ASSOGESTIONI
associazione del risparmio gestito

Rome, 17th September 2004

Mr. Fabrice Demarigny
Secretary general
CESR – The Committee of
European Securities
Regulators

Re. 814/04

Dear Mr. Demarigny,

Re: CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Market in Financial Instruments (Ref.: CESR/04-261b).

In response to your invitation to formulate observations and comments contained in the consultation document, this Association wishes firstly to thank you for the opportunity afforded to it.

Assogestioni is the Italian national association for the fund management industry and its members, who manage assets valued at over 900 billion euro, are directly affected by the regulations under consultation.

As a preliminary and general manner we wish to emphasize that in the view of our members, who manage assets in both collective and individual forms, it is fundamentally important to ensure the greatest coherence possible between the contents of the Technical Advice and the regulations laid down by the new UCITS directive.

A second aspect, of equal interest to asset management companies, relates to the plan for streamlining regulatory structures for the provision of investment services.

In this regard we consider that the CESR could further use the opportunity arising from the current revision of the material to better tailor duties and responsibilities to the particular characteristics of each specific service provided.

In this respect we consider that, in terms of discipline, a clearer distinction should be provided between the investment portfolio manager and providers of other investment services, in particular trading and placing.

From an operating point of view, we find that the roles of intermediaries often overlap in the provision of investment services, both during the course of the relationship and the prior offer stage to clients. This is the case above all in relation to the obligation for *best execution* and to the implementation of the s*uitability test*, with respect to which, before moving on to an analysis of the specific questions arising from the *Technical Advice*, we wish to make the following observations:

In relation to best execution

While reserving the right to make further remarks before the 4 October next, we wish at this time to make some comments on the approach that we consider should be followed in the regulation of duties of *best execution*.

Although we concur with the baselines set out by the Committee on the renewal of the duty as part of the general clause that obliges firms to act in the client's interest, we believe that the solutions set out in the draft *Technical Advice* do not take the concrete activities performed by each intermediary into consideration (with the risk of diminishing the mandatory effect of the regulation).

In fact, while managers may have recourse to their own *trading desk*, the overwhelming majority of transactions made on clients' behalf in the context of asset management are carried out by other trading intermediaries.

It is only for this latter category, therefore, that it is possible to monitor the execution of orders, due to the parameters specifically indicated by the directive (price, cost, speed of execution and regulations, sizes… cfr. art. 21 par. 1). Managers, on the other hand, can assess traders' conduct only *ex post.*

The issue, in essence, is not the removal of the managers' obligation to *best execution* but, on the contrary, to make the obligation effective by regulating it on two levels:

- on the first level, demanding that parties directly accessing the trading platform scrupulously respect the factors indicated at Article 21 on the basis of the scale of importance derived from the criteria formulated by the CESR,
- on the second level, imposing upon intermediary managers that operate on the client's behalf – but who do not access the trading centres - a specific duty to adopt predefined and efficient procedures for the selection of

trading intermediaries that guarantee, on a statistical basis, that the best conditions have been obtained.

In relation to the suitability test

Another area in which we think it desirable to distinguish the regulation of individual management service from the remaining investment services is that relating to the *suitability test.* This is in fact related to the assessment of the suitability of transactions made on the client's behalf, from which relevant professional responsibility profiles of the intermediary are derived.

This *test* can only be carried out by intermediaries who enter into direct contact with the client. In cases where the management firms do not provide such a placing service, they find themselves having to base their activities on information from other intermediaries.

Also with regard to the management of information flows therefore, in line with the provisions of the OSE in the document "*Governance of collective Investment Schemes*" (cfr. Section B pag. 11), the task is to outline the respective professional responsibilities of each intermediary.

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For a more specific analysis of the contents of the *draft Technical Advice*, please see the attached document.

We remain available for any clarification that may be necessary.

With kindest regards,

The Director General

ANNEX

SECTION II - INTERMEDIARIES

Compliance and Personal Transactions

GENERAL COMMENTS

We consider it appropriate to specify that firms prepare a code of conduct containing written principles that provide clear rules for the identification and management of risks that may arise in the execution of the function. We also agree on the need to assign the supervision of compliance to a senior manager or other party with the necessary experience and professionalism, to whom responsibility for updating and verification of the code of conduct's guidelines can also be assigned.

Specific comments:

Q 1.1: Must the compliance function in every investment firm comply with the requirements for independence set out in paragraph 2(d), or should this degree of independence only be required where this is appropriate and proportionate in view of the complexity of its business and other relevant factors, including the nature and scale of its business?

Q1.2: May deferred implementation of requirements for independence be based on the nature and scale of the business of the investment firm?

> **Response to Q1.1 e 1.2: We do not consider it appropriate to provide an exemption from the requirements of independence for small firms. Independence is actually an essential characteristic for each compliance function and as such must be guaranteed by every firm, regardless of size. We furthermore consider that it is wholly reasonable, including in relation to small companies, to specify that the compliance function includes the two requirements indicated by par. 2(d) of BOX 1.**

Q1.3: Should the current text of CESR Standard 127 be retained or should its scope be extended to the outsourcing of all investment services and activities or should paragraph 9(b) be deleted and reliance be placed on the status and responsibilities of the outsourcing investment firm?

