delete from *"which…"* **to** *"…financial position".*

We also think that it is not necessary to list these procedures as the principle is adequately expressed by the first sentence of the paragraph 4. If they must be listed, they should be given as **examples of procedures a firm can use in order to comply with the principle.**

1.2 Risk management policy – paragraph 5

Paragraph 5 a)

The requirement imposed on the investment firms to manage and control all the risks inherent to the investment firm's activities is not realistic. As potential risks firm must deal with are too numerous in practice, it would be too high a standard to require firms to control all of them.
Therefore, we suggest to delete the word *"all"* **and to add the word** *"relevant"* **to the paragraph 5 a).**

1.3 Information processing system - paragraph 6

Paragraph 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 in order to achieve the integrity and confidentiality of information.
Therefore we would delete the word *"guarantee"* **and add** *"take reasonable steps to…"* **wording after** *"establish".*

Paragraph 6 c)

Given that the first sentence already implies that the objective is to ensure continuous functioning in the event of an uplanned severe business interruption, the level of detail in the second sentence is inappropriate for Level 2 measures.
Therefore we propose to delete the second sentence of this paragraph.

1.4 Internal control - paragraph 7

We do not agree with the first sentence of the paragraph providing that the investment firm must regularly verify whether it can rely on an adequate internal control. This requirement is too burdensome and overprescriptive. "*Verify*" and "*rely*" are both subjective words and do not provide legal certainty.
Therefore it would be sufficient to say:

"*The investment firm must ensure an adequate internal control*".

1.5 Additional requirements - paragraph 8

We think that the points 1-3 provide unnecessary detail and that the paragraph introducing these points is sufficient. **Therefore we propose to delete points 1 to 3.**

3. OPERATIONAL RISK IN CASE OF OUTSOURCING – BOX 3

1.1 Scope – paragraphs 1 to 5

Paragraphs 1 and 2

We support the definition and the scope of application of the outsourcing rules delimited by CESR's draft advice. Indeed, we welcome the amplification and clarification of materiality criteria for the definition of the outsourcing arrangements covered by the draft advice referring to operational functions, where a weakness or failure in the performance of the outsourced functions would cast serious doubt upon the investment firm's reputation, financial position etc.

Paragraph 3

Nevertheless, we think that this paragraph should focus more on the process of outsourcing instead of restricting the outsourcing possibilities with a prescriptive list of the outsourcing arrangements expected to be included in the scope of application of CESR's rules. Therefore, we propose two different solutions:

- Put the outsourcing arrangements covered by CESR's draft advice <u>as examples</u> or as part of <u>guidance</u>, not as the only and exclusive outsourcing arrangements that can be subject to the outsourcing rules. OR:

- **Delete all the paragraph 3**, given that the materiality test in the paragraph 2 referring to the weakness or failure in the performance of the outsourced operational functions constitutes already an efficient method to determine the outsourcing arrangements, to which CESR rules apply.

Paragraph 4

We also welcome CESR's distinction between outsourcing to a third party and intra-group (or in-house) as they carry different risk profile. Given that, the operational risks attached to outsourcing to a group company are minimised, the regulatory demands should be lower for intra-group or in-house outsourcing. However, we can not accept CESR's formulation, that in case of intra-group outsourcing, the extent of application of the obligations of the investment *firm "should take this situation into account accordingly"*, without providing substantive precision necessary to estimate to what extent the investment firm is allowed to not to take into account CESR's provisions on outsourcing with respect to intra-group outsourcing.

It would be helpful, if guidance is given on what obligations or conditions the investment firm can be dispensed with in paragraph 9. One would expect that 9 d) iv, 9 d) v, 9 d) viii, 9 e, would have very little relevance as the outsourcer is expected to have full control over the service provider affiliate, being in the same group.

Paragraph 5

Concerning the outsourcing arrangements excluded from the scope of CESR's advice, we think that, a prescriptive list without any possibility for the investment firms to exclude another outsourcing arrangements from the scope of CESR's draft advice risk to block the investments firms' outsourcing activities:

- if there is no risk that a weakness in the performance of the outsourced functions would cast serious doubt upon the investment firm's reputation, position etc., the investment firm will have no need to comply with CESR's rules on outsourcing.
- if CESR applies the materiality test set out in paragraph 2 in order to determine which outsourcing arrangements are subject to the outsourcing rules, then the same materiality test should be used to determine which outsourcing arrangements are excluded from the scope of application of the outsourcing rules.

Therefore we propose the paragraph 5 to be stated as follows:

"The following are examples of outsourcing arrangements deemed not to meet the conditions set out in paragraph 2 and therefore are excluded from the scope of application of this advice. However, it is recommended that as a matter of best practice, an investment firm applies a good standard of systems and control on the outsourced activities".

1.2 Principles – paragraphs 6 to 9

Paragraph 6

We can not agree with CESR's provision saying that, the outsourcing arrangements cannot result in the delegation of senior management's responsibility. We think that CESR should make a clear distinction between "accountability" and "responsibility" in outsourcing. Indeed an institution can make a third party responsible for service delivery whilst retaining accountability within the organisation. An institution can never outsource accountability, but instead may outsource responsibility.
Therefore we propose to replace the word **"responsibility"** in the paragraph 6 by the word **"accountability"**.

In addition, we do not accept the expression *"…render the investment firm a substantially empty box".* We do not envisage a situation where all activities in the authorised institution are outsourced, and consequently **this line should be deleted**. If the investment firm is not undertaking regulated activities, then it would be subject to de-registration, or cease to be authorised, as it is not carrying on the activities it was authorised for.

Paragraph 7

We understand that the competent authority must be provided with all relevant information, enabling the competent authority to effectively exercise its supervision over the investment firms. However, we have concerns with regard to the obligation imposed on the investment firms to provide the competent authority with prior notification of its intention to enter into outsourcing arrangement for the following reasons:

- this goes beyond the mandate of the European Commission and is not required by article 13.5 of the MIFID. The Directive does not include any obligation for the investment firms to make this prior notification to the competent authority.
- this broad term could provide the competent authorities with too powerful and arbitrary tool, enabling the competent authority to use the requirement for prior notification as a mean to authorise or not the investment firms to enter into an outsourcing agreement.

- given that, CEBS in its consultation paper on outsourcing limited the obligation to notify only "serious problems" which are of material concern, we think that CESR when introducing such a requirement should give a more precise definition of what could be pre-notified.

Also, **we would recommend** not to include a formal notification obligation, but to indicate that:

"The competent authority expects the outsourcing institution to notify as soon as possible in an appropriate manner of decisions and developments, or of disasters, which are of material concern".

Paragraph 9 a) to g)

We think that the list of measures to be taken by the investment firm in order to comply with the paragraph 8 is too detailed and over prescriptive. However if it is to be retained, at a minimum, the following amendments should be made*:*

- The principle defined at the beginning of **paragraph 9 a)** providing that the firm must ensure that senior management defines and regularly reviews the firm's policy for outsourcing operational functions will suffice. The methods to ensure the principle are unnecessary and over prescriptive for the Level 2 implementing measures and should be left to market participants.

Therefore we propose to delete the sentence starting by *"this includes…".*

- In relation to **paragraph 9 b),** we completely share CESR's point of view that, the investment firm must ensure that the service provider has the ability and capacity to perform the outsourced functions reliably, professionally and in the best interest of the investment firm's clients. Nevertheless, it should be up to the investment firm to decide what methods and arrangements are the most adequate and efficient in order to meet the goal stated above. It is up to the investment firm to organise itself in a manner that satisfies its continuing obligations with the competent authorities, without being prescriptive. Also, instead of imposing numerous obligations on the investment firms on how to control the service provider, CESR would better provide the investment firm with sufficient authority to obtain information about outsourced activities from the service provider or from its external auditor.

