



DANISH BANKERS ASSOCIATION

CESR

DBA response to the revised Consultation Paper on the 1.st set of mandates

Introduction

The Danish Bankers Association (DBA)¹ responded on the 1.st Consultation Paper by CESR on the 1st. set of mandates of the implementing measures of the Markets in Financial Instruments Directive (MiFID). We welcome the opportunity to comment on the 2nd Consultation Paper (CP) issued by CESR and we appreciate the openness of CESR regarding its considerations on its advice to the Commission.

We regret, however, that the revised CP covers only part of the subjects included in the 1st set of mandates (excluding, of course, the issues that are subject to a different deadline, such as best execution). It is uncertain to us how CESR is going to proceed with the other issues in the 1st set of mandates that are not included in this new CP. In the case that these issues are not going to be revised in any form, we would like to refer our previous response to CESR's 1st CP on the 1st set of mandates, which we have **en-closed** this letter.

We would like to express the following general and specific remarks to the consultation paper.

General Remarks

With regard to the subjects that are covered by the 2nd CP, we find it hard to respond in greater detail in those areas where no precise Level 2 text is provided.

The degree of detail in some areas is still not optimal. We need to ensure sufficient flexibility for market participants. However, due to the lack of "revised level 2-text" we are not aware of the degree of detail intended by CESR in its submission of technical advice to the Commission.

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¹ The Danish Bankers Association - Finansrådet - is the trade organisation for Danish banks, covering the entire banking sector. Members include banks, savings banks and Danish branches of foreign banks. The Association has 161 members which covers member banks with only a handful employees to larger bank groups.

Specific Remarks

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Independence of compliance

First of all it is very important for the final work of CESR in this area to be fully consistent with the ongoing work undertaken by other bodies, notably the Basel Committee.

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Furthermore we welcome the adoption of a functional rather than an organisational approach to compliance. Regarding the question of independence we would like to state that it is important that a compliance officer is to some extent involved in the business of the firm and not placed “outside” the organisation of the firm. A compliance officer should not resume a commercial responsibility but can in other ways be involved in the business for instance in some back office function.

Regarding very small firms, we find both of the two options (outsourcing of compliance and allowing some degree of flexibility to investment firms as regards the means to achieve the objective of independence of compliance) potentially helpful. However, we do not believe that specifying criteria to define small firms would be helpful nor do we think this to be necessary. Instead, we would encourage CESR to focus on a flexible approach that is “appropriate and proportionate to the nature, scale and complexity of the business.”

Record keeping and burden of proof

We appreciate CESR’s statements that “its proposal does not intend to reverse the **burden of proof** but, rather, to introduce obligations of record keeping” and that there is “no assumption of guilt”. However, we continue to be very concerned about how CESR will achieve this goal. Without sight of the exact wording of the CESR Level 2 advice it is difficult to comment further on this issue.

Tape recording

In our first response, we strongly opposed the requirement to record telephone orders on a voice recording system. This would be a completely new requirement within the EU since there is no such requirement in the EU so far (with the exception of one jurisdiction) and would be very costly to implement. We do not see any evidence that it would be helpful as a general requirement.

The cost of such an obligation would be huge due to the cost of installation of the recording system, testing of the system, staff training and ongoing costs such as maintenance of the system, storage of the data, retrieval of the data when requested. We would like to refer to the analysis by the European Banking Federation which we fully support.

Outsourcing

We welcome CESR’s commitment to ensuring convergence with other work on outsourcing and alignment with other Directives on e.g. MFID and UCITS. However, without sight of the exact wording of the CESR Level 2 advice we are not in a position to comment in more detail.

Conflicts of interest and the segregation of areas of business

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We support CESR's proposed approach, but are unable to provide further views without sight of the exact wording of the CESR Level 2 advice, and we must refer to our previous response.

Investment research

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We support CESR's proposed approach. We are unable to provide further views without sight of the exact wording of the CESR Level 2 advice.

