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21/01/05

LEVEL 2 Directive on Markets in Financial Instruments
Response to CESR Consultation Paper, 2nd Set of Mandates

I. INTRODUCTION

We welcome the opportunity to provide comments to CESR's consultation paper on the second 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 answered to the specific questions presented by CESR taking into consideration our experience in different markets based on our own systems, procedures and market practices.

We agree with many of the proposed measures and highly appreciate the introduction of a less prescriptive approach relying in a more extensive way on investment firms' practices.

However, on certain parts of the draft advice, we urge CESR to put less focus on detailed measures and concentrate more on a maximum harmonisation approach consisting of introducing common principles in the EU. We notice that CESR's prescriptive approach to define the level 1 terms dangerously leads in some occasions to an over-regulation or even mis-interpretation of what was agreed under the Directive. This result of an over-regulation should not take place in such a sensitive field of legislation. This is particularly the case in relation to investment advice definition, suitability test and definition of systematic internaliser.

We also warmly encourage CESR's somehow "shy" approach according to which no level 2 measures should be drafted in case the level 1 text offers enough clarity. In fact, we prefer to comply with the level 1 general but clear rules, rather than being required to apply narrow and restrictive level 2 obligations going beyond or against the level 1 text. Therefore, CESR should not propose level 2 implementing measures if it is not necessary. This is particularly the case in relation to the definition of systematic internaliser or the expression "at the initiative of the client" under execution only provisions.

We also would like to strongly recommend for an extension of the MIFID implementation deadline for one year at least. Otherwise we see the risk that investment firms can not comply with the new rules at the foreseen date because of the lack of time to install the new systems and procedures.

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II. INTERMEDIAIRIES

1. Definition of "investment advice" (Article 4 (1) No.4) BOX 1

As a preliminary comment, in our view CESR should remind the Commission that its mandate largely exceeds the explicit as well as the implicit content of the Level 1 text when asking for differentiating a personal recommendation from general recommendations, marketing communication etc. In our point of view, the only purpose of the level 1 text is to define the term "investment advice" as the provision of personal recommendations. Extending this to the advice on other definitions not appearing in Level 1 text is firstly an excessive interpretation of the Level 1 text and secondly, it leads to complex discussions which are not relevant here.

Question 1.1
We agree that advising to use a certain broker, fund manager or custodian should not be covered by the definition of investment advice since the Level 1 text speaks exclusively about advising on transactions in financial instruments.

Question 1.2
We strongly believe that a personal recommendation should always be based on client's personal situation. Moreover, the suitability test can only apply in cases of personalised recommendations, which can simply be defined, as "specific" advice to a "specific" client. Thus, we choose the first option. In our view, referring to the bilateral contact between the firm and its clients leads to complex discussions on other definitions making the scope of the investment advice definition not flexible. Therefore, it will not enhance consumer protection but rather decrease it.
(See also our preliminary comment).

Question 1.3
Investment advice definition should be restricted to recommendations of specific financial instruments. According to the Directive, an investment advice refers to "one or more transactions relating to financial instruments". If any client were advised to invest a certain amount in a very specific market (e.g. Finnish telecom), which would reasonably mean only a few transactions at the most, this could fall indeed within the current scope of the Directive's definition and no further defining is necessary. Therefore, extending the scope of investment advice to generic information on financial planning and asset allocation will not improve the definition but only increase confusion.

BOX 1
Paragraph 1
We generally agree with the definition. However, we wish to put forward some suggestions:
- For the purpose of clarification, given that the Level 1 text applies to the relationship between an investment firm and "a client" (article 4 (1) No.4) or "a potential client " (articles (19(4) and (5)), in our view CESR should also specify that a personal recommendation means any information given to "a client or a potential client", and not to "a person". The term "person", apparently equivalent to the term "potential client" is more vague than the latter and can include absolutely everybody.

- We do not agree that the word "specific" in the proposed definition of investment advice is still between brackets (twice). This word should be introduced in both places. Otherwise there is not enough precision in the term "advice" in question. If one cannot tell from the "advice" which financial instrument is advised, there is just no advice in the sense of the Directive.

Paragraphs 2 to 6
Based on our above comments and in relation to question 1.2, we suggest that these paragraphs should be deleted.

2. List of financial Instruments (Article 4 – Annex I Section C) BOXES 2-6

During this round of the consultation, we have the following comments concerning this part of the draft advice:
- In the Netherlands, warrants are classified as stocks. Therefore, Dutch retail clients who can trade in stocks, can automatically trade in warrants, which is due to the Euronext system. Therefore, we strongly contest that they are subject to derivatives regime.
- We also would like to be sure that 'harmless' bonuses/premiums on a savings account, (partly) dependent on a certain stock are not regarded as derivatives and will not be subject to derivatives regimes.

