

*ANSWERS TO THE SECOND CESR
CONSULTATION DOCUMENT ON THE
IMPLEMENTING MEASURES TO DIRECTIVE
2004/39/EC ON
MARKETS IN FINANCIAL INSTRUMENTS.*

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General considerations

The Italian Banking Association (ABI), which with over 800 member banks represents the entire Italian banking industry, appreciates the second round of consultations initiated by the CESR concerning paper 04-562 containing the new proposals for implementing measures to Directive 2004/39/EC on markets in financial instruments.

On the whole the proposals are reasonable, but they do have some problems. The problems are both general and of detail. The detail considerations are set forth in the answers to individual questions.

On general matters, the proposals for the future rules, which will materially affect the daily behaviour of intermediaries, hence of clients, appear in some cases to be vague and generic, as is the case with the criteria proposed for the definition of systematic internalizers. This risks creating too great a scope for discretionality in interpretation and application of the Directive, and thus diminishing its potential contribution to market integration and the creation of a level playing field.

In other cases, such as the “execution only” rules, the proposals appear to adopt the practices and regulations of some Member States, facilitating the adaptation of intermediaries and clients in those States, with evident repercussions on the relative competitiveness of different national financial industries.

Further, we were unpleasantly surprised to note that the data supplied by the CESR on contracts executed on regulated markets failed to include those from the leading European market, the London Stock Exchange. This failure significantly undercuts the informational quality of the data, making it harder to assess or estimate the importance of the new type of intermediary envisaged by the Directive, the systematic internalizer.

Naturally, we do realize that innovative, important new rules such as those introduced with the Directive pose quite a stiff challenge in designing the best implementing measures for the European financial system. Moreover, correct implementation is the key to investor protection and to the proper functioning and integration of the European securities markets.

Answers: “Intermediaries”

1. Advisory services

Question 1.1. - Do you agree that advice on services, such as recommendation to use a particular broker, fund manager or custodian, should not be covered?

We think recommendations to use a particular broker, fund manager, or custodian (sub-activities) should not be included in the concept of “investment advice” .

Given that in Article 4.1.4 the Directive itself supply a precise, stringent definition of the content of investment advisory services (“in respect of one or more transactions in financial instruments”), the mere recommendation to use one market operator rather than another must necessarily be considered as distinct from the core business of investment advice.

Question 1.2. - Do you agree with the approach that a personal recommendation has to be held out as being suited to, or based on a consideration of, the client’s personal situation or do you consider this criterion to be unnecessary or ambiguous and would like to refer to the bilateral nature of the relationships and bilateral contacts between the firm and its clients? In the latter case which criteria would you use to differentiate between a “personal recommendation” and a “general recommendation” or a “marketing communication”?

We consider that the provision of investment advisory services, by nature, must refer to the client’s personal situation.

We further consider that investment advice, like the other main investment services, must be governed by a contractual relationship with the client.

In addition to its role as a necessary legal discriminant, the requirement for a specific advisory service contract has two key advantages:

- It gives the investor the clear, immediate perception of the difference between this type of service and the performance of “simple” advisory services instrumental to other services, such as financial marketing and placement.
- It is consistent with the reservation of the main service, i.e. the provision of investment advice,” which where market developments permit should imply the possibility of making it a new area of business with its own specific remuneration.

Thus Article 19.7 of the Directive seems to allude to the need for a contract, in providing (for all investment services, hence including investment advice) that investment firms must prepare a register that comprises the document or documents agreed by the investment firm with the client, specifying the rights and obligations of the parties and the other terms and conditions under which the firm supplies services to the client. The article further notes

that the rights and obligations of the parties can be supplemented by reference to other documents or legal texts.

We therefore do not agree with the CESR's assertion (on p. 13) that a contract is not a necessary requisite to determine the provision of investment advice.

Question 1.3. - Do you think it is reasonable to restrict "investment advice" to recommendations of specific financial instruments or is it necessary to cover generic information including financial planning and asset allocation services for financial instruments?

We think that in general it is reasonable to hold that financial planning and asset allocation services should fall under the definition of advisory services, given that by nature they form part of a relationship based on considerations of the client's personal situation.