Transaction reporting

In line with the majority of previous respondents, we welcome CESR's decision to remove the requirement 1h) for a standard-level agreement between investment firms and reporting firms. It will be in interests of firms to ensure appropriate arrangements but we believe that those should not be enshrined at Level 2 but dealt with at national level. We strongly recommend further work at Level 3 by CESR to remove from investment firms unnecessary double reporting requirements to both reporting channels (approved by competent authorities) and competent authorities. Further to this point we do not see the point in using both Annex A and Annex B.

Furthermore the field "*Trading Capacity*" is generally acknowledged to be very difficult to cope with and, according to the Copenhagen Stock Exchange, it do not imply any value added regarding the surveillance. Therefore we do not see the reason for this field. The alternative option is to remove the field, which we strongly recommend.

Regarding assessing liquidity in order to determine the most relevant market in terms of liquidity we support a 'proxy-based' approach rather than computing a liquidity measure for each financial instrument. A proxy-based approach is simple and transparent. We also welcome that CESR intends to state that for the computation of liquidity to determine the most relevant markets in terms of liquidity, the competent authorities need to consider trading on all markets, and not just regulated markets.

We welcome the removal of the requirement to make available to the public (rather than just competent authorities) an updated list of competent authorities designated for the purpose of the most liquid markets for a specific financial instrument. We agree that the publication of such a list could have had anti-competitive effects.

Kind regards

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DANISH BANKERS ASSOCIATION

CESR

DBA response to CESR's draft advice on possible implementing measures of MiFID

Introduction

The Danish Bankers Association appreciates this opportunity to provide comments on CESR's consultation paper regarding advice for level 2-regulation on MiFID.

The Danish Bankers Association - Finansrådet - is the trade organisation for Danish banks, covering the entire banking sector. Members include banks, savings banks and Danish branches of foreign banks. The Association has 161 members which covers member banks with only a handful employees to larger bank groups. We would like to express the following general and specific remarks to the consultation paper.

General remarks

1. We find that the consultation paper proposes far too detailed and prescriptive measures and we urge CESR to reconsider the level of details. The consultation paper and the Commission's mandate seek to codify into EU law some matters that should not be dealt with at level 2 but in a more flexible way in order for the European financial markets to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.
2. Level 2 measures should recognise and distinguish between different market structures and business models. Consideration should be taken to differences in scale, nature and complexity of business. For instance, such consideration to nature, scale and complexity of business should apply to all the measures regarding compliance and not only to the question of independence.
3. It is a fact that the proposed measures will lead to increased cost for investment firms due to IT-development, training of staff and changing of documentation. Such increased cost will inevitably lead to a rise in the price of investment services to the disadvantage of the investors/clients. Hence, consideration should be given to whether an imposed measure in the end will result in a net benefit for the investors in the form of increased transparency and a better service without substantial rise in price. We believe, that the draft proposal in many situations does not provide for such benefits.

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4. The consultation paper envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. Instead, they should meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to conflict of interest policies.
5. We fear that the load of information that CESR propose to be provided to clients would damage the clients' ability to form a general view of how the market functions and how to invest rather than provide the necessary transparency and general view. In addition, we see it as outermost importance to ensure that information provided to clients can be standardised.
6. We would like to stress the need for transitional measures for various aspects of the consultation paper that will require the industry to make organisational and technological changes.
7. Finally, when a firm has provided existing clients with the material required under the existing ISD, MiFID should not require new documentation to be provided until changes in a firm's business relationship with its existing clients make it appropriate to modify terms of business. Grandfathering clauses are needed.

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We would like to provide the following specific remarks to the consultation paper.

Specific remarks

Section II - Intermediaries

Compliance and personal transactions (art. 13(2))

Question 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?

Question 1.2. - May deferred implementation of requirements for independence be based on the nature and scale of the business of the investment firm?