3. General Obligation to act fairly, honestly, and professionally and in accordance with the best interests of the client (Article 19.1) BOX 7

Question 3.1
Any other issues should not be addressed under the Article 19 (1). Concerning the proposals on portfolio management in Box 7, we think that both of them are abundant:
-The proposal in the first paragraph is unnecessarily dealing with client agreements for portfolio management. CESR already discussed this question in detail as part of its draft advice under the Article 19.7 ("client agreement and portfolio management").

- Concerning the proposal in the second paragraph, we do not see any added value of this proposal comparing to the Level 1 text which is already clear enough and ensures to both retail and professional clients a high level of security when providing them with "all investment, and/or where appropriate ancillary services".

Therefore, we propose the deletion of these two paragraphs.

4. Suitability test (Article 19 (4)) BOX 8

Question 4.1
We think that CESR should not ask this question for the following reasons:

- The case where a client is not able or refuses to provide any information on his personal situation is not addressed by the Commission's mandate to CESR, which is logical as the level 1 text does not allow to make such a deduction. Therefore, we must conclude that CESR made an over-interpretation of the article 19.4 when asking the market participants to answer this specific question.

- Above the fact that this case exceeds the scope of the article 19.4, we think that the problem is a very academic one: the client, refusing (or not being able) to give any information on his personal situation (which according to the directive means the information on his knowledge, experience, financial situation and investment objectives), will not get any personal recommendation and therefore any investment advice in the sense of the directive. In our view, the personal recommendation and therefore the investment advice in the sense of the directive is the advice based on personal situation that the client deliberately disclosed to the investment firm. If the client does not want or can not provide any information on his personal situation, the firm has to categorise him and the category will be based on previous transactions or, if there aren't any, the client will probably be categorised into the most conservative profile based on the assumption that the client has no knowledge and experience etc. The advice can of course be provided, but it will not be the advice as meant by the Directive. If, as a result, the client does not like that, he will tell the firm what he wants. But in most cases these clients will not care about the advice and act on their own. Thus, we think that it was not the intention of the Level 1 text to ensure the quality of the advice given to the clients who actually do not want any and this question should simply not be addressed.

BOX 8
Paragraph 1
We fully support CESR's "may" wording and fully invite CESR to keep it in its final draft advice because it leaves flexibility to investment firms necessary to correctly asses client's knowledge and experience in the investment field, his financial situation, as well as his investment objectives on a case by case basis.

However, we would wish to provide CESR with guidelines on predominant factors which in our view, CESR should take into account when exploring the meaning of the terms "knowledge and experience " as well as "financial situation":

Knowledge and experience
In our view, the right way to assess the client's knowledge and experience is above all to ask the client's own opinion on his knowledge and experience in different sets of financial instruments.
In our view, gathering information on the past transactions of the client will not necessarily allow to carefully and correctly judge such experience. For example a big number of futures transactions in the past does not mean that the client is experienced enough to buy a simple series of options as well. Other similar examples can be given. Therefore, relying on clients' previous transactions will lead to illogical judgements: for one client two derivatives transactions will be enough, others will not be experienced even after 20.

Therefore, we propose to add to the paragraph 1) a) the following wording:
"The information regarding the client's or potential client's knowledge and experience… may include client's own opinion on his knowledge and experience…".

Financial situation
We agree that it can always be helpful to know the client's financial capacity, the nature of the source and extent of his regular income etc. Although, CESR should be aware of the fact that the information gathered from the client will never include all possible aspects of his real personal financial situation and that the client will always know more than the investment firm especially on his risk profile, his mortgage etc.
Therefore, we think that the most relevant questions to be asked to a client on his financial situation are the following ones:
- do you want to invest to earn more (necessary, regular) income?
- (If the client wants to trade in derivatives) In case of unexpected events, do you have enough financial resilience outside your investment portfolio?

Paragraph 5
Concerning the professional clients, this paragraph states clearly that professional clients are responsible for informing the investment firm of major changes affecting their financial situation, which we completely agree with.

However, the question of responsibility for not informing the investment firm of any major changes in retail client's personal situation is not clearly resolved. Paragraph 5 imposes on investment firms the obligation to advise retail clients to inform the investment firm of any major change affecting the clients'personal situation, which we do not contest. Paragraph 5 also obliges investment advisor who is aware of a major change in the retail client's personal situation, to request additional information, which we do not intend to contest neither.

In our view, the difference of treatment between retail and professional clients is that retail clients need to be warned that the information on changements in their personal situation should be communicated by them to the investment firm, whereas professional client do not need that warning as they are supposed to be aware of that.

