Barclays Response to CESR's Call for Evidence on the FIMD Mandates

Barclays welcomes the opportunity to comment on CESR's call for evidence on the FIMD mandates. We have seen the responses submitted by APCIMS, IMA and LIBA and support the views they express.

Barclays is a UK-based financial services group engaged primarily in banking, investment banking and investment management. The Group also operates in many other countries around the world and is a leading provider of co-ordinated global services to multinational corporations and financial institutions in the World's main financial centres.

Private Clients & International serves one million affluent and high net worth clients, primarily in continental Europe and the UK, providing banking, stockbroking and asset management services and focusing on providing a single relationship for the provision of banking and investment products.

In our response we are focussing on the comitology provisions surrounding Article 19 and the principles that should guide them. However, we also have a few general comments on the Level 2 process of the FIMD as a whole.

Level of Detail

We are concerned that the provisional mandates are very detailed and potentially over-prescriptive for Level 2. We would draw CESR's attention to the objective of "striking the right balance between establishing a set of harmonised conditions for the licensing and operation of investment firms and regulated markets and the need to avoid excessive intervention in respect of the management and organisation of the investment firms."

We welcome the Commission's statement that, "the amount of detail included in the advice should be very carefully calibrated case by case; the advice should ensure clarity and legal certainty but avoid formulations which would lead to overprescriptive, excessively detailed legislation, adding undue burdens and unnecessary costs to the firms and hampering innovation in the field of financial services".

In this context, we would emphasise the need to differentiate between what is required at Levels 1, 2 and 3 respectively of the Lamfalussy approach. We would encourage CESR, in instances where the Level 1 text already provides sufficient detail, to be prepared to advise the Commission that further detailed implementing legislation is not necessary.

It is also important that CESR consider which measures are appropriately dealt with at Level 2 and which it would be more appropriate to pass up to Level 3. Given the variety of activities carried out by investment firms within individual member states and between the different member states of the EU, CESR's advice will need to be broad and flexible enough to allow

national regulators to apply them to their varied market structures at Level 3.

Differences between Key Member States

In order to achieve the appropriate balance between Level 2 and Level 3, CESR may find it beneficial to examine the differences between key member states current regulatory regime in order to establish where specific problems may be experienced in a particular member state. This fact-find should not be used as the basis for proposing a detailed Europe-wide rulebook. Rather, it should provide a basis from which CESR can ensure that the implementing measures it advises are proportionate, appropriate, relevant to markets and their users, and recognise the different environments national regulators will be operating in at Level 3.

Grandfathering Provisions

Grandfathering is another key issue that CESR should bear in mind in its Level 2 advice. Existing customers should be "grandfathered" into the new regime, as it would be time-consuming and very expensive to replace existing customer agreements with new agreements and other documentation and the cost would ultimately be borne by the customer. In our experience, a significant number of existing clients will fail to return completed agreements and in these circumstances firms will be compelled to cease servicing the client and transfer assets back to them. A proportion of existing clients will therefore lose their access to professional investment expertise if adequate transitional and grandfathering arrangements are not put in place

CESR Mandates Relating to Article 19

We are concerned that the general question on Article 19 is asking CESR to provide far too much detail. The mandate states that:

CESR should define, where relevant, the exact content of each of the obligations laid down in article 19 on the basis of the following criteria:

- The nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions.
- The nature of the financial instruments being offered or considered.
- The retail or professional nature of the client of potential clients.

For the provisions of paragraphs 1 & 2 of Article 19, no distinction should be drawn between the nature of services, financial instruments and retail/professional nature of client or potential client. Investment firms should act honestly, fairly and professionally in all circumstances and all information should be fair, clear and not misleading in all circumstances. To define the exact content of paragraphs 3 to 10 on the basis of the above criteria would involve a level of detail and prescription that is not suitable for Level 2. It would be better to leave sufficient flexibility to national regulators at Level 3 to deal with the market structure of their respective national markets (see general points above).

Any implementing provisions adopted in relation to Article 19 should not exceed the CESR Conduct of Business standards and should take into consideration any relevant provisions of existing Community Law. Formulations already exist in the Distance Marketing Directive (2002/65/EC) and the E-Commerce Directive (2000/31/EC) that also apply to most types of transaction covered by Article 19 FIMD. We would recommend that CESR use the wording of these existing Directives wherever possible.

We would also advocate that, in order to keep costs down, investment firms be allowed to provide the relevant information in a standardised form where appropriate.

Article 19(2)

In relation to Article 19(2), CESR has been asked to provide advice on:

1. The criteria for assessing fairness, clearness and not misleading character of marketing communications and of any other promotional/publicity communication addressed to clients or potential clients.

Such criteria are already set out in **Article 6 of the E-Commerce Directive** (ECD), "Commercial Communications: Information to be provided".

2. What should be considered a marketing communication in the context of this provision.

Article 2(f) ECD gives the definition of a "Commercial Communication".

Article 19(3)

With regard to Article 19(3), CESR has been asked to provide advice on specifying the content of the appropriate minimum information that the investment firm should supply to its clients in respect of:

1. Its services and of the firm itself. The content of the minimum information should depend on each type of service. (Information relating to this question must also be supplied to potential clients.)

Such information is already laid out in **Article 3.1(1) of the Distance Marketing Directive** (DMD) "Information to be provided to the consumer prior to the conclusion of the distance contract: The Supplier" and **Article 5 ECD** "Establishment and information requirements: General information to be provided".

2. Financial instruments and/or investment strategies (including different warnings).

Article 3.1(2) DMD contains "Information to the consumer prior to the conclusion of the distance contract: The Financial Service".

3. The different execution venues.

The use of different execution venues is a best execution issue. As long as an investment firm informs the client that it may go off market to obtain the best price for the client and complies with best execution requirements in doing so, the client should be sufficiently protected without the need to supply him with a list of all the different possible execution venues.

4. The costs and associated charges that client or potential client will have to pay for the provision of the different investment services.

Article 3.1(2) DMD "Information to the consumer prior to the conclusion of the distance contract: The Financial Service" requires the investment firm to provide the details of costs and charges to the client.

5. Which information should be provided at the outset of the relationship;
DMD Article 3 "Information to the consumer prior to the conclusion of the distance contract" sets this out.

and which should be updated on a continuous basis;
For this aspect, CESR should distinguish between non-advice and other services. There should not be a requirement pro-actively to update the information held on non-advice clients. For advisory and especially discretionary services, beyond reactive changes that the client informs the investment firm of, an annual mailing to check the accuracy of the information held should be sufficient.

determine the form in which the information is to be made available as well as the arrangements for making it available
DMD Article 5 covers the "Communication of the contractual terms and conditions and of the prior information", combined with **DMD Article 2(f)** which provides the definition of "durable medium" as referred to in Article 5.

Article 19(7)
On Article 19(7), CESR has been asked to provide advice on:
- the minimum content of the client records, in particular the customer agreement and the time at which such records must be established by the investment firm.
Section 3 (Articles 9, 10 & 11) ECD covers "Contracts concluded by electronic means" and **Article 3.1(3) DMD** sets out what information should be contained in a distance contract.

Article 19(8)
Under Article 19(8), CESR has been asked to provide advice on:
- The criteria for determining when and in which manner the investment firm should report to its clients.
A difference should be drawn between the requirements for reporting to advisory and discretionary clients, to whom the investment firm should disclose more information more frequently (six-monthly), and for reporting to non-advice clients (annually). In order to keep costs down, we would advocate that it be allowed to provide this information in a standardised form.