Question 1.1: It should not be prescribed that the compliance function should be independent. The requirement that firms should have an independent compliance function is inappropriate for Level 2 measures. It is an impracticable standard for firms that do not fall into the broker/dealer model. If one must be chosen, we prefer the second option – “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, the

compliance function should comply with the requirements for independence set out in paragraph 2(d)". Furthermore, regulatory requirements should focus on the effectiveness of the firm's compliance function. Independence is one way of achieving effectiveness, but there are others.

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For some investment firms there does not exist any essential conflict of interest due to the scale, nature and non-complexity of the business. This is the case for those of our members that are small banks who often transmit orders to another bank. If such banks should have an individual, independent compliance function it would be too costly and would inevitably lead to a situation where they are not able to provide investment service to their clients due to the administratively burdensome and costly procedures. Hence, it is essential that a more flexible approach is provided for such investment firms.

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Furthermore, the degree of independence of a compliance function should be kept to a minimum in cases where the potential risk of conflict of interest is low, because the investment firm does not have corporate finance and investment research activities. In such cases, the compliance officer should be responsible for the handling of client complaints, issues relating to order-handling and documentation but should also to some degree be able to be engaged in other activities in the investment firm.

In Denmark the investment firms that do have a compliance function in some cases uses a "part time" compliance officer. The employee then works part time with compliance issues and the rest of the time as a controller or is engaged in activities relating to operational risk. This is due to the fact that compliance and operational risk are activities that are close related. We believe that such a way of arranging the compliance function is possible within the provisions of the draft advice since part time compliance officers will not be involved in the performance of services or activities they monitor.

2. (d) (ii): CESR proposes that the "budget and remuneration of the compliance function....[must be].... linked to its own objectives and not the financial performance of the business line of the investment firm". The fact that a business line operates compliantly ought to assist it to meet its competitive business objectives and therefore there is no automatic conflict between linking the remuneration of the compliance function with business performance. In particular, in order to attract high-calibre compliance officers, it may be necessary for their remuneration to be linked to the bonus pool of a particular business line of a firm. We would suggest that 2(d)(ii) be reworded as follows:

"The remuneration of the compliance function does not undermine its independence."

In this way, the onus would be put upon the investment firm to demonstrate that the remuneration structure worked effectively. As an alternative,

the remuneration of a compliance officer connected to for instance the fixed income business line of a Danish branch of a bank could be linked to the financial performance of the fixed income business lines in all the branches of the bank for instance branches in Sweden, Norway and Finland.

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7. (a): It should be noted that an investment firm only to some extent is able follow an employee's personal transaction due to the fact that an employee can have an account and a deposit in another investment firm and thereby being able to trade through another investment firm.

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Question 1.3. - 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?

Question 1.3: As for all other CESR Standards, this standard too should be reviewed to determine whether it remains appropriate to the current context established by the Level 1 Directive. We believe that outsourcing should be allowed for all investment services, as the benefits of this flexibility would apply to all other fields. In this sense we would favour applying the outsourcing possibility provided in the draft advice to all services. On the other hand, any application of the conditions for outsourcing should take due account of the difference between products and services and the respective levels of risk.

Obligations to internal systems, resources and procedures (art. 13(4) and (5) second sub-paragraph)

No comments.

Obligation to avoid undue additional operational risk in case of outsourcing (art. 13.5 first sub-paragraph)

CEBS and CESR have both published requirements for outsourcing. IOSCO is also undertaking work on outsourcing. It is vital that these organisations ensure that these requirements do not diverge. This is particularly important for banks offering investment services, as they will be subject to both the CEBS and CESR requirements.

We consider that it is not necessary to have very detailed rules on outsourcing. For example it is not appropriate that the content of a service level agreement between a firm and its outsourcer should be included in level 2 law.

The question of outsourcing is a business decision. We propose therefore to delete Paragraph 7 of Box 3 regarding the prior notification of the competent authority of an investment firm's intention to enter into outsourcing arrangements falling within paragraph 2. The competent authority should be notified of an outsourcing arrangement in due time after entering into such an arrangement.