We further hold that the scope of advisory services must not depend solely or mainly on whether the content of the recommendations is specific or generic, but rather on the existence of specific, pre-defined elements of the concept of investment advice, such as reference to the personal situation of the client and the existence of a contract. The activities of financial planning and asset allocation, in fact, may form one of the stages or procedures in the provision of investment advice; but in some cases they may also be considered as mere recommendations, and thus distinct from the core business of provision of investment advice, depending on whether or not the distinctive traits of the investment advice service are present.

2. Derivatives

Question 2.1.: Should "commodities" for this purpose be limited to goods?

We think "commodities" should be limited to goods, as the CESR proposes.

Question 2.2.: Alternatively, should an approach be taken that permits rights or property specifically mentioned in C(10) and other intangibles to be treated as "commodities" as well?

It is preferable, in our view, that intangibles and other underlying assets mentioned in C(10) should not be defined as commodities; the latter should be goods only (see Question 2.1).

Question 2.3.: Should derivative instruments based on telecommunications bandwidth be considered to be within the scope of the Directive?

Derivatives based on bandwidth, in our view, should be considered as financial instruments subject to MiFID, insofar as in the future this type of underlying asset could take on major importance in the light of developments in the market in information and communication technology.

Question 2.4.: If it should be considered within the scope of the Directive, should it be considered to be within the scope of paragraph C(7) or of paragraph C(10) of Annex I?

Bandwidth derivatives should be within paragraph C(10), like derivatives in other intangibles. Bandwidths should not be considered as commodities.

Question 2.5.: If the definition of "commodities" is restricted to goods, should a requirement be imposed that there must be a liquid market in the underlying?

No. A liquid market in the underlying asset need not be required for recognition of the derivative as a financial instrument. This characteristic is not required for other types of derivatives, such as financial derivatives, and would needlessly complicate the procedure for identifying commodities.

Question 2.6.: If not, should a requirement be imposed that, in addition to being capable of delivery, the underlying must be capable of being traded and if so, should there be a requirement for a liquid market?

In line with the argument under Question 2.5, we do not feel such a requirement is necessary.

Question 2.7.: Should there be an initial filter to exclude contracts which are likely to be spot contracts? If so, do you agree with the proposed approach of excluding contracts whose settlement period does not exceed the lesser of two business days and the generally accepted settlement period in the relevant market?

For the purpose of identifying contracts that are likely to be spot contracts and not true derivatives, we feel that the proposed method of an initial filter excluding contracts with a settlement period of two business days or the generally accepted settlement period in the market, whichever is less, is effective.

Question 2.8.: Should the status of the parties to the contract only be relevant for determining whether the exemptions in Articles 2(1)(i) and (k) or should it also be taken into consideration as an indicative factor for determining whether there is a commodity derivative as opposed to a commercial contract for the supply of commodities?

We feel that the status of the parties should be relevant only in determining whether or not the exemptions under Articles 2.1 (i) and (k)¹ should apply. It should not be considered as an indicative factor in determining the scope or nature of the contract.

¹ Art. 2.1 (i): persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;

Art. 2.1 (k): persons whose main business consists of dealing on own account in commodities and/or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;

Question 2.9.: Should commercial merchants be required to rely on the intention to deliver test or should the producer and user indicating factor apply to them as well? If so how can a commercial merchant be differentiated from a speculator?

We think wholesalers (commercial merchants) must be subject to the “intention-to-deliver” test, together with the producer-and-user indicating factor, in distinguishing derivatives traded for commercial purposes (which are not recognized financial instruments) from speculative hedges (which are recognized).

Question 2.10.: Do you agree with an approach under which the status of the contract for both parties is based on a consideration of the status and/or intent of either of the parties?

We feel that the derivative must have the same status for both parties and that in determining that status the intent and status of both parties should be considered.

Question 2.11.: If both elements of (2)² are present should this be conclusive or indicative? If indicative, if only one is present is that still an indicator?

We agree with the CESR that if the parties have neither the legal capacity nor the necessary licences to deliver the underlying commodity, this is conclusive. If only one of these two characteristics is present, then this should be considered as indicative.