Therefore, the **paragraph 9 b should be deleted** from *"To that end"* until *"the same service provider"* and **the following provision should be added**:

"Provisions for the outsourcing institution and its regulators to perform necessary audit activity must be included in the contract. Such provisions should provide the outsourcer and its regulator with sufficient authority to obtain information about outsourced activities from the service provider or from its external auditor, if deemed necessary, to carry out an examination of the external service provider."

- We do not agree with certain aspects of **paragraph 9 c):**

<u>Firstly,</u> we do not agree with the provision stating that *"the investment firm must retain the required expertise to effectively supervise the outsourced functions"*.
As a maximum requirement, the investment firms can be obliged and allowed to *"ensure that the service provider has the ability and capacity to perform the outsourced functions reliably…"*, just exactly as stated in paragraph 9 b). The supervision function is the task of the competent authority and not this of the investment firm since the 3rd parties acting as the service providers are subject to a licence attributed by the competent authority. Consequently, the term "supervise" in the paragraph 9 c) is incorrect and inadequate and should not even be replaced by "ensure" because it would become a copy of the beginning of the paragraph 9b).
That is why, in our opinion the paragraph 9 c) should be deleted.

<u>Secondly,</u> the last part of the paragraph 9 c) stating *that "the senior management should take appropriate action if cause for concerns arise"* is the repetition of the paragraph 9 a) stating that *"the outsourcing investment firm must ensure that senior management defines and regularly reviews the investment firm's policy for outsourcing operational functions"*.

Therefore, we hope that all of the paragraph 9 c) will be deleted, as it is inadequate and redundant with paragraphs 9 a) and 9 b).

- We fully agree with the need to allocate in a written agreement the parties' respective responsibilities, as stated in **paragraph 9 d)**. However we think that, the content of that agreement should be left to the parties, given that:

<u>Firstly,</u> on the basis of the principle of contractual liberty, it is up to the parties in an outsourcing agreement and not up to CESR to decide what their agreement should and should not include.
<u>Secondly,</u> the parties in an outsourcing agreement are all professional and therefore we see no need for any protection measures.

We therefore propose to delete the paragraph 9 from i) to ix) and to leave only the following:

"The parties' respective responsibilities in an outsourcing agreement should be clearly allocated in a written agreement".

- **As to paragraph 9 g)** there should not exist an obligation imposed on the investment firms to ensure that the terms of the contract with the service provider require it to deal in an open and cooperative way with the competent authorities.

Firstly, an outsourcing agreement between the investment firm and the service provider should not regulate the relationship between the competent authority and the service provider. Thus, this clause is unnecessary and excessive. From the very practical point of view this would mean that the obligation is imposed on the investment firms to control the way the 3rd party cooperates with the competent authority. As a result, the investment firm would have obligation to protect the competent authority's interests, which would constitute an absurd situation.

Secondly, we think that this requirement goes beyond the Level 1 text which does not aim to impose on the investment firms any additional charge to ensure preservation of the interests of the competent authority via an agreement between the investment firm and the service provider. The general obligation the investment firms must comply with is to ensure that interests of their clients are not damaged by outsourcing of some of its functions and not the interests of the competent authorities.
Therefore, we would like to stress the need for deleting all the paragraph 9 g).

4. RECORD-KEEPING – BOX 4

1.1 General Comment – Data Protection considerations

CESR states that it is aware of the two EU Data Protection Directives and that there is no intention to create record-keeping requirements that conflict with existing EU law. However, it is our interpretation that the proposed general record keeping obligations will indeed conflict with the EU Data Protection Directives that require a purpose on processing, a proportionality test and a deletion of data once those data do not serve any longer to the objectives of the undertaken transaction[5], unless there is express consent from the data subject or there is a public interest that justifies keeping those data. Thus, we think that the proposed advice in relation to time retention should be modulated depending on the purposes for the retention of those data.

1.2 Retention of records of all services and transactions for 5 years - Paragraph 2 a)

The general requirement to keep records of all services and transactions for 5 years is inappropriate. It would be impractical and impossible for certain records to be kept for more than 6 months or 1 year. (See our comments on the minimum list of records to be maintained).
Therefore we would suggest to add to the current paragraph 2 a) the wording:

“where appropriate”

1.3 Retention of tapes of telephone orders for 1 year – paragraph 2 b)

During the CESR public hearing in July the audience generally complaint about the cost of keeping tapes for such a long period. CESR maintained that for arguments to be convincing in this respect, market participants should provide evidence of the marginal cost of keeping those tapes for longer. Although we agree with the general statements on costs our arguments against such a long period are based on data protection considerations.

We believe that the general requirement to keep telephone orders on a voice recording system for a year infringes the EU 1995 Data Protection Directive general principles and in particular article 6 since CESR does not justify the purposes of retaining such data.

We therefore believe that depending on the objective of the taping different retention periods can be envisaged, thus taking into consideration article 6 of the Data Protection Directive:

a) **Resolve transaction disputes with clients.**
In this case, we would like to point out that CESR’s advice[6] is to send a contract note and confirmation no later than the first business day following the execution of an order. If the transaction is disputed, it is likely that the client will complain promptly upon receipt of the confirmation. Keeping the telephone record of that order for 1 year does not seem to serve a specific purpose and thus infringes the EU Data Protection Directive. We acknowledge however that the dispute may not end with a settlement with the client and the regulator and court may need to intervene, in which case the tape may be used as evidence. Thus, we propose that the client may request (and thus give consent) the tape to be kept for a longer period.

b) **Resolve transaction disputes with other market counterparties or operational problems that may arise prior to settlement or after settlement.**
Clearly, in this case the parties involved are not going to wait for 1 year to complain about a specific error. This would be generally done within the same day or the following business day after the transaction is conducted. Again, as in the previous case, those tapes should be able to be kept until the dispute is resolved.

[5] See in particular Article 6 of the 1995 Data Protection Directive: “personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed”.

[6] Box 10, reporting to clients, paragraph 2.

c) Ascertain whether there has been market abuse
In this case we believe that only recent tapes will be useful, otherwise it will be impossible to reconstruct for example any investigation on market abuse.

Therefore, **we propose that, as a minimum, the paragraph b) is redrafted as follows**:

> *"keep records of telephone orders on a voice recording system as follows:*
> *i) in relation to transactions executed with clients for a period of 6 months after the confirmation the client has received notice. In the event of a complaint from the client in relation to the specific transaction, the client may request the firm to keep the relevant tape until the dispute has been resolved.*
> *ii) in relation to transactions executed on own account or with eligible counterparties for a period of 6 months after the transaction has been settled. In the event of potential or actual litigation, the parties involved may request that the relevant tapes be kept until the dispute has been resolved.*
> *iii) where compliance considers that a specific transaction may give rise to doubts as to market abuse conduct the relevant tapes can be kept for longer than 6 months until the necessary internal or external investigation has been resolved."*

However, **our preferred solution**, in line with our general comments about the need for a principle-based approach would be to redraft the paragraph b) as follows:

> *"b) keep records of telephone orders on a voice recording system for no longer than necessary in order to resolve any transaction disputes with clients or eligible counterparties or to resolve any internal or external investigations on market abuse conduct"*

Paragraphs 2 c) and d)

The requirements imposed on the investment firms are not realistic to comply with for the reason of high cost implications.
Therefore we recommend to delete these two paragraphs.

1.4 Onus of Proof – paragraph 4 and question 4.1

We disagree with the general obligation for the investment firm to be able to demonstrate that it has not acted in breach of the conduct of business rules under the Directive and thus our answer to question 4.1 is negative. It should be up to the competent authority to demonstrate that the investment firm has breached a conduct of business rule and not up to the investment firm.

CESR makes reference to article 15 to the Distance Marketing of financial services Directive as one of the arguments to justify the reversal of the burden of proof, however that provision in the Directive[7] relates to the obligations of the supplier vis -à-vis the consumer and thus it is not a general obligation as proposed by CESR in paragraph 4.