Record keeping obligation (art. 23(6))

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CESR discusses on page 26-27 the issue of recording of telephone conversations and impose an obligation to keep records of telephone orders on a voice recording system for a period of at least one year (provision 2b).

Apparently, this provision impose an obligation to record telephone orders on a voice recording system but it is not evident to us how wide this obligation to record telephone orders goes. We strongly oppose a general requirement to record all telephone orders, for instance also orders that are received from retail clients at branches.

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Danish investment firms currently capture the required data relating to all orders received from customers, as the current ISD requires, but they do not voice-record all telephone orders. By way of example, telephone orders from non-professional customers given to local bank branches are usually not recorded.

We consider that only tapes of telephone orders that are already being recorded should be subject to the requirements. This could be achieved by amending 2 (b) to read as follows:

“Where telephone orders are voice recorded, these recordings should be kept for a period of at least one year.”

Question 4.1. – Should there be a separate obligation for the investment firm to be able to demonstrate that it has not acted in breach of its obligations under the Directive?

Question 4.1: No. This reverses the onus of proof, which goes against both the European Parliament's and the European Council's decision at Level 1. It is a fundamental principle of Danish law and legal tradition that the onus to prove a case rests with the “accuser”. If no evidence is brought, then the case has not been established. We agree with the members of CESR that believes that sufficient safeguards are already provided. We disagree with the approach of some CESR's members that if a reversal of the burden of proof is not included in the draft advice this should require a more detailed regulation. The proposed provisions regarding record keeping is already too detailed.

Question 4.2. – What should the nature of the record keeping requirement be in relation to i) capital markets business such as equity IPOs, bond issues, secondary offerings of securities; ii) investment banking business such as mergers and acquisitions; and iii) general financial advice to corporate clients in relation to gearing, financing, dividend policy etc?

Question 4.2: There is not a need for further specific record keeping on these issues.

Safeguarding of clients' assets (art. 13 (7) and (8))

It is our opinion, that many of the proposals in Box 5 'specify particular arrangements' which are too prescriptive for implementing measures, or seek to do so. We strongly urge CESR to advice a more generic set of proposals.

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There is a urgent need to avoid provisions that would require a "repapering" exercise as regards providing *current* clients with new documentation. When a firm has provided existing clients with the material required by national requirements under the ISD that are broadly in line with MiFID, new documentation should not need to be provided until changes in a firm's business relationship with its existing clients make it appropriate to modify terms of business: only at *that stage* would it be appropriate to provide new documentation to the extent that a firm considers that its current material may not cover the ground.

Clients assets requirements are one of the areas where the need for implementing measures to be in the form of Directives, not Regulations, is especially important. Implementation by Regulations would be inappropriate given the Member States' different national insolvency laws, and the broad range of financial instruments covered by the Directive, which are likely to require tailoring of the general requirements.

MiFID makes it clear that measures to protect investors should be adapted to the "particularities of each category of investors". Therefore, the position of CESR should be that a firm is under an obligation only to *notify professional clients/eligible counterparties* as regards the particular arrangements that are referred to in the draft Advice – for example, as regards pooling arrangements – and that it is only from retail clients that *prior consent* should be obtained.

We are concerned that the requirements as regards the factors to be considered when a depository is selected are too prescriptive. This could be addressed by amending the finanal part of the paragraph 8 (a) to read:

"must take into account all relevant factors, these might include, to the extent that they are applicable or relevant, the following".

Conflict of interest

We strongly support CESR's objective "to set out flexible principles of general application across the whole range of business models" (page 40). However, we consider that CESR has not satisfied this stated objective. Many of the draft proposals in Box 6 are too prescriptive to offer the desired flexibility. We strongly urge CESR to set forth a more generic set of proposals.

We foresee that the application of the Level 2 Directive as drafted would give rise to potentially major constraints and administrative burdens. The level of detail is too high and high-level principles should be used.

Paragraph 1 (a) could be specified by recognizing the investment firm's normal and legitimate interest in profit in order to exclude an interpretation where the investment firm's interest in fees is regarded a detriment to a client.