> **Response to Q1.3: We approve of the opportunity to extend the possibility of outsourcing to other investment services, considering that this possibility is related to the optimization of resources and functions, with beneficial effects for the client in terms of the service provided. In this regard, we consider that the current formulation of Standard 127 (delegating party's responsibility and delegate's authorization) is suitable for the purpose of protecting investors. On the other hand, we do not**

consider that the alternative solutions - for example that of replacing the requirement for third party authorization with the implementation by the firm of an appropriate 'due diligence' procedure - represent, in terms of investor protection, a substitute sufficient to safeguard the client's interests.

RECORD KEEPING OBLIGATION

Specific comments:

Q4.1: Should there be a separate 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?

Response to Q4.1: It is fundamental to distinguish the fields of application of the principle of reversal of the burden of proof. This can be accepted only in judicial proceedings for cases of compensation for damages as an instrument of client protection, especially *retail.*
On the other hand, it appears absolutely inappropriate if lowered in all other fields, above all for supervisory activities. In this respect, the reversal of the burden of proof would translate into a type of intermediary's objective responsibility.

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SAFEGUARDING OF CLIENTS' ASSETS

Specific comments:

Q5.1: Where the jurisdiction in which financial instruments have to be held regulates the holding and safekeeping of financial instruments, should investment firms be required to sub-deposit their clients' financial instruments with such institutions in all cases or are there cases in which overriding considerations to the contrary mean that it would be permissible to use an unregulated depository?

Response to Question 5.1: We consider the solution that obliges investment firms to always refer to authorized intermediaries to be preferable. Authorization is an element of guarantee for clients, particularly in the case of transactions in jurisdictions of third party countries.

Q5.3: Should a requirement be imposed that the records of the investment firm must indicate for each client the depository with which the relevant clients' assets are held, or is it sufficient that the investment firm should maintain records of the

amount of each type of asset held for each client and of the amount of each type of asset held with each depository and ensure that the aggregate figures correspond with each other in accordance with paragraphs 11(c) and 13(b)?

Response to Q5.3: We consider it preferable that the firm is obliged to make records which show the financial instruments and cash held for each client, together with the depositary of the assets. This formulation serves the interests of certitude and separateness of the assets of the various clients.

Q5.4 : If the client's assets may be held by a depository on behalf of the investment firm, should:
(a) the investment firm be
(i) prohibited from purporting to exclude or limit its responsibility for losses directly arising from its failure to exercise all due skill, care and diligence in the selection and periodic review of the depository; and
(ii) required to accept the same responsibility for a depository that is a member of its group as it accepts for itself; or

(b) must the contract between the investment firm and the client state that the investment firm will:
(i) in any event be wholly liable for any losses the client suffers where the investment firm is directly or indirectly linked to the depository, and
(ii) be liable in whole or in part, according to the circumstances, for any such losses unless the investment firm shows that it has exercised all due skill, care and diligence in the selection and periodic review of the depository?

Response to Q5.4: We consider the first of the two proposed combinations [a(i) and (ii)] to be preferable, although in our opinion it should be partially corrected. Actually it is more realistic to specify that what should be demanded from firms is the exercise of all "reasonable care" which then corresponds to the duty to have exercised the specifically requested professional diligence in the provision of the service.

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CONFLICTS OF INTEREST

GENERAL COMMENTS

Assogestioni considers that the approch adopted by the FIM directive on the conflict of interests, based on their identification, management and disclosure, is capable of guaranteeing effective protection to investors. This stated, we consider that the CESR has well implemented the mandate of the European Commission by

providing that firms are obliged to prepare, formulate, and implement written internal rules that contain organizational details to efficiently cope with cases of conflict and to bring clients' knowledge to any situation that is potentially prejudicial to their interests.

Specific comments:

Question 6.1: Should other examples of methods for managing conflicts of interest be referred to in the advice?

Question 6.2:

(a) Should paragraphs 8(a) to (f) (or the final list of measures for managing conflicts of interest adopted in response to question 1) be stated as examples of arrangements that may, depending on the circumstances referred to in paragraph 5, be effective methods of providing an appropriate degree of independence in respect of persons engaged in different business activities?

(b) Alternatively, should there be a requirement for an investment firm to include these measures in its conflicts policy to the fullest extent possible unless it is able to demonstrate that it has implemented alternative arrangements for effectively preventing conflicts of interest from adversely affecting the interests of clients?

(c) If the answer to question (b) is yes, which of these measures should be subject to the requirement referred to in that question?

Response to Q6.1 and Q 6.2: It is unrealistic to think that one can predict all cases of conflict management. Therefore we consider it preferable that the list to which *Question 6.1* refers is understood only as an exemplary indicator of the management of conflicts and that it does not claim to be exhaustive. Therefore we do not consider it necessary to add further hypothetical events to the list.

Question 6.3(a): Is it appropriate for an investment firm that publishes or issues investment research to maintain information barriers between analysts and its other divisions?

Response to Q6.3(a): The situation envisaged requires more precise regulation in relation to the type of investment service provided. Investment analyses carried out, for example, in relation to the management of a portfolio, which do not in fact have the same

characteristics and purpose as those carried out in the context of other investment services, would be inappropriately regulated.

Q6.4: Should the derogation from the requirements in paragraph 16(f)(i) to (v) be available if:

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

(b) the investment firm complies with the requirements in paragraph 17 of the second option set out below?

Response to Q6.4: We consider the first of the regulatory combinations presented to be preferable. This option, however, appears to be more in line with the formulation and objectives of European regulations imposed as part of the provisions on market abuse.