Therefore, for the purpose of clarification, the question of who is bearing the final responsibility of not informing the investment firm of any major changes affecting the retail client's personal situation could be resolved by amending the second part of the paragraph 5 in the following way:
Instead of the sentence *"The retail client must be advised etc*…", the following sentence should be introduced:
"The investment firm has obligation to advise (or warn) the retail client that he should inform the investment firm of any major changes affecting his personal situation". Subject to this warning, retail client is responsible for informing the investment firm of any major changes affecting his personal situation". (understood as knowledge, experience financial situation and investment objectives).

6. Execution only (Article 19 (6)) BOX 10

Question 5.1
In determining whether financial instruments are complex or not, we think that the economic effects should be predominant. We would also propose that these economic criteria are based on the following, workable and understandable distinction:
- Running the risk of losing the investment (bonds, stocks, (reverse) convertibles, warrants, certain structured products) and on the other hand:
- Risk of losing more than the investment (options and futures trading, products including a loan).

BOX 10
"At the initiative of the client" and question 5.2
In our view, this question is already clearly resolved by the recital 30 of the Directive and CESR's additional interpretation of the expression "at the initiative of the client" is dangerous as currently drafted and risks to entail extremely negative consequences on investment firms:
On the basis of the current draft advice a "non-professional client" who wants to hold the firm liable for a certain regrettable investment decision ordered through direct channels, will try to prove that the firm has tried to influence him to buy the product. If at any time previous to the transaction, mailings have been sent on such or similar products, it will be extremely difficult and burdensome for firms to defend themselves against such allegations. Consequently, firms will have to prevent this legal risk by making sure that their current "execution-only clients" never receive mailings and as a consequence, these clients will become non-professional clients. Firms such as large banks send numerous mailings on numerous products to their clients who represent the "probably interested" client groups. Such marketing and communication efforts are seriously hindered if many clients should be left out of the mailing groups.

Since creating "execution-only" group of clients may look practical for firms, it will constitute an unacceptable legal risk because of the burden of proof it implies.
Therefore we suggest deleting the entire paragraph 1 as no level 2 measures should be implemented.

Definition of "non-complex instruments"
We can not agree with CESR's excessively rigid approach qualifying as non-complex all non-derivative financial instruments.
Indeed, there exist derivative instruments which are easily understandable and thus could be classified as non-complex. In the Netherlands for example, warrants are classified as stocks. Therefore, Dutch retail clients who can trade in stocks, can automatically trade in warrants, which is also due to the Euronext system. As a result of CESR's definition, warrants in the Netherlands would be excluded from trading on execution-only basis, which would not be in the best interest of clients.
Among CESR's criteria to define non - complex instruments mentioned in points a) b) c), only these mentioned in the point c) referring to the easy access and the likelihood of being understood by the average client are relevant. Frequency of the transfer and potential liability of the client can not properly reflect complex or non-complex character of financial instruments.
Therefore, we suggest CESR to delete points a) and b).

7. Transactions executed with eligible counterparties (Article 24) BOXES 11, 12

We feel this section needs to be reconsidered as a whole and big firms should be better kept in mind when drafting the rules.

BOX 11
Opt-in regime, opt-out regime
To avoid confusion, the article 24 allows for variations in conduct of business regimes based on transactions and not on products, as stated by CESR in opt-in and opt-out regimes. We are strongly against the possibility to 'be' a retail client for product A and an eligible counterparty for product B. This is administratively not workable and would be too burdensome.
Therefore, the word "products" should be deleted from the box 11.

BOX 12
Balance sheet total
In our view, CESR should not take into account the balance sheet total, but the balance sheet consolidated. In many cases the balance sheet is simply presented to the investment firms as consolidated and it would be very difficult to see what the independent balance sheet total would be. It would not be feasible for a firm to make extensive studies of a mother company's balance sheet in order to derive the estimated total of the subsidiary's balance sheet.

III. MARKETS

As a general comment, firstly we believe that this part of CESR's consultation paper does not reflect enough the interests of the whole financial services industry in Europe. We have impression that this section is rather aligned with Stock Exchanges' market practices making it very difficult for Investment Banks to compete effectively with them on a level – playing field; or on retail-facing banks / brokers' practices who have a totally different set of requirements to protect their customers than Investment Banks do.

Secondly we would like to emphasize that we fully support joint response of: International Swaps and Derivatives Association, International Securities Market Association, International Primary Market Association, Association of Norwegian Stockbroking Companies, Bankers and Securities Dealers Association of Iceland, Bond Market Association, Danish Securities Dealers Association, Finnish Association of Securities Dealers, Futures and Options Association, London Investment Banking Association, Swedish Securities Dealers Association, which is very thorough and drawn from across the whole of the Investment Banking community in Europe.

Thirdly, given the absence of analytical data and a very short deadline for implementation, we think that CESR should adopt a "test approach" consisting of acquiring experience and appropriate data before fixing methods to define the terms of a "liquid market in shares" or a "standard market size".