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Paragraph 3 could be read as requiring an intra-day register, which would be impossible to maintain. Recording conflicts is not a useful tool; the focus should be on managing them.

As regard *conflicts policy*, we believe that concrete organisational standards should be stated at a general level in Level 2. Then firms should be allowed to adapt or develop their conflicts policy appropriately. We support a conflicts policy in principle as a way to retain managerial responsibility, but stress that the detail of this should not be prescribed by European law.

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

Question 6.1: Further examples are unnecessary.

Question 6.2: We strongly prefer (a) and oppose (b). Any detail of this sort should be no more than guidance.

The requirement to disclose the details of inducements as required by *paragraph 11(b)* exceeds the level 1 Directive, which is unacceptable. Level 1 only requires disclosure of the general nature and/or sources of conflicts of interest.

Furthermore, the provision relating to inducements (9 to 11) are from the original CESR Investor Protection standards and have remained unchanged. However, the requirement to inform a client “at least once a year, of the relevant details of such inducements” is impractical if it means that a firm is expected to be able to give anything other than a general description of the sorts of “inducements” it receives. We would propose that 11(b) should be deleted, or, in the alternative redrafted as follows:

“(b) at least once a year, in general terms, of the nature of any inducements which it gives or receives.”

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We oppose the proposal in *paragraph 12* to disclose the investment firm's conflicts policy. Level 1, in Article 18 (2), does not require firms to disclose their conflicts policy to clients. Article 18(2) only requires investment firms to disclose the general nature and/or sources of conflict of interest to the client in the case organisational or administrative arrangements to manage conflict of interest are not sufficient to ensure that risk of damage to client interest will be prevented. CESR should bear in mind, that there is a fundamental built-in conflict in the core business of investment service since some clients wish to buy and some clients wish to sell.

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The obligation to The Level 1 Directive does not include a requirement for client consent as proposed in *paragraph 14(b)*, therefore it cannot be brought in at Level 2. Hence, this requirement is deleted.

Fair, clear and not misleading information (art. 19(2))

Generally speaking, the information requirements proposed by CESR relating to article 19 (2), 19 (3) and 19 (7) are very confusing. First of all, it is difficult to see the connection between the information provisions proposed by CESR in relation to the different articles. Secondly, the information requirements are too overwhelming due to the level of details and this will be to the disadvantage of the retail client rather than lead to an increase in the investor protection. Thirdly, CESR should make sure that there isn't overlap or contradictions between the proposed provisions regarding article 19 (2) and other directives. Finally, it is essential that the investment firms can use standardised information based on for instance the types of financial instruments.

Information to clients (art. 19 (3))

CESR proposal is very detailed. Rather than being able to form a general view of the investment services and products offered by an Investment Firm and on basis of this make an informed decision the clients will literary drown in information. Hence, the purpose of article 19 (3) has not been fulfilled due to the level of details suggested by CESR.

With respect to Box 8, the proposal requires a firm to provide all information “in writing”. We think it is good practice to give the client written information on the risks and characteristics of the type of financial instrument he is interested in, i.e. generic information on the possible effects of illiquidity. It is not practicable to require written information concerning the specific instrument, i.e. details about its liquidity (paragraph 7 a ii (1), whether it is traded on regulated markets (paragraph 7 a ii (2) or its duration (paragraph 9). We think that Art. 19 (3) envisages giving this type of generic information (“standardized format”). In our reading, it leaves information on the specific product to be provided on request or in the course of investment advice. Such information might also be available on the web. Additional requirements would pose severe problems for existing service models, such as direct banking.

It is our opinion that requiring information on specific financial instruments would be contrary to the intention of the level 1 principles in article 19 which envisaged the use of standardised information.

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Client agreement (art. 19(7))

As stated previously, there is an urgent need to avoid provisions that would require a “repapering” exercise as regards providing *current* clients with new documentation. In Denmark, investment firms have recently sent new client agreements to retail clients due to new regulation in accordance with CESR’s standards on Conduct of Business Rules and it would be disproportional from a cost benefit point of view to send new agreements to all retail clients by April 30th 2006. Hence, CESR should propose a grandfathering clause.