1.5 Annex – Minimum list of records to be maintained

We generally agree with the list of records to be maintained by the investment firm. However, according to the paragraph 2 a) all the records listed in the annex must be maintained by the investment firm for a period of at least 5 years. We think that records relating to trading and execution of transactions (items 5 to 12 in the annex) should not be required to be kept for more than 1 year because after this 1 year period it is simply impossible for the investment firm to reconstruct them.
Therefore we reiterate our suggestion to include *"where appropriate"* **wording in the paragraph 2 a).**

[7] "Without prejudice to article 7.3, Member States may stipulate that the burden of proof in respect of the supplier's obligations to inform the consumer and the consumer's consent to conclusion of the contract and, where appropriate, its performance, can be placed on the supplier. Any contractual term or condition providing that the burden of proof of the respect by the supplier of all or part of the obligations incumbent on him pursuant to this Directive should lie with the consumer shall be an unfair term within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts". Article 15, Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, OJL 271 of 9.10.2002.

5. SAFEGUARDING OF CLIENTS' ASSETS – BOX 5

1.1 Interpretation and scope - paragraph 1 and 2

Paragraph 1

We do not agree with the necessity requirement according to which clients have possibility to deposit their assets with a third party and authorise the investment firm to operate on their behalf the account held with such third party, only if this is necessary for the performance of the investment services provided to them.
In our opinion, this necessity requirement not only limits the investment firms` scope of operation, but above all clients` freedom to decide or not to deposit their assets with a third party, what should not be limited by such a necessity test.
Therefore we propose to delete the words following "*or other right*"*.*

1.2 Arrangements designed to protect client assets – paragraphs 3 to 6

Paragraph 5 c i)

We completely agree that an investment firm is allowed to use for its own account the financial instruments it holds on behalf of a client if the document in which the client's consent is expressed gives information on the obligations and responsibilities of the investment firm.
However we contest the requirement that the same document should also provide information to clients on the obligations and responsibilities of other clients for whose account the investment firm has been allowed to use the financial instruments. Indeed we believe it is not necessary for the firm to give information in respect of other clients since this would conflict with customer confidentiality obligations and does not add to customer protection.
Therefore we suggest redrafting the paragraph 5 c i) as follows:

"The obligations and responsibilities of the investment firm, with respect to the use of the client's financial instruments..."

1.3 Subdeposit of client assets – paragraphs 7 and 8, Question 5.1

Paragraph 8 a)

Concerning the annual review of depositories, we consider that even if this annual review of appropriateness may be necessary in case of depositories holding investments, this requirement is too burdensome if imposed on depositories holding clients` money.
In order to take into account different cases **we propose paragraph 8 a) to be redrafted as follows:**

"exercises all due skill, care and diligence in the selection, appointment, review of the depository as often as reasonable in the relevant market, including review ..."

Paragraph 8 a i)

CESR acknowledged in its explanatory statement that the draft technical advice might be affected by any future action of the Commission following its Communication on Clearing and Settlement.
Thus, we think that:

- the CESR reference to a "regulated institution" in paragraph 8 a i) is premature as far as the Directive on Clearing and Settlement is not adopted.
- the risk exists that the reference to a "regulated institution" is not sufficient to cover all types of depositories in the current European landscape. Therefore, in order to not to limit the choice of depositories to those that would be authorised (and thus regulated) as credit institutions or investment firms, we would prefer that CESR does not make any exclusion depending on whether the depository is regulated.

Thus we propose to delete simply the sentences in brackets in paragraph 8 a i). If this is not acceptable, as a minimum option 1 should be supported.

Question 5.1

Consequently, our answer is negative. In no circumstances, should the investment firm be required to subdeposit its clients` financial instruments only with regulated depositories. Moreover, given the due diligence steps that an investment firm has to undertake when selecting a depository, we do not consider it necessary or desirable to prevent an unregulated institution from being appointed where the circumstances make this appropriate. Therefore we would prefer that CESR doesn't make any exclusion depending on whether the depositary is regulated.

1.4 Pooling of financial instruments held by an investment firm for more than one client - paragraph 9 and question 5.2

Paragrapgh 9 and question 5.2

In relation to appropriate systems ensuring that only financial instruments belonging to clients who have given their consent are pooled, we think that this is not necessary to require consent from retail clients as pooling does not present any risk for their assets. The requirement to obtain clients' consent should only apply to professional clients for example via an agreement because of a high level risk. However we think that this is not up to the Level 2 implementing measures to prescribe systems and controls ensuring that only financial instruments belonging to clients who gave their consent are pooled.
Therefore we propose to delete all the paragraph 9.

1.5 Appropriate record keeping / clarity of ownership identification - paragraph 10

Paragraph 10

We do not see any need to require from the investment firms to be able to identify whether funds that it receives are client funds or payment for services. The investment firm should simply be able to identify all funds that it receives, whatever their source is.
Thus, we think that paragraph 10 would be clearer if it simply provided that:

"An investment firm must be able to identify client funds that it receives".

Question 5.3

In our point of view, an investment firm must be able to demonstrate which assets from each client are hold by which depository.
Therefore we support option 1 imposing on the investment firms the obligation to indicate in its records the depository with which the relevant client assets are held.

1.6 Clarity of responsibilities – question 5.4

We would rather choose the second option. However, we think that further changes need to be incorporated:

- if the client's assets are held by a depository on behalf of the investment firm, the firm is totally responsible for the assets and the fact that it is linked directly or indirectly to the depository is not relevant.
- the investment firm should not be responsible if client himself assigned the investment firm to call in a specified depository. This should be made more explicit by CESR in the BOX 5, especially that this is in line with their own interpretation of the term *"assets held by an investment firm"* in the section I "Definitions", page 8 excluding from the scope of the CESR advice clients' assets held by a third party appointed by the client himself.

Therefore we choose second option redrafted as follows:

"The investment firm will (i) in any event be wholly liable for any looses the client suffers where the client's assets are held by a depository on behalf of the investment firm and (ii) be liable in whole or in part, according to the circumstances, for any such losses unless: 1) the investment firm demonstrates that it has exercised all due skill, care and diligence in the selection and periodic review of the depository. 2) the investment firm demonstrates that client assigned the investment firm to call in a specified depository."

6. CONFLICTS OF INTEREST – BOX 6

1.1 Conflicts Policy – paragraphs 4 to 8

Paragraph 4

The principle according to which investment firms must have a written policy to manage conflicts of interest is sufficiently expressed in the first sentence. The second sentence is too detailed and overprescriptive for Level 2 measures.
Therefore, the second sentence in the paragraph 4 should be deleted.

Paragraph 5

The points a) to c) of this provision should be deferred to Level 3 as this level of detail is inappropriate here.

Paragraph 8

We are fully supportive of ensuring an appropriate degree of independence. However, as some CESR members acknowledge in the explanatory statement to the advice, we believe that listing the particular methods of achieving independence may not always the best or most appropriate solution for the prevention and management of conflicts of interest. There may be situations where it is more appropriate for firms to implement a combination of other measures that will prevent conflicts in a more effective fashion depending on the firm's structure and activities.

Thus, **we support** the alternative of relying on the general obligation in the article 13.3 of the MIFID requiring an investment firm to take all reasonable steps to prevent conflicts of interest and to treat the measures listed in paragraph 8 as examples of the arrangements that firms may use to comply with the general obligation **(thus we choose second option in the paragraph 8)**. This would also ensure coherence with other provisions of CESR's advice, namely the second option in question 1.1[8] and the affirmative answer to question 1.2[9].