3. Portfolio management

Question 3.1.: Do you agree with the proposals on portfolio management? Should any other issues be addressed under Article 19(1)?

The proposals are acceptable, although in our view the CESR should explicitly confirm that the reference to the category of retail clients means they do not apply to professional investors.

4. Suitability test

Question 4.1. - Do market participants think that adequate investment advice or portfolio management service is still possible on the basis of the assumption that the client has no knowledge and experience, the assets provided by the client are his only liquid assets and/or the financial instruments envisaged have the lowest level of risk, if the client is not able to or refuses to provide any information either on his knowledge and experience, his financial situation or its investment objectives? Or would this assumption give a reasonable observer of the type of the client or potential client the impression that the recommendation is not

² See Box 3, point (2), of the CESR paper, which reads: “A contract not falling within Annex I, paragraph C(6), is to be regarded as not made for commercial purposes and having the characteristics of another derivative financial instrument if the parties do not have both the legal capacity, and any necessary permits or licences, to make or take delivery of the commodity to which the contract relates.”

suited to, or based on a consideration of his personal circumstances?

In our view it is better in any case to offer investment advice or portfolio management services to clients who for personal reasons refuse to provide information on their knowledge, experience, financial situation and investment objectives, although these services should be provided in “prudent” manner, i.e. oriented towards low risk. We think that the intermediary can nevertheless evaluate the information it does have, also deriving from earlier relations.

5. Execution only

As a preliminary to responding, let us note that in judging the “complexity” of a financial instrument one must refer not only to the difficulty of evaluating the correct price but also to other features, such as yield and volatility.

In addition, although the professed intention in defining an instrument as “complex” is to refer only to its actual complexity and not to its risk, in box 10 of the consultation paper, giving the standards for defining “non-complex” instruments, point (b) envisages an indicator of risk³, but one that does not appear to correspond to any known financial instrument, at least not in Italy.

Question 5.1. - In determining criteria, should CESR pay more attention to the legal categorisation or the economic effect of the financial instrument?

We think both legal and economic factors should be taken duly into account in determining criteria for identifying non-complex instruments.

However, it must be added that in point (a) in Box 10, the use of the adverb “frequently” is not consistent with the aim of providing criteria for defining an instrument as non-complex in that this term tends to confuse the “illiquidity” of an instrument with complexity. We therefore suggest deleting the word “frequently”.

We further consider that for purposes of operational certainty the CESR should provide a list, albeit not exhaustive, of financial instruments that could not be traded by this procedure .

³ The CESR suggests: “Non complex instruments shall mean all non-derivative financial instruments: ... b) that do not involve any actual or potential liability for the client that exceeds the amount of his contribution [including any commitment that represents a genuine contribution to the acquisition costs of the financial instrument] ...”

Question 5.2. - Do you think that it is reasonable to assume that a service is not provided “at the initiative of the client” if undue influence by or on behalf of the investment firm impairs the client’s or the potential client’s freedom of choice or is likely to significantly limit the client’s or potential client’s ability to make an informed decision? Alternatively, do you think that the consideration of this overarching principle is not necessary because the use of undue influence could be subject to the general regulation under the UCPD and that CESR should base its advice more strictly on Recital 30 or refer entirely to this Recital advising the Commission that it is not necessary to adopt Level 2 measures in this area?

We thank that the provision of Recital 30⁴ is sufficient to handle situations of undue influence and that Level 2 measures are consequently not needed in this area.

6. Eligible counterparties

Question 6.1.: Do Market Participants agree that the quantitative thresholds for undertakings to request treatment as eligible counterparties should be the same as the thresholds for professional clients? Please provide the reasons for your position.

We think the quantitative thresholds for eligible counterparties must be different and higher than those for professional clients.

This differentiation serves the purpose of operational certainty, to prevent the same person from moving from one status to another, exploiting the different degrees of protection depending on specific advantage in each situation.

⁴ “A service should be considered to be provided at the initiative of a client unless the client demands it in response to a personalised communication from or on behalf of the firm to that particular client, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction. A service can be considered to be provided at the initiative of the client notwithstanding that the client demands it on the basis of any communication containing a promotion or offer of financial instruments made by any means that by its very nature is general and addressed to the public or a larger group or category of clients or potential clients.”