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In view of the substantial and complex requirements that CESR requires a firm to include in its client agreement, it may be difficult to ensure that the agreement will be “clear and easily understandable by the client”. In any case the text for whether the agreement is “clear and understandable” should be an objective one, not the subjective view of the client.

We would propose adopting the wording already used in Box 7 paragraph 3(a) and amending Box 9 (pp. 60-64) paragraph 3 to read as follows:

“The retail client agreement must be clear and likely to be understood by the average member of the group of clients (retail/professional) receiving the agreement”.

According to the consultation document box 9 paragraph 1 and 8 requires retail client agreements to be concluded in written form, i.e. signed by the customer. Under paragraph 5, it will be possible to refer the customer to other documents, so it will continue to be possible to use general terms of business, for example. The question of how to deal with existing clients is not explicitly resolved. It would be unreasonably burdensome if all contracts with an investment firm’s existing customers had to be replaced. This would necessitate sending out the new contracts, having them signed and returned by the customer and sending at least one follow-up package to those customers who fail to respond.

Hence, in the interests of proportionality, the new form of contract should only be mandatory for new customers. It should at least be sufficient, simply, to advise existing customers about the new rules and, if necessary, send them any information which is not covered in their existing contracts without the need to obtain their signature.

Reporting to clients (article 19(8))

Some of the information that CESR envisaged should be on the contract note or confirmation notice is impossible for an investment firm to obtain in the case of non-domestic financial instruments where the investment firm use a foreign broker in order to buy or sell a financial instrument which is traded at a regulated market or MTF, where the investment firm does not have access. Information on time and date of execution and the regulated

market or MTF on which the transaction was carried out or the fact that it was carried out outside of a regulated market or MTF (Box 10, paragraph 2 (c), (d) and (f)) are all information which the investment firm does not receive from the foreign broker.

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Best execution (art. 21)

Since CESR has provided an extension of the deadline for responses regarding this issue until October 4th we will respond to this issue separately before that deadline.

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Client order handling (art. 22(1))

Q.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?

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

Q. 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?

Q.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?

Q.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?

"Regarding paragraph 7 on the requirements to carry out orders promptly and sequentially. We agree that the primary rule in paragraph 6 should be to execute non-professional orders sequentially. There is a variety of situations when this may not be appropriate and would not disadvantage the client. Some of these circumstances would occur for reasons other than market conditions or the characteristics of the order. In view of this, we think that it would be preferable to make the text of paragraph 7 a little less prescriptive. We would propose that the last part of paragraph 7 should be amended to read:

"Or for other reasons that do not disadvantage the client"

Question 2: No, Professional clients are able to look after their own interests.

Question 3: There is no need to set out any further requirements other than those set out in Box 11, paragraph 2 to 7.

Question 5: We agree with CESR (box 11 para 8) that order aggregation should be permitted if it is likely that aggregation will work to the advantage

of a client and if there has been disclosures of the possibility that the effect of aggregation could sometimes work to a clients' disadvantage.

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Aggregation of orders is carried out throughout the EU. It is generally only carried out for non-professional clients. The rationale is that small orders are more expensive to execute than larger orders and there is generally a benefit to clients whose orders have been aggregated due to their reduction in execution and settlement costs. Moreover the aggregation of orders may result in a better price than would have been obtained for a smaller order – so this is also an advantage of aggregation. Overall, therefore, aggregation generally works to the advantage of clients.

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Question 11.6: This should be left to the decision of each firm.

Question 11.7: Yes. We can see no reason to prevent the aggregation of client and own account orders subject to firms having and adhering to an allocation policy which treats customers fairly in these circumstances.

Section III – Markets

Pre-trade transparency requirements for Regulated Markets and MTFs (art. 44 and 29)

Since CESR has provided an extension of the deadline for responses regarding this issue until October 4th we will respond to this issue separately before that deadline.