Paragraph 8 a)

We would prefer that CESR's advice acknowledges that "*information barriers*" should be put in place at the discretion of firms to the areas of business between divisions where conflicts may arise, rather than to all the activities.
In order to make the paragraph 8 a) less rigid and more realistic we propose to redraft it as follows:

"Establishing information barriers between activities where the investment firm has reasonable doubts that conflicts of interest may arise".

Paragraph 8 c)

It is not appropriate to prescribe internal remuneration structures. Furthermore, this proposed requirement appears to imply that employees cannot be paid to reflect the success of the firm, which contradicts the basic economics of investment banking employment. Firms' bonus pool is a result of everyone's efforts and there should be no regulatory intervention in its dispersal.

8 " This degree of independence should only be required where this is appropriate and proportionate in view of the complexity of the investment firm's business and other relevant factors, including the nature and scale of the investment firm's business".

9 " Deferred implementation requirements for independence may be based on the nature and scale of the business of the investment firm".

This objective would be better served by the following clause:**

"The firm's remuneration policy should be aligned with its policies on the independence of analysts and the management of conflicts of interest."

Question 6.1

We reiterate our preference for principles over prescription. Further examples of methods for managing conflicts of interest are unnecessary.

Question 6.2

We consequently prefer option providing that the list of measures for managing conflicts of interest should be stated as examples and thus oppose the option b. Any detail of this sort should be no more than guidance and the second option would therefore be excessively onerous and impracticable.

1.3 Inducements – paragraphs 9 to 11

Paragraph 9

We fully agree with the affirmation in the explanatory statement that acceptance and provision of inducements by the investment firm is a particular area of concern in relation to conflicts of interests. We thus support CESR's advice and believe that this principle-based approach is a more efficient method to address this issue rather than providing a full list of acceptable practices.

Paragraph 11

Although we acknowledge the importance for clients to receive information on inducements, we think that in practice the only clients that may be interested in this information are those who receive, offer or have the intention to offer inducements to the firm's employees. Therefore, we see no reason from a customer's protection point of view for an investment firm to inform the client in writing at least once a year of the relevant details of such inducements nor to inform clients or potential clients of the firm's policy on inducements before the commencement of the provision of services. Furthermore, CESR already acknowledged in its consultation paper in July 2002 on conduct of business rules that disclosure must be made when inducements *"are received"* and *"to the customer upon request"*[10].

We therefore propose to redraft paragraph 11 as follows:

"Where an investment firm receives or gives inducements the disclosure of such inducements must be made to the customer upon request".

And to delete paragraphs 11a) and 11b) as further details are no more necessary.

Paragraph 6, page 3.

1.4 Disclosure – paragraphs 12 to 14

Paragraph 12

We disagree with the general obligation to disclose to clients the conflicts of interest policy and particularly to do so before the commencement of the provision of services. These obligations are not enshrined in the MIFID and thus we see no reason why CESR should impose them in a level 2 implementing measure. Indeed, article 18.2 specifically states that disclosure of conflicts and sources of conflicts should only take place when organisational arrangements are not able to prevent damage to clients. Although CESR's advice only refers to the *"policy"* we believe that the spirit of the MIFID under this article is that disclosure is not necessary if organisational arrangements (e.g. Chinese Walls) can work efficiently. We could support however the possibility to provide to clients in general terms the firms*"conflicts of interest"* policy upon request.

Paragraph 14 b)

CESR is going beyond what is required by the Commission's mandate and what is stated in the MIFID by requiring the client's consent and written disclosure in relation to article 18.2. **Therefore we propose that this requirement is deleted.**

We would also like to draw attention to the fact that IOSCO[11] acknowledged that disclosures of conflicts of interests may be inadequate if they are difficult to understand or provided in areas of a report likely to be overlooked by readers. Furthermore IOSCO disclosure principle relates in any case only to sell-side securities analyst conflicts of interest and thus does not cover all types of investment firms' activities. Such disclosure obligations are already regulated under the implementing measures of the Market Abuse Directive and should thus not be regulated under the MIFID.

We therefore propose the following:

- **redraft the paragraph 12 as follows**: "*An investment firm should disclose to its clients in general terms its conflicts policy upon request*"; deleting the rest of paragraph 12
- **delete the paragraph 13** since it is irrelevant if paragraph 12 is redrafted
- **delete the paragraph 14** since it goes beyond what is required in article 18.2 of the MIFID

1.5 Investment Research – paragraphs 15 to 19

We agree with CESR that while providing investment research conflicts of interest risks are more accentuated than in other investment firms' activities. However, we disagree with CESR on the need to complement with their advice what is already required under the Market Abuse Directive and its implementing measures[12]. Furthermore, we see no indication in a direct or indirect fashion in articles 13.3 or 18 nor in the Commission's mandate that would enable CESR to provide advice on conflicts of interest arising on investment research.

We therefore believe that the whole section V should be deleted.

If, despite our interpretation, the Commission believes that CESR can provide advice in this area, we have the following detailed comments:

- the second option in the paragraph 16.f i) is preferable provided that (a) to (f) are to be considered a list of examples rather than requirements.

However we must note that **paragraph 16 f (v)** repeats paragraph 16 e). **This would be sufficient to require that:**

"the investment firm's relevant persons with a material interest in the subject matter of investment research must comply with the firm's conflicts of interest policy".

[11] IOSCO Statement of Principles for addressing sell-side securities analyst conflicts of interest", principle 6.

[12] Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation, OJL 96 of 12.4.2003 and Directive 2003/125/EC of 22 December 2003 on the fair presentation of investment recommendations and the disclosure of conflicts of interests, OJL 339 of 24.12.2003

- in relation to **the question 6.3 a) and b)** we think that information barriers with other divisions other than corporate finance may be appropriate but we would prefer that CESR advice does not list which other divisions should be separated and leaves this up to the investment firm to decide depending on its own internal structures and organisational arrangements;
- in relation to **the paragraph 17** we would prefer **option 1** since it is more flexible than option 2 and still addresses the need for fair information to the investors in relation to the investment research.

However certain amendments need to be added to other paragraphs within the option 1:

- the requirement of the paragraph 18 is impracticably onerous and excessive **we propose to delete this paragraph.**
- the terms "a*ssiduous efforts*" in the paragraph 17 and "*comprehensively demonstrate*" in the paragraph 19 are unacceptably subjective terms and would impose too high a standard.

Thus we propose to delete the words *"assiduous"* **and** *"comprehensively".*

7. FAIR, CLEAR AND NOT MISLEADING INFORMATION – BOX 7

1.1 General comments - definition of a marketing communication

As explained in the explanatory statement (page 49), the definition of a marketing communication does not apply to communications directed to one person or group of persons acting jointly. **However we think that two additional exceptions should be added** in order to accomplish a reasonable and workable set of rules and to keep up with the meaning of the Directive:

- brief communications on account statements or on the ATM screen in order to attract attention to a certain service or product, followed by a contact point. In fact, additional information is undesirable for all parties in those cases and makes the medium useless.

- the presence of merely company names, logo's, contact points or a reference to a certain product

We also think that the present drafting of the definition includes many communications of a firm that are not regarded by the public as marketing at all. This will therefore cause a contradiction with the Directive, which states that: "*marketing communications shall be clearly identifiable as such".* In fact, this rule will have no meaning anymore if the definition is stretched towards any manifestation of name, logo and/or product.
Therefore this definition should not apply to communications in which no specific product at all is mentioned yet. It seems to be ignored that a basic communication regarding a certain investment service (e.g. opening a securities account), is aimed to attract attention from those who might be interested in investing. The communication will guide the interested person to the right address or person. At that time, the actual product information the client needs is still to be given. In our view, no value is added by adding some standard messages to the advertisement.