Answers: “Markets”

Before going into the merits of the individual questions, let us point out the general problem that Article 27 of the Directive on systematic internalizers suffers from and uncertainty of interpretation concerning the internalizer’s obligation under 27.3 and 27.5⁵ to publish firm quotes. So even though the Commission has not expressed asked, it would be advisable for the CESR to clarify whether this rule institutes a mere information function that the internalizer must perform vis-à-vis the market, consisting in making its quotes public but not necessarily applicable (“access to information”) or whether the Directive means that the quotes so displayed can be applied by any and all market participants, including those who are not clients of the systematic internalizer (“access to application”).

1. The definition of internalizer

First, let us remark that in our view the interpretation suggested in the consultation paper for the qualifying characteristics of the internalizer (systematic, organized, frequent) does not define the internalizer clearly enough, because the meanings of these three attributes are partially overlapping. In particular, note the redundancy of the terms “frequent” and “systematic”. To solve this problem (as we specify in the answers to questions 8.1 and 8.3), we think additional criteria, including quantitative ones, should be provided for.

Question 8.1.: Do consultees agree with criteria for determining systematic internaliser? Should additional/other criteria be used and if so, what should these be?

We think the criteria are generic, vague. It would be better to develop additional criteria, which could well be quantitative, in order to narrow the scope for discretion in interpreting the definition of systematic internalizer and hence in attributing that status, in order to ensure the certainty of the rule and make sure there is truly a level playing field within the Union.

Question 8.2.: Should the criteria be fulfilled collectively or used separately?

An investment firm is a systematic internalizer when it fulfills all or at least a clear majority of the criteria. This requirement should be specified in the regulation of level 2 itself.

⁵ Art. 27.1: “Member States shall require systematic internalisers in shares to publish a firm quote in those shares admitted to trading on a regulated market for which they are systematic internalisers and for which there is a liquid market. In the case of shares for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request.”

Art. 27.3: “Systematic internalisers shall make public their quotes on a regular and continuous basis during normal trading hours. They shall be entitled to update their quotes at any time. They shall also be allowed, under exceptional market conditions, to withdraw their quotes.”

Question 8.3.: Should CESR set criteria for the term “frequent”? If so, do consultees support the setting of numeric criteria or do they believe that a more flexible approach would be useful? What should these criteria be?

We think one or more quantitative or numerical criteria are necessary, with threshold values, presumably expressed in relative terms, to ensure the necessary flexibility. For example, the regulation of level 2 could consider the ratio of the value of the orders on liquid shares that a firm internalizes to that of total executed orders on that shares (30% say); or it could set an absolute value threshold (“x” million euros worth of orders on liquid shares internalized monthly, say); or a combination of the two could be used, with a relative standards such as the 30% ratio applied together with a minimum value threshold, i.e. on condition that the value of the orders internalized in a month is at least “x” million euros. These criteria could be also diversified by the relative liquidity of each share, i.e. according to the affiliation of that share to a class or to another.

Question 8.4.: Do you agree with the proposed obligation to disclose the intention to cease systematic internalisation? Should CESR propose more detailed proposals on this and if so, what should be the appropriate notice period?

We agree with the proposed obligation. An appropriate notice period, in our view, would be two weeks if the internalization of a single instrument is ceasing. If the intermediary intends to cease all internalization activity definitively, a longer notice period – say one month – would be better. This period would among other things enable the intermediary to revise and adapt its execution policy.

2. Liquidity

Before answering the specific questions, let us remark that with a view to ensuring acceptable market transparency there need to be adopted criteria that maximize the number of shares considered liquid, which are those subject to pre-trade transparency obligations.