1. Pre-trade transparency – Systematic Internalisers (Articles 4 and 27) Definition of Systematic Internaliser BOX 14

Box 17 and question 8.1
We do not agree with CESR's interpretation of the level 1definition of systematic internaliser.
Firstly, we think that CESR does not intend to explain the meaning of the level 1 criteria of dealing on own account on an "organised, frequent and systematic basis", but rather introduces, via level 2, new cumbersome requirements that investment firms will have to comply with:
- requirement to have a regular internalisation policy goes beyond the term "organised" in the level 1 text.
- internalisation activity to have an identifiable commercial purpose
- especially requirement on firms intending to cease acting as systematic internaliser even in one share to announce their intention to do so in advance.

Secondly, CESR when drafting its advice does not seem to having considered the recital 53 explicitly excluding from the scope of the Directive transactions carried out on an Over The Counter basis.

Question 8.2
Given the formulation of the level 1 text " on an organised, frequent, and systematic basis", there is no doubt that the criteria should be fulfilled collectively.

Question 8.3
Concerning setting criteria for "frequent", a more flexible approach seems more adapted. In our view, "frequent" could be described as "non occasional".

Question 8.4
The proposed obligation to disclose the intention to cease systematic internalisation is an obligation newly introduced by CESR with no legal basis in level 1 text, neither in the Commission's mandate.

As conclusion, we think that CESR's rules as currently drafted do not serve the purpose of proper implementing of level 1 measures. Article 4.1.7 and recital 53 explain already clearly enough the definition of a systematic internaliser and no level 2 measures are necessary.

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2. Scope of the Rule (Article 27.1) BOX15

CESR should put an accent on what is feasible from the market participants' point of view.
Given the absence of an appropriate analytical data and a very tight deadline for implementation, we urge CESR to adopt approaches which market participants are already familiar with and will therefore be able to implement on time.

Question 8.5
As we do not know how in practice all pre-trade transparency regime will work, it would be simpler and more reasonable to measure the liquidity on an EU-wide basis.

Question 8.6
At this stage, using a proxy approach based on an EU – wide indices would be the simplest to manage by market participants. CESR's approach based on pre-determined criteria is too complex to put in practice, especially that CESR also proposes to combine them.

Question 8.8
Combination of different (absolute and relative criteria) to define shares as liquid is too complex to implement.

3. The determination of Standard Market Size/Classes of shares (Articles 27.1 and 27.2) BOX16

Question 9.1
We agree with CESR's approach of proposing a unified block regime for the relevant provisions in the Directive.

Question 9.2
It would be a problem for systematic internalisers to have a large number of SMS classes since it would be too difficult to manage.

Question 9.3
We are more supportive of converting the SMS into number of shares.

Question 9.4
We think that subsequent annual revisions of the grouping of shares are reasonable.

Question 9.5
This would be too premature to fix an initial SMS from the first day of trading of a share. Therefore, a three-month trading period seems to be a more reasonable approach.

Question 9.6
We consider a two-week period from publication as sufficient for systematic internalisers to adapt to new SMS.

Question 9.7
The establishment of a single contact point seems to be the good solution for publication of the information since consultation of websites of competent authorities in each Member State would be too complex to administer.

4. Obligations of the Systematic Internaliser BOX 17

Question 10.1
We do not see any specific regulatory issues and specific provisions needed when a systematic internaliser is the trading venue with the largest turnover in a particular share falling within the scope of Article 27.

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Question 10.2
In our point of view, as far as CESR's expression "100 of its % normal trading hours as a systematic internaliser" refers to the normal trading hours during which the internalisation can be undertaken, we think that it constitutes a reasonable and workable requirement for level 1"continuous basis".

Question 10.3
We think that publication of quotes solely on the firm's own website would be "easily accessible" for market participants. Moreover, publication on firm's website meets the following CESR's requirements: publication on a real time basis, no high costs for market participants, systematic internaliser remains responsible for publication of the quotes.

Question 10.4
We agree with the proposed general criteria for determining when a price or prices reflect market conditions and we think that no more specific criteria should be added.

Question 10.5
We strongly prefer an open list of exceptional market conditions rather than defining of absolute criteria that do not include all exceptional cases which can appear on the market.

Question 10.7
We agree with CESR's approach on updating of quotes.

5. Handling of client orders and executing the orders BOXES 18-20

BOX 18, question 11.1
We agree that it is unnecessary for CESR to provide additional advice in respect of the handling of client orders where a systematic internaliser publishes multiple quotes.

BOX 19, question 11.2
We do not see any benefit to CESR making more detailed recommendations concerning how a firm should set the number and/or volume of orders that represents the norm.

BOX 20, question 11.3 and 11.4
We think that there is no need to specify a minimum number of securities in relation to the definition of a transaction where execution in several securities is part of one transaction. Market participants need a more qualitative approach rather than fixing of a minimum number of securities.