Moreover, one of the most basic rules of communication is never to supply too much information at one shot. The public will firstly not be prepared to read the information and secondly will not take enough notice to understand it and will immediately forget the information, since it is too much.
A client must be well protected but he is not helped by additional texts in commercial advertising. In our view, a client should be well informed at the time that he is capable of comprehending all relevant aspects of the product. In many cases, that will be at the time that he has inquired after the product. Optimal client protection is reached by giving a well founded advice and, if no advice is requested, complete information to interested investors including a clear indication of the risks involved. Additional rules about obligatory phrases, mentioning authorities and warnings about investments in general, are not in the benefit of the client. The more they are present (in irrelevant stages) the more they will be neglected by the public.

As a result, banks will not advertise on products if the effect of such expensive communication is clients being annoyed by additional texts that they will regard as disclaimers. A ban on compact communications could therefore end up in no communications at all and, as a further result, less acquaintance with investing and thus fewer contracts to be negotiated within the EU.

1.2 General obligations - paragraphs 2 to 7

Paragraph 3

We think that the paragraphs 3 a), 3 b), 3c), 3 d) are overly prescriptive elaborations of the principle set out in the paragraph 2 and that the paragraph 3 a) on the basis of which the investment firm must ensure that communication is likely to be understood by the average member of the group concerned by the communication. Hence this is a very impractical standard.
Therefore we propose to delete the entire paragraph 3.

Paragraph 5

We think that the stretched definition of the content of a marketing communication in leads to irrational situations. Indeed every time a firm wants to sponsor an event or to present its name somewhere, it should tell about its registration and its contact details, which would be a rule without any reason. Moreover, this rule does not protect any client interest.

In order to palliate this failure we propose the paragraph 9 to be stated as follows:

"*paragraphs 8 and 5 do not apply to…".*

Paragraph 7

We agree with the principle according to which the competent authority may require an investment firm to furnish evidence as to the accuracy of factual claims in any marketing communication. However, we must disagree with the possibility granted to the competent authority to consider factual claims in any marketing communications as inaccurate for the only reason that the evidence was not furnished by the investment firm or is deemed insufficient by the competent authority. The burden of proof implied here is unacceptable and this is too high a standard:

- Firstly, the only ground enabling the competent authority to consider the factual claims in any marketing communication as inaccurate is that the factual claims are **effectively inaccurate**, and not that the proof of the accuracy was not provided;
- Secondly, if the competent authority has doubts as to the accuracy of the factual claims in any marketing communication of the investment firm, it should be up to the competent authority to make such a proof before considering the factual claims as inaccurate, and not up to the investment firm to make this proof in order to avoid the risk that the claims are considered as inaccurate if the proof is not provided. Once the competent authority provides such a proof of inaccuracy, then it will be up to the investment firm to prove the accuracy of the factual claims.

1.3 Content of specific and direct offer retail marketing communications – Paragraphs 8 to 10

We generally agree with these paragraphs. However, in their factual advertisements, firms will often not just publish a fee or the name of the product, but also a short explanation or a few words to attract attention, such as 'all your investments in one view', 'no transaction fees this month', 'best performing fund since 10 years', 'good news for you'.
As this case is not included in the paragraph 9, **we propose to add the following point i) at the and of the paragraph 9:**

"A few words or a sentence in order to attract clients' attention".

1.4 Specific obligations – paragraphs 11 to 16

Paragraph 11

We believe that the principle saying that information provided to clients must not state the guarantee of the performance of the financial instruments if the latter is not legally enforceable, needs further precisions. Indeed, under most law systems, private law ensures that a given guarantee may be regarded as an enforceable guarantee. Otherwise it is not called "guarantee".
Therefore, this requirement being over prescriptive, we propose to delete it.

Paragraph 13

We do not agree with the prohibition to use simulated historic returns in information provided to a retail client or potential retail clients. We think that firms should be able to use historic returns if those are certified by an auditor and the firm clearly informs the client that the information constitutes a simulated historic return.

Therefore we propose to redraft the paragraph 13 as follows:

" An investment firm may use simulated historic returns in information provided to a retail client or potential retail client, only if simulated historic returns are certified by an auditor and if the client is clearly made aware of the fact that the historic returns are simulated".

Paragraph 14 b ii)

We would also like to contest the reference period related to past performance of a financial instrument and/or investment service must not be less than one year. Hence it means that it is prohibited to refer to the past 10 months even if the fund has existed for only 10 months.
Thus we will appreciate if the paragraph 14 b ii) only states the following:

"The reference period must be stated"

and the rest of the sentence is deleted.

Paragraph 14 c ii)

We do not agree with the obligation that the information provided by an investment firm to a retail client or potential retail client on forecasted future returns must contain an statement that such forecasts are based on objective and realistic assumptions of investment returns. Indeed, the objective and realistic character of such assumptions is very difficult and almost impossible to measure.
We therefore propose two alternative solutions:

- **to redraft the paragraph 14 c ii) as follows:**

" *it must be clearly indicated that the investment firm took all reasonable steps to make such forecasts as objective and realistic as possible*", or:

- **delete the paragraph 14 c ii)** because the paragraph 14 c i) is sufficient from a clients' protection point of view

8. INFORMATION TO CLIENTS – BOX 8

1.1 General Comment

We would like to note that the article 19.3 allows firms to provide information to clients in a standardised form. Although CESR acknowledged during the public hearing that they are aware of this fact and that nothing in CESR's advice prevents the firm from providing the information in a standard form, we think that CESR's advice should be more explicit about this possibility. Furthermore, CESR's advice in relation to clients' agreements allows for the possibility in paragraph 5 of Box 9 to incorporate the information by reference to other documents (thus providing standardised information). **As a minimum this type of possibility should be also contemplated in relation to Box 8.**

We would also like to put an accent on the fact that CESR make no difference between new client and potential client. In every sentence indistinct groups of clients are mentioned which makes the rules unclear. Therefore CESR 's approach would be more comprehensive if CESR gave precisions to which groups which information should be provided.

1.2 Timing and form of information provision – paragraphs 1 to 15

Paragraph 1

CESR should take into account the fact that more and more clients use internet applications to invest and thus should make their advice more web-enabled. Moreover, many clients will find they get too much paperwork and they will prefer the electronic way.
Hence we propose that the requirement to provide information *"in writing"* **is simply omitted.**

Paragraph 1 b)

We completely disagree with this provision provided that there is hardly any difference between existing and potential clients, existing clients will receive the same information about the firm again and again, according to these rules.

Consequently, in order to palliate this failure, **CESR's advice should add to the paragraph 1 b) the statement expressed in the explanatory text on page 55 providing that:**

"An investment firm may be deemed to have complied with the obligation to provide information under Article 19(3) of the Directive where the client has been given the information on a previous occasion and that information is still up to date."

Paragraph 4 b)

We contest all this provision. Indeed, in case of voice telephone communications with a client the investment firm should only be required to make clear its identity and the commercial purpose of the call as already stated in the paragraph 4 a). We do not see the purpose of imposing on the investment firms the obligation to provide clients at a minimum with all the information stated from the paragraph i) to v) and with the requirement to obtain the explicit consent of the client to receive all this information:

- Firstly, in practice, when a retail client is asked if he agrees to receive the information in question, it can happen that the client is not sure at the beginning of the telephone communication and thus s/he does not give an explicit consent before starting to listening to the information in question.
- Secondly, if the client does not want to receive information for any reason, he will not omit to express his disagreement. On the contrary, if the client wants to receive information, he will ask for it and then will receive it.

Therefore, all the paragraph 4 b) being not workable and unnecessary, we suggest to delete it. However, in order to preserve clients' interests, **we propose to add to the current paragraph 4 a) the following text:**

" Any other relevant information will be given at the initiative of the firm or will be requested by the client".