Further, to achieve widespread, uniform transparency – not limited solely to the financial markets in which liquid securities are traded – we believe that a minimum number of liquid shares should be required for each EU Member State. There may be countries, such as many of the new members, with relatively underdeveloped financial markets and which, by mechanical and inflexible application of the criteria could have few liquid shares or even no one, as it result by the application, to CESR’ published data about trades on european stock exchanges, of two quantitative criteria (see also response to answer 8.8), with thresholds fixed at 1,000 average number of trades per trading day and at €2 million for daily turnover. This would undermine the efficiency and transparency of the local market, with repercussions on overall economic growth. The scarce relevance of a national financial market doesn’t justify such a choice. Moreover, there is the risk that illiquid shares may have a lesser potential for growth than liquid ones, given that it is easier for those who are already deemed liquid to continue to be so than for those excluded to qualify for the list. The method of designating liquid shares must therefore be dynamic and must have as few as possible “exogenous” entry barriers (like those deriving from a definition).

Question 8.5.: Should liquidity be measured on an EU wide or national basis?

We believe that it's premature to choose between those two criteria, as both have pros and cons. In fact, if liquidity were measured on an EU-wide basis, shares that are heavily traded in one domestic market could fail to qualify as liquid in proportion to total European trading volume. And finally, the integration of European share markets is still evolving and it cannot be expected to be completed in the short term.

Question 8.6.: Do consultees have a preference in favour of setting pre-determined criteria or using a proxy approach?

We prefer the setting of strict pre-determined criteria (see 8.9).

Question 8.7.: Regarding the different criteria described above, do consultees agree with the analysis of each of them, and are there other methods which should be evaluated?

We agree with the analyses and have no other methods to suggest.

Question 8.8.: Is it possible and/or appropriate to use for the purposes of Article 27 a combination of absolute and relative criteria to define shares as liquid?

We think a combination of criteria should be used. Specifically, we suggest average number of trades per trading day (criterion c) combined with daily turnover in a share (criterion d) and possibly also relative activity in different shares (criterion g).

Question 8.9.: Do consultees consider the proposed figures (i.e. 480 trades per day and 95% of total trading) as appropriate? If not, and where no figures are suggested, what are the appropriate figures in your opinion?

We believe that based also on the CESR's data on trading in the leading regulated markets in Europe, different values should be considered. Specifically: for average number of trades per trading day, we would set a threshold at between 500 and 1,000; for daily turnover in a share, a value of between €2 million and €5 million; for relative activity in different shares (if it is decided to apply it), around 90%. We believe that this would result in the identification of a suitable number of liquid shares at European level, ranging between 200 and 500 depending on the threshold values chosen.

Question 8.10.: Do consultees agree with the analysis of the relative merits and drawbacks of using proxies such as indices?

Let us underscore that proxies, such as indices to designate liquid shares, have to be managed by independent third parties and not by the regulated markets, which as trading venues are in competition with the internalizers. The national authorities must guarantee the independence of the institution responsible for the index.

Question 8.11.: Which criteria would best accommodate the needs of different markets within the EU?

In response to so general question, we do not think there is any single criterion that can accommodate the needs of the different markets. A combination of strict criteria (see the answers to the preceding questions) is the best solution.

3. SMS and number of classes

First let us recall that under Article 27 shares must be grouped into classes on the basis of the average value of orders executed in the market, defining as the market for any given share the total of all orders executed in that share in the European Union, except abnormally large orders (block sales). In this regard, the CESR has released information and data on contracts executed in the european regulated markets. Some points are especially deserving of attention:

- (1) The failure to publish the data for Europe's leading regulated market, the London Stock Exchange, significantly reduces the informational quality of the data supplied.
- (2) Reference only to contracts concluded in regulated markets in order to determine the average value of orders produces an underestimate, especially for countries where there is no obligation to trade on-exchange. This approach excludes over-the-counter trading which, if smaller than block trades, form part of the definition of the "market for each share" according to Article 27. At the same time, in view of the difficulty of getting information on OTC orders, it would be good to envisage correctives to the calculation of average value of the orders executed.
- (3) It would be good to clearly define the size limit beyond which a trade is considered to be larger than normal market size (block trades).

Question 9.2: Would you consider a large number of SMS classes, each comprising a relatively small bandwidth of arithmetic average value of orders executed, as problematic for systematic internalisers?