Admission of Financial Instruments to Trading (art. 40)

No comments.

Section IV Cooperation and enforcement

Transaction Reporting (art. 25)

Q15.1: Should competent authorities be able to waive the requirement for investment firms to report transactions in electronic format? Should such an exemption be limited to exceptional cases, and what cases would those be in your view?

Question 15.1: Competent authorities should have the possibility of such a waiver, since there can be cases of complex transactions where there is a need to provide the report transaction in another format.

Q15.2: In respect of bond markets and commodity derivatives markets, new systems for reporting financial transactions will probably have to be put in place in many Member States, in order for investment firms to be able to meet the requirements of the Directive and Level 2 advice. (Note that Article 20(1)(b)) of ISD1 already requires investment firms to report all the transactions covering bonds and other forms of securitised debt to competent authorities, though Member States have the right to provide that this obligation only applies to aggregated transactions in these instruments.) To what extent should the implementing measures allow market participants

more time to implement these proposals ("transitional regime")? What could be legitimate reasons for such a possibility?

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Question 15.2: Given the short timescale required by the April 30 2006 deadline, transitional provisions are essential due to IT-adjustments testing of new systems etc.

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Q15.3: To what extent should CESR investigate the possibility for future convergence between national reporting systems? What are the advantages and disadvantages of harmonising at EU level the conditions (including format and standards) with which all the reporting methods and arrangements have to comply in order to be approved, instead of, as proposed by CESR, harmonising the conditions at a national level? What impact might harmonisation have on existing national reporting channels, national monitoring systems and on the industry?

Question 15.3: CESR is right (on cost-benefit grounds) to propose for the purposes of MiFID implementing measures to harmonise solely at national level. However, as MiFID and other elements of the Financial Services Action Plan contribute to the goal of a single integrated EU securities market the amount of cross-border business will increase and investors and issuers will benefit from the cost savings to be achieved in harmonising at the EU level. But we stress that this should be a project for the medium to long-term, outside the legislative context. The goal must be reached gradually and on the conditions of the market. For example, as national systems reach the end of their useful life – but not before - they could be replaced by systems that meet an agreed EU-level system description created by CESR. As CESR has observed, its current proposals will already require significant and costly system development in many Member States by firms and their regulators and those new systems must be permitted to depreciate in line with accepted standards for IT system renewal.

Q15.4: Do you agree with the set of the general minimum conditions suggested? If you do not agree, what other general conditions would be more appropriate in your view? In particular, taking into consideration the responsibilities of investment firms on the one hand and third parties and other reporting channels, on the other, do you think that CESR should include the requirement of a standard-level agreement between an investment firm and a reporting channel in the list of general minimum conditions, or would this be better addressed at Level 3? What is your view on the border line as to the responsibilities for reporting if done by a third party acting on behalf of an investment firm or by a reporting channel?

Question 15.4: The question has three questions embedded in it. Our answer responds to each in turn. On the first, except for the electronic form requirement discussed under Q15.1 above, and the service-level agreement

requirement which is the subject of the second question, it is our understanding that the general minimum conditions set out by CESR provide an appropriate set of benchmarks by which to judge the acceptability of reporting channels. No additional requirements and no further levels of detail are necessary. On the second question, the specific issue of a standard-level agreement between an investment firm and a reporting channel, we consider that this is more appropriate for treatment at Level 3 given that approved reporting channels will, under CESR's draft advice, be subject to monitoring by the competent authority. On the third question, as regards third parties our view is that responsibility (for failure to report, errors etc) should remain with the firm. In the case of an approved reporting channel, the firm should have a waiver of responsibility as provided for in A25 (5). We further suggest that in order to avoid costly duplicative reporting Level 2 should specify that the waiver should be automatic.

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Q15.5: What other issues, if any, should CESR take into account when responding to the Mandate concerning the "methods and arrangements for reporting financial transactions"?