However, If CESR decide to keep the paragraph 4 b), we would like to oppose the **paragraph 4 b iv)** related to the content of the minimum information to be provided to retail or potential retail clients. We do not agree that firms should tell clients about their tax duties. Indeed this will result in mostly irrelevant standard remarks, which will not be in the benefit of the conversation. Any costs or taxes that are not imposed by or via the investment firm are not the responsibility of the latter and should not be part of a set of obligatory phrases. **Hence we propose to delete this paragraph.**

Paragraph 6

As already mentioned in our comments on the paragraph 1 b, we find the advice too excessive in terms of information requirements. In our opinion the level of information should take into consideration the existing relationship between the firm and the client since this information may be already available. CESR acknowledges in its explanatory statement that *"a firm may be deemed to have complied with the obligation to provide information under article 19.3 when the client has been given the information on a previous occasion and that information is still updated".*

We think that this exception must be made explicit and therefore we suggest that paragraph 6 is redrafted as follows:

"*The information to be provided to a retail or potential retail client under the article 19 (3) about the investment firm, as well as the information described in the paragraphs 7 to 15, includes the following, unless the client has been given the information on a previous occasion and that information is still up to date*".

Paragraph 6 i)

We would like to point out that the items included in this paragraph are already covered in the draft advice under Articles 13(3) and (18) and **therefore this paragraph should be deleted.**

Paragraph 7 e)

The requirement to inform clients about the possibility that other taxes and/or costs may exist is too burdensome.

- it is not the responsibility of the investment firm to give 'warnings' about having to pay tax other than taxes that are no imposed by the firm.
- the firm may not have a complete view on the tax position of the client. The client himself should know about his income or property tax, not the investment firm.

Therefore the paragraph 7 e) should be deleted.

Paragraph 7 f)

We think that requirement to inform clients on withdrawal rights and costs would only make sense with products that involve a long term commitment to invest. Otherwise, if there is no right of withdrawal, when for example the service comprises the access to a certain trading system, we think that firms should not have an obligation to add the useless information that no right of withdrawal exists.
Therefore we propose to redraft the paragraph 7 f) as follows:

"the existence, in case of a long-term commitment, of any right of withdrawal…".

Paragraph 7 g)

Concerning the obligation to provide clients with the information about any limitation of the period for which the information provided is valid is unnecessary and burdensome. Given that in most cases, the information is valid until the next modification, we are of the opinion that introducing a timeframe would be a superfluous burden.
Therefore the paragraph 7 g) should be deleted.

In relation to **paragraph 12** we think that:

- the list of transactions that the investment firm must take into account when providing clients with warnings of relevant risks linked to these transactions is too detailed. Moreover the list is potentially dangerous as it is far from comprehensive and has important omissions. Hence, this paragraph tends to add obligations to the Level 1 text, instead of further explaining them.

- any category of risk meant in this paragraph can simply be explained in a document attached to the client agreement.

Paragraph 15

As to**,** we think that the whole paragraph should be limited to orders from retail clients who subscribe for the new shares before the shares are on the market and who will receive the shares directly from the IPO and not via the stock exchange trade.
Any other meaning of this article would cause banks to cease all direct trade.

9. CLIENT AGREEMENT – BOX 9

1.1 General Comment

As stated above, we also consider that CESR's advice in respect of clients' agreements is overly detailed. We do not believe that such level of detail is for the benefit of clients and nothing in Level 1 indicates that Level 2 should set out the complete text of the model client agreement. We therefore would suggest that CESR concentrates on providing a more high level principles-based approach and to leave, if any, the details to a Level 3 guidance. Otherwise the risk exists that the draft advice will go out of date.

1.2 Basis retail client agreement – paragraphs 1 to 8

Paragraph 3

Concerning the agreement can be *"easily understandable"* up to a certain extent. Many complicated (legal) obligatory aspects will never be really "easily understandable". Therefore this article should be slightly amended, otherwise no firm can comply.
Our suggestion is to leave out the word *"easily".*

Paragraph 4 c

We think that this is senseless and incomprehensible to require investment firms to mention a representative of the firm who works for the local (foreign) operations of the firm. The client will have a relationship with the firm in the relevant Member State and the foreign representative will have nothing to do with this relationship.
Therefore we suggest to delete this paragraph.

Paragraph 4 f)

In our opinion the obligation to mention any withdrawal right or a cooling-off period in a retail client agreement is useless and confusing. A client can always choose to stop investing or to liquidate his portfolio, or even leave the firm as a client. Describing of withdrawal right or even a cooling-off makes the agreement wrongly look like some long term investing commitment and must be based upon a misunderstanding. **Therefore this paragraph should also be deleted**.

Paragraph 4 r)

The mentioning of the languages in which the client can communicate with the firm is over prescriptive and unnecessary. Indeed, If the contract is in the local language, further communications will logically be in this local language. If the agreement is in another language, this means that the communication will be done in this other language. This kind of proposed obliged agreement content makes the agreement unnecessarily long and **thus the requirement should be deleted.**

Paragraph 5

we think that the retail client agreement should be allowed to refer not only to "*other documents*" but also to the firm's website.

Paragraph 8

The obligation to keep a copy of the retail client agreement should not include requirement imposed on the investment firm to keep it at least 5 years after the end of the relationship, because it may cause conflicts with the provisions of the Data Protection Directive, as we have explained above in relation to the record keeping obligations.

1.3 Retail client agreement involving trading in warrants or derivatives – paragraph 9

General comment

In the Netherlands situation, warrants have always been traded similarly to stock and in fact they have never been regarded as risky derivatives. Therefore in the Netherlands, clients may buy warrants without having agreed to a derivative trading contract or separate warrant trading contract.
Consequently, for many clients, it will seem unreasonable to be denied access to warrant trading based upon these new CESR rules.
Also, converting their contracts will be a very burdensome and expensive operation, which will not be compensated by improved client protection.

Paragraph 9 c)

CESR should make it clearer and precise whether the notification refers to a change in the margin requirements of an individual account (more margin is booked than before), or a change in a margin calculation, which applies to all clients.
A generic change in margin calculation may be imposed by a stock exchange and can only be notified by a firm if the firm has received a notice from the stock exchange. We presume this has to be notified to clients who actually have a charged margin and not to all. Repeating these arithmetical models in client agreements does not make any sense. Besides, our experience is that clients definitely want to be informed about their individual margin, but are not interested in the underlying calculations, an issue, which is the domain of only a small group of experts. Thus, the agreement would become highly complicated and unreadable for most people, especially that present systems are in our view sufficient and alterations will be very costly.
Therefore we strongly advise to leave out the paragraph 9 c) since it will heavily burden firms and it will not help clients.

10. REPORTING TO CLIENTS – BOX 10

1.1 General comment

As a general remark we would like to point out that there should be flexibility for clients to be allowed to waive rights to receive certain or any reports. This is not provided by CESR's draft advice and in our experience many clients do not wish to receive confirms.

1.2 Question 10.1

An advice often constitutes the expression of the opinion of the investment adviser, and in the course of a conversation the adviser and the client will jointly reach conclusions such as buying A or selling B. If the adviser strongly disagrees with the client, especially because of a decision contrary to the agreed investment profile, it is correct to point this out to the client, preferably in writing.

Apart from such cases, we strongly advise **against** an obligation to report to a client after any investment advice is given**.** For the investment firm, this would have the following negative consequences:

- The adviser should make notes of everything he says during a conversation with a client about a portfolio, work these notes out into a statement and send it to the client. Moreover, short phone calls with clients will not be possible anymore. As a result one adviser, now serving 100 clients, will serve only 50 after such requirement is in place.
- If the solution of the firm is to draft rather compact advisory statements (if hiring twice the number of personnel is not feasible), it can be used against the firm if the client is not satisfied about his investment results. Only if the statement contains all considerations and alternative, will a firm be safe.
- Newly welcomed initiatives such as advisory desks where a client can get quick and inexpensive advice by phone without having a personal relationship with the adviser, will not survive.
- Apart from the cost of drafting these messages, reorganising front offices and hiring more personnel, only the cost of sending thousands of messages a week will not compensate the possible improvement of client protection.
- We do not feel that clients are served by receiving messages about given advice once they have already understood and followed- the advice. Only in the case they seek possibilities to hold a firm liable for occurred losses, will these advice statements, if they are more compact than the held conversation, be 'useful' to them.