First, the determination of the best number of classes cannot do without statistical analysis, which in our view only the CESR can perform at European level. In general, therefore, we consider that the number of classes must be chosen with a view on the one hand to ease of calculation and operation and on the other to representativeness. The procedure could be as follows. First, to safeguard simplicity of operation, a limited number of classes should be set (say, five). Subsequently, to ensure representativeness, the SMS classes should be defined so as to minimize the sum of the absolute values of the differences between SMS and the average of orders executed in the securities (Deviation Standard Method). Instead of equal weighting, the sum could be weighted by the total value of the share, so as to determine classes that represent the market uniformly. The control variable in the minimization process should be the pair of extreme values that define the intervals for the SMS classes.

Question 9.3.: In your opinion, would it be more appropriate to fix the SMS as monetary value or convert it into number of shares?

We think SMS should be fixed as number of shares (size or number) to facilitate operations and management by the system of intermediaries.

Question 9.4.: Do you consider subsequent annual revisions of the grouping of shares as sufficient or would you prefer them to be more frequent? Should CESR make more concrete proposals on revision? In particular, should the time of revisions be fixed at level 2?

In the trade-off between ease of management and stability on the one hand and representativeness on the other, revisions should be annual, except in exceptional circumstances or uncommon events affecting the entire market and requiring prompt revision. We believe, further, that the frequency of revision should be set at level 2, so as to provide certainty and ensure coordinated calculation within the EU.

Question 9.5.: Do you support the determination of an initial SMS by grouping the share into a class, once a newly issued share is traded for three months, or do you consider it reasonable to fix an initial SMS from the first day of trading of a share by using a proxy based on peer stocks?

We think the SMS should be determined initially by proxies, providing that a more appropriate SMS is calculated earlier than the three-month trading period suggested, which is to say as soon as the volatility in trading typical of the start-up trading period diminishes.

Question 9.1: Do you agree with CESR's approach of proposing a unified block regime for the relevant provisions in the Directive or do you see reasons why a differentiation between Art.27 MiFID on the one hand and Art.29, 30, 44, 45 MiFID on the other hand would be advisable?

Articles 29, 30, 44, 45 deal with pre- and post-trade transparency requirements on MTFs and regulated markets, whereas Articles 27 and 28 deal with those same requirements on systematic internalizers. We agree with the approach proposed, namely the unified block regime for all three trading venues as far as pre- and post-trade transparency requirements are concerned. This simplifies the operations of intermediaries and harmonizes the conditions for the operation of the three types of trading venue.

Question 9.6.: Do you consider a two-week period from publication as sufficient for systematic internalisers to adapt to new SMSs?

Yes, two weeks is enough.

Question 9.7.: Do you agree on the proposal on publication of the classification of shares? Would you prefer the establishment of a single contact point (at level2)?

We prefer the list of liquid shares and their classification and indication of their SMS to be made official at a single point at level 2. They may, for example, be published on CESR's website. If it wants, each national authority can then publish the same list at national level. This would minimize the probability of errors by intermediaries that could lead to violation of the regulatory requirements.

4. Customer retail size

Question 11.5: Should the size be based on EU-wide criteria or would national approaches be preferred?

We think customer retail size should be based on EU-wide criteria. Otherwise there would be disparity of treatment between investors in different EU countries, and different behaviour by a single internalizer in different Member States.

Question 11.6: Do consultees prefer having a fixed threshold for all shares, or should the size be linked to the grouping of shares (and subsequently to the SMS of each class) or to some other factor? If so, which?

We think a single fixed threshold is preferable; it would simplify operations and make it easier for systematic internalizers to perform all their obligations.

Question 11.7: If a threshold is set, how should it reflect the different sizes around the EU, i.e. should it be the highest retail size, the lowest or something in between?

We think the threshold size should be the highest, to produce the greatest possible transparency and efficiency of markets and cover the entire body of retail customers, thus ensuring the greatest possible representativeness.

5. Complex orders

Question 11.3: Do consultees agree with the definition of a transaction where execution in several securities is part of one transaction? In particular, is there a need to specify a minimum number of securities and if so, what should the number be?

