

ABI COMMENTS ON CESR CALL FOR EVIDENCE – PROVISIONAL MANDATES UNDER THE FUTURE DIRECTIVE ON FINANCIAL INSTRUMENTS MARKETS (ISD2)

Before setting forth our specific comments, ABI should like to note in general that in carrying out its mandate from the Commission the CESR should design implementing measures for the future Directive on financial instruments markets that are as specific and detailed as possible. This will serve one of the purposes of the Directive, namely the greatest possible uniformity of the regulatory framework in the Member States, to prevent competitive disparities between intermediaries located in different state (“dumping”).

Turning to specific matters, the Italian banking industry has a number of observations on the individual measures proposed:

- ◆ on point 3.1 concerning the implementing measures to Article 13 of the proposed Directive (organizational requirements), we recommend that as regards the internal compliance function for intermediaries the CESR’s approach should be that: a) this “function” should be restricted to *ex ante* verification of correct transposition of external rules into internal rules and procedures and should not extend to *ex post* verification of the intermediaries’ behaviour in applying such rules and procedures, which is one of the activities proper to the internal auditing function; b) while recognizing the advantages of having a compliance function organizationally independent of the internal audit function, organizational models that put the compliance function within the audit direction should also be allowed, in that this could have advantages in terms of effectiveness and efficiency (quicker and less costly implementation).

It is important that the CESR clearly define the scope of the “principle of segregation of duties/functions”, which is not further specified. The principle is supposed to govern internal procedures to guarantee proper performance of the intermediary’s activities. We hope that the scope of the principle will be circumscribed, as it is in Italy, to portfolio management business.

- ◆ on point 3.2 (“conflict of interest”), referred to in Article 18 and Article 13.3 of the Directive, the CESR’s approach is broadly acceptable. However, we think the case of “conflict between clients” set out in point d) of the document should be better clarified.
- ◆ on point 3.4 (“best execution”), referred to in Article 21 of the Directive, the approach to this issue given in Level 1 does not sufficiently guarantee investor protection. We would recommend to the CESR that the “weight” of each factor considered in evaluating best execution of an order (price, speed, etc.) be carefully modulated according to whether the security is traded on regulated markets or not and whether a buy or a sell order is involved.
- ◆ on the points concerning pre- and post-trade transparency, even though they refer to regulated markets and MTFs, we think it would be helpful right from the start to signal ABI’s general view on the importance of applying pre-trade transparency requirements to order internalizers.

To summarize such a position, we are convinced that the future directive must lay down a set of rules that can effectively protect investors by requiring ample, timely and significant information disclosure. Investors’ freedom of choice, which is what drive competition, is a mere fiction unless it

is accompanied by adequate transparency as to the “effective” terms on which trading services are offered. For that matter, this is the rule underlying any sort of transparent and efficient market, regardless of economic sector.

It is no accident that the European Central Bank, in its opinion of 12 June 2003 on ISD2, recalled that “Market transparency is ... central to both the fairness and efficiency of a market and in particular to its liquidity and quality of price formation.”.

Consequently, we think that, independently of the outcome of the discussion between Community institutions on this topic, laying down for all the intermediaries effective requirements of market disclosure (pre and post trade) on the formation of the prices posted is a necessary condition for market transparency and investor protection.

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