1.3 Contract notes and confirmations – paragraphs 1 to 7

Paragraph 8 a)

According to many general conditions (such as the General Banking Conditions in the Netherlands) the assets of the client are pledged to the relative firm in all cases. Identifying the assets that have been pledged in the yearly statement could cause great confusion with clients and will result in unnecessary unrest and many worried questions. Given that this is not in the benefit of the clients and the firms **we propose to delete this paragraph.**

11. BEST EXECUTION

3.4.1 Factors to be taken into account for best execution, questions 1 to 4

We think that the criteria listed by CESR are appropriate but we believe that since all the factors are interdependent – for example, all clients want the best price but price is influenced by the size which also has an effect on the speed of execution - it is difficult to decide which of the factors should be given more importance.

We would however see a difference in the importance of the factors in relation to the type of client. Retail, private and corporate require a different service provision resulting from characteristics of the business. Low value business of retail clients requires a low cost service, with high speed of execution with an execution price as good as on the most liquid market. At the other end of the spectrum, with corporate clients with high value orders price is unlikely to be an absolute criterion.

We would consider that for retail clients price and cost would be more important, whereas for professional clients, size, speed and likelihood of execution would be leading.

Furthermore, CESR may wish to draw a distinction depending on the type of type of financial instrument since these are traded on different types of markets:

- Equity and ETFs: there is one exchange as the main liquidity pool (as a reference for all other markets types) with the exception of blue chips that will be traded on more exchanges to enable low cost execution with comparable but lower prices than on the main liquidity pool. Internalisation may offer the possibility to improve price, speed and cost and OTC would be used for large orders
- Options market: there is one exchange as the main liquidity pool (as a reference for all other markets types), and again also OTC for large orders, with internalisation offering the possibility to improve price, speed and cost
- Fixed income and complex derivatives: these transactions will be mainly OTC with an often limited number of liquidity providers. Again internalisation may offer the possibility to improve price, speed and cost.

Furthermore, commercial considerations of the investment firm should drive the relative importance of the factor that will be reflected in the service provided to the client.

3.4.2 Trading venues to be included in the order execution policy and obligation to monitor and update the order execution policy

Review requirements – questions 1 to 9

Question 1

ABN AMRO provides the whole scale of services from standard execution only services to retail clients to value added “handle with care” broker services to corporate clients.

In relation to the venues, ABN AMRO is connected to the main European exchanges for Equity and Derivatives and the main electronic platforms for bonds. Internalisation platforms could be an additional platform if there is a commercial future for those platforms given the pre-trade transparency rules which in our opinion are too burdensome from a commercial risk and operational cost perspective.

Question 3

Liquidity (taking into account the size of the order) is the most important factor of choosing a venue after those costs. The typical examples of costs in evaluating venues are infrastructure and system costs needed to support trade and post-trade (clearing and settlement) processing and transaction costs (execution, clearing and settlement fee). The re-evaluation of venues only takes place whenever there is material change at any of the trading venues, for example, a shift of liquidity from one venue to another.

12. CLIENT-ORDER HANDLING RULES – BOX 11

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?

In our view, with one exception discussed at question 3, CESR's advice follows the Level 1 approach.

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?

It is good business practice for both retail and professional clients and the investment firms through which they deal to establish the terms of an order prior to its execution or transmission to a trading venue such as the order book of a regulated market.
This is common sense and essential to avoid post execution disputes.

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

Firstly, the sequential requirement **in paragraph 6** is not compatible with the Level 1 text, which requires prompt, fair, and expeditious, not *"sequential"* execution.

Secondly, a sequential obligation might be workable in small firms handling exclusively low value retail orders which they route to the order book of one regulated market for execution. In all other circumstances, the absolute nature of the obligation in paragraph 6 sets an impossibly high standard.

Instead, we suggest that CESR should propose a solution based on a **higher level of principle**, requiring firms to have a policy and/or procedures designed to ensure that clients' orders are executed fairly and promptly and to develop any further detail at Level 3.

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 orders promptly and sequentially?

We agree in principle. However it needs to be combined with the comments under question 3.

Question 5:
Do you think 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 interest of its clients?

We do not see a conflict between the aggregation of client orders and the obligation for the investment firm to act in the best interest 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?

We strongly believe that the above conditions should be left to the discretion of individual investment firms.

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?

We believe that the aggregation of client and own account orders should be allowed subject to firms having and adhering to an allocation policy which treats customers fairly in these circumstances.

Question 8:

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

As professional clients are sufficiently competent and do not require the same level od protection as retail clients, we believe that paragraphs 15 and 16 should only apply to retail clients.

III. EXPERT GROUP ON MARKETS

1. PRE-TRADE TRANSPARENCY FOR REGULATED MARKETS – BOX 12

Exemptions from pre-trade transparency – paragraphs 13 to 15 – questions 12.5 to 7

Paragraph 13, question 12.5

We support the waiver for crossing systems since we see no benefit in having pre-trade transparency in market models where there is no price formation mechanism. For consistency purposes this waiver should also be applied to the implementing measures to article 27 in relation to investment firms that undertake systematic internalisation.

Paragraph 15, question 12.7

In relation to the waiver for large trades we believe that the most appropriate method is the "average daily volume method" since in terms of data gathering it is compatible with the method to be used for establishing what should be considered a standard market size. Moreover, this method is already used in London Stock Exchange. We also support the assessment of CESR of the need to group shares into different groups leading to different types of sizes.

Question 12.6

We also support that the same size for the waiver of pre-trade transparency is used for delayed publication post-trade. Given that the objective is to have different sizes depending on the groups of shares, we would recommend that depending on the size different delays for publication could be envisaged, as in currently the case in different markets (e.g. the bigger the size, the longer the deferral).

2. POST-TRADE TRANSPARENCY FOR INVESTMENT FIRMS – BOX 13

Content of post-trade information – paragraphs 21 to 23 – questions 13.1 to 2

We agree with the method of post-trade transparency of trade by trade information (paragraph 21 and question 13.1) however we do not support the inclusion of "aggregated information" (paragraph 22 and question 13.2) and believe that this should be left to market forces.

Arrangements to disclose post-trade information – paragraphs 24 to 29

We do not have any particular concern on having post-trade information published within one minute after the transaction took place as long as there is a common understanding that this minute starts counting after the transaction has been confirmed and not after the trade has been concluded.

Deferred publication of transactions – paragraphs 30 to 32

In relation to question 13.6 and paragraph 31 we believe that all trades above block size should be eligible for deferred publication and not only those trades where the firm has taken a risk position. We believe that deferred publication allows the market to absorb a specific position without undue volatility and thus it is not only a question of the risk that the parties are taking about the risk of undue volatility on the price of the shares *per se*.

1. ADMISSION TO TRADING – BOX 14

Our comments in this section are simply limited to the verification of initial disclosure obligations by the regulated market. We believe that this verification is superfluous and in contradiction with the Prospectus Directive. Under the terms of this Directive (article 18), the home competent authority will provide the host competent authority (for cross-border offers) with a certificate of approval attesting that the prospectus has been drawn up in accordance with the Prospectus Directive. This certificate of approval should suffice to reassure the regulated market that the prospectus obligations have been complied with. Furthermore, introducing this new verification obligation will only introduce delays to the admission process. We would however agree, and believe that this would be in line with the Prospectus Directive and article 40.3 of the MIFID, that the issuer should provide a copy of the certificate of approval to the RM.

We would therefore propose to redraft paragraph 4 as follows:

"*The admission of financial instruments to trading on an RM shall be subject to the delivery by the issuer of a copy of the certificate of approval of the prospectus issued by the home competent authority in accordance with article 18 of the Prospectus Directive*".