Question 15.5: CESR should ensure that its advice takes full account of current global developments in messaging formats and mechanisms and carries within it sufficient flexibility to enable CESR members and European based investment firms to operate cost-effectively in a global marketplace. It will be particularly important to optimise the overlap between trade reporting under Article 28 and transaction reporting under Article 25. It should be possible to submit only one reporting which is the case in Denmark.

Assessing liquidity in order to determine the most relevant market in terms of liquidity

No comments.

Minimum content and common standard/format of transaction reports

Q17.1: Do you agree with the approach to standardise/harmonise the list in Annex A to this draft advice only at a national level in order to be able to keep reporting systems that are already in place? If you do not agree, what approach do you think would be more appropriate?

Q17.2: What are advantages/disadvantages of moving towards harmonisation at EU level as regards the standards or format of the list in Annex A to this draft advice? To what extent would harmonisation at EU level of the standards or format of the list in Annex A to this draft advice impact the existing national data collection mechanisms and national transaction databases? Do you see merits in having an EU harmonised regime for the content and format of transaction reports, taking into consideration whether future and immediate long-term benefits could compensate the initial costs of harmonising the transaction reports?

Question 17.1: Yes.

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Question 17.2: In particular we reiterate that while we see long term benefits, progress must be gradual and grounded on making change according to an agreed blueprint but only when systems, including field structures, have come to the end of their useful lives or when global developments make change necessary in order to maintain the competitive position of EU securities markets (see also our answer to Q15.3).

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Q17.3: Do you agree with the proposed fields in Annex A and B to this draft advice? If you do not agree, what other fields would be more appropriate in your view?

Question 17.3: The only difference as far as we can see between Annex A and B is the "Notation" demands. Why do we need two different formulas?

In commenting on this section of the draft advice it would have been useful to know the basis on which the Annex A and B was compiled. Does it reflect a consensus among CESR members on the amount of information necessary to enable them to fulfil their functions under MiFID? If so, has each proposed field and its content been tested against specific regulatory needs and the cost of system changes to which it would give rise? Is the list based upon the current minimum common requirements of CESR members, or is it an aggregation of the maximum requirements they impose ?

In the absence of that information it is not possible to discuss objectively whether we agree with the proposed fields or not. One thing we can point out is that we do not understand the field "Trading Capacity" (identify whether the reporting firm was acting as an agent on behalf of a customer/client). For instance according to the Copenhagen Stock Exchange they do not use that information. It is useless. Moreover, it causes tremendous difficulties to do it right (it is close to impossible to do it right). What is the value of this information for CESR?

Q17.5: What are the advantages/disadvantages of requiring the field "client identification code" in transaction reports, bearing in mind the objectives of transaction reporting? What are your views on making the client/customer identification field mandatory in transaction reports? What are your views on the idea to promote a pan-European code for client/customer identification? Do you see any legal impediment to the introduction of such a code in your Member State?

Question 17.5: We recognise that some regulators believe that the inclusion of the firm's internal customer identification code is an important part of their analysis of transaction reports. We observe that most reporting firms are unconvinced, since it appears to them that in the event of activity in the market which the regulator believes merits investigation, the firms are subject to specific requests for disclosure of full details of the cli-

ents/counterparties concerned. It may be that attachment of a client identifier to all transactions limits the number of specific requests that regulators make to firms but this is not self-evident to the reporting firms.

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As regards a pan-European code for client/customer identification we observe that such a code would be unlikely to resolve the problems we have set out above. It would be expensive to set up and maintain; new account opening arrangements would be needlessly delayed to the detriment of investors (assigning ISINs for securities takes several days); the small minority who seek to abuse markets or investors would have no difficulty in avoiding the greater transparency for regulators that a single code might, in theory, provide.

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The problems and costs (IT, client convenience, client confidentiality) associated with mandatory client identification codes, whether on a national or pan-European basis, are such that CESR could not justify them without a thorough cost-benefit analysis.

Obligation to cooperate (art. 56(2)) + Cooperation and Exchange of Information (art. 58)

No comments.

Kind regards

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