IV. EXPERT GROUP ON COOPERATION AND ENFORCEMENT

1. TRANSACTION REPORTING – BOXES 15 TO 17

Waiver for investment firms – paragraph 3 – question 15.1

We very much support the possibility established in article 25.5 for a waiver for direct reports by the investment firms. We currently undertake those reports via the facilities of a regulated market and would like to continue doing so.

We find the approach proposed by CESR to implement this article somehow complicated and we wonder whether it is necessary to have also extensive Level 3 recommendations in this respect. We would think that if CESR agrees on the minimum condition for reporting channels **(paragraph 1)** and there is an agreement that these reporting channels must be approved by the competent authority **(paragraph 2)** there is no need for:

- further examination of responsibility issues regarding transaction reports (first proposed Level 3 recommendation)
- further discussion on how competent authorities are expected to waive the obligation (third proposed Level 3 recommendation)
- leaving a level of uncertainty[13] -until Level 3 is agreed- in Level 2 as to whether the arrangements are sufficient to allow for the waiver

We would therefore suggest to redraft paragraph 3 as follows:

"*The obligation on the investment firm laid down in article 25.3 is waived if firms use a reporting channel approved by the competent authority*".

The most relevant market in terms of liquidity – paragraphs 1 to 12, question 16

The use of proxies to determine the most relevant market in terms of liquidity seems a good approach since it is easy to understand.

In relation to 3rd country debt issuers - given that the proxy for fixed income is the domicile of the issuer in Europe- one possible approach to solve the "lack" of European domicile" for 3rd country issuers is to use the approach of the Prospectus Directive since by July 2005 all those 3rd country issuers should have a chosen European home Member State.

The level of harmonisation and minimum contents of the reports

During the public hearing in July the question of how much harmonisation could be undertaken in relation to transaction reporting was widely discussed. Many participants during the hearing, including ourselves, express the desirability to have **maximum harmonisation** in relation to the different **information items** so that the contents of the report would be the same across the EU. The CESR Chair was surprised since there was a belief (from the results of the responses to the call for evidence) in CESR that the market wanted to keep their national arrangements in place. We note from the summary of the responses to the call for evidence that comments against maximum harmonisation were related to an **harmonised EU-wide standard IT format**[14] but not against harmonisation in terms of information items.

We would tend to agree that it may be premature to harmonise technical arrangements and IT standards but we see no justifiable reason for not being able to agree on an uniform content of the transaction reports. CESR noted that there were many differences at national level but acknowledged that the main bone of contention was the fact that not all Member States required a client identification code. This obstacle is also clearly explained in the consultation paper. Despite this main difference, <u>we still believe that there should be one harmonised content of the report for the following reasons</u>:

13 Paragraph 3 in Box 15 refers to the fact that the arrangements "could be considered" as sufficient to allow the waiver thus not making clear that those arrangements would be sufficient.

14 Annex 2 to the consultation paper, page 145.

1. We believe that compared to other articles in the MIFID, article 25.3 and 4 are **maximum** related implementing measures are requiring. We believe that there might be some **harmonisation** provisions, thus not allowing Member States to go beyond what those articles and its misunderstandings in relation to the terminology used in article 25.4, in particular when read together with the mandate from the European Commission.

As stated above, it is our opinion that article 25.4 is a maximum harmonisation article, otherwise the article would have been phrased[15] as "Member States shall at least" compared to the wording used "The reports shall in particular". The use of wording " in particular" simply denotes that article 25.4 is giving some examples but it does not mean that this is a minimum harmonisation provision. We acknowledge that the mandate from the European Commission may have created some confusion since it states "the minimum content" of the reports. However, again this reference to "minimum" is not synonymous to a minimum harmonisation provision since the Commission cannot decide at level 2 whether on a particular subject there should be maximum or minimum harmonisation. As the representative of the Commission clarified during the hearing there can be maximum harmonisation in this respect.

We would like to remind CESR that this is a similar debate to the one on the schedules in relation to the level 2 implementing measures on the Prospectus Directive. The Prospectus Regulation specifically states in article 1 (2) that the Regulation lays down "the minimum information requirements to be included in a prospectus" but clarifies in article 3 that "a prospectus shall contain the information items required" in the different annexes and that "a competent authority shall not request that a prospectus contains information items which are not included" in those annexes. The only thing that a competent authority may require is that the information items are "completed" but they cannot require an additional information item.

We would support that the same approach of the prospectus schedules is used for the content of the transaction reports, thus that the information fields contained in Annex A in the CESR consultation paper (as amended taking into consideration the consultation responses) become the only information fields that investment firms have to report on an EU-wide basis.

2. We find it somehow surprising that CESR is able to agree on an harmonised content for purposes of exchange of information (Annex B) but it is not able to agree on an harmonised content for purposes of transaction reporting by investment firms (Annex A). We acknowledge that Annex B contains extra information but we see no major differences in the contents of Annex A and B that would jeopardise an agreement on Annex A.

3. In relation to the client identification code, we think that CESR should make an extra effort and conclude that this code is not a necessary information item for Annex A. With a client identification code a regulator is not able to identify a person directly but will need to contact the firm in order to obtain further information. Thus we see no reason to keep this requirement even at national level. As with any maximum harmonisation exercise national countries have to make choices as to the national requirements that they need to eliminate for the benefits of further European integration. We truly believe that the EU decision-makers have made a choice in this respect. Thus, if the requirement to have a client identification code cannot be accepted by some CESR members, then it should be eliminated.

We also like to remind CESR that a legal case could be established as to the fact that the Directive does not require the identification of the client for transaction reporting purposes but that this information should only be made available to regulators if required. Indeed, in the first consultation paper[16] on the revision of the ISD the European Commission proposed to require in the Directive the identification of the client. Taking into consideration the results of the consultation, the Commission chose not to require this information[17], which has been the prevailing approach in the text of the Directive.

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15 This is the terminology used to for example in relation to pre-trade transparency for regulated markets in article 44.

16 "These reports shall, at least, include details of the name and numbers of the instruments bought or sold, transaction prices, identify the market/trading facility or other means by which the transaction was concluded, **the identity** and professional or retail nature of the client". Consultation paper of July 2001 Annex 2, page 21.

17 "These reports shall specify the instrument bought/sold, quantity, transaction prices and identify the market, trading system or other means through which the transaction was concluded. In order to ensure that the competent authorities have access to the information necessary for the performance of their duties, home Member States shall at least require that **investment firms keep at the disposal of the authorities** for at least five years the relevant data relating to the investment services and activities which they have carried out. This information shall contain **all the information and details of the identity of the client**, and information required under the Directive on Money Laundering". Revision of the Investment Services Directive, Annex I: Revised Orientations, page 14, March 2002.

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V. CONCLUSION

To conclude, ABN AMRO is supportive of most of Level 2 rules as proposed by CESR. However, we believe that the excessive detail in a number of provisions does not add to the clients' protection and does not allow investment firms to comply with principles in a flexible way.

Therefore, we believe that CESR, when reviewing the Level 2 implementing measures, should give particular attention to the following:

- Investment firms need a principle – based approach in line with maximum harmonisation, rather than a list of over-prescriptive details.

- CESR should take into account the different roles of the Managing Board and the Supervisory Board functions within investment firms.

- Retail and professional clients need a different level of protection.

- Justifying its rules in terms of cost-benefit will help CESR to provide market participants with a more realistic approach of Level 2 measures.

In our comments we have tried to provide alternative wording for some of the proposed provisions in order to:

- simplify some of the rules by deleting provisions that were over-prescriptive in various sections or that were clearly going against current market practices.

- render some of the provisions more flexible in accordance with current market practices while at the same time preserving the necessary investment firm clients' protection.