First, let us observe that it would be advisable to better clarify the meaning of the CESR's definition of "specific reference price". In any event, we believe that in addition to a minimum number of securities (such as 10, as proposed) a minimum overall value of the portfolio transaction⁶ should also be set in order to prevent the evasion of the pre-trade transparency requirements. This threshold, for ease of calculation and operations, could be obtained by multiplying customer retail size by a factor somewhere between one and the minimum number of securities traded (10). In order not to set the threshold too high, the factor could be set at 2 or 3 times the customer retail size.

Question 11.4.: Do consultees agree with the approach to "orders subject to conditions other than current market price"?

⁶ The NYSE defines *portfolio trading* as a trade involving at least 15 securities for a minimum total value of \$1 million.

We think that with a view to greater certainty and transparency, and to ensure the most uniform possible application throughout the EU, it would be better to have more details on the types of orders exempt from the transparency requirements. To this end, it would be most useful for the CESR to draw up and publicize a list, even if not exhaustive, of cases.

6. Quotes

Question 10.1. Do Consultees consider that there might be specific regulatory issues and specific provisions needed where a systematic internaliser is the trading venue with the largest turnover in a particular share falling within the scope of Article 27?

In our view, it is very unlikely that a systematic internalizer will turn out to be the trading venue with the greatest liquidity in any security, considering that the growth of an internalizer's trading business (unlike that of regulated markets and MTFs) is limited by the fact that since it trades on its own account its puts its own funds at risk. Moreover, recall that the transparency requirements apply only to liquid securities, which makes this eventuality all the more unlikely.

We consequently believe that the transparency regime envisaged for systematic internalizers under the Directive is appropriate, whatever their share of total trading, and that it is inadvisable to institute stricter transparency rules.

In our view, there would be a need to devise a specific regulatory solution only in the event that the problem entailed negative effects that the market was unable to remedy on its own.

Question 10.2: Do consultees agree that the availability of quotes during 100% of normal trading hours of the firm is a reasonable and workable requirement for "on a continuous basis"?

Yes, we think the requirement of quote availability for 100% of normal trading hours is reasonable. There must nevertheless be allowance for the possibility of the internalizer's suspending quotes during that time for technical reasons or *force majeure* (strikes, etc.) independent of its on its own will.

Question 10.3: Do consultees think that publication of quotes solely on the firm's own website meets the "easily accessible" test?

No. Publication solely on the firm's own website is not enough to meet the pre-trade transparency requirements. It would not make it easy to consolidate pre-trade information between different trading venues, as Recital 34 urges.⁷

⁷ "Fair competition requires that market participants and investors be able to compare the prices that trading venues (i.e. regulated markets, MTFs and intermediaries) are required to publish. To this end, it is recommended that Member States remove any obstacles which may prevent the consolidation at European level of the relevant information and its publication."

Question 10.4.: Do you agree with the proposed general criteria for determining when a price or prices reflect market conditions or do you think that more specific criteria should be added? In the latter case which criteria do you think should be added?

We think the criteria should be as general as possible, in order not to block the business of the systematic internalizer or curtail its freedom to contribute actively to price formation.

Question 10.5: Do you prefer either of the criteria defining exceptional market conditions, and should those criteria be supplemented by an open list of exceptional market conditions?

We agree fully with the CESR's proposals. There is no need for any supplementary criteria.

Question 10.6.: Are there exceptional market circumstances where a systematic internaliser should be able to withdraw its quotes even though a trading suspension has not been called by the regulated market? In the latter case, which market conditions should be added to an open list?

We do not think any other conditions need be added, save *force majeure* (strikes, technical failures), as indicated in the answer to 10.2.

Question 10.7.: Do you agree that the proposed approach to the updating of quotes is acceptable or would you prefer more specific criteria? In the latter case, which criteria could be added?

We think the requirement that internalizers must justify quote changes is too burdensome, considering that often market actions by investors (including investment firms when they trade on their own account) are motivated not only by economic factors (which can be explained) but also by hunches, the ability to foresee market movements, and the like. Considering that internalizers play a role that is fully equivalent to that of market maker, the justification requirement is inconsistent with that type of operation.

7. Execution of client orders

Question 11.1: Do consultees 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?

We agree. There is not need for CESR to provide additional advice, as the text of the Directive is already clear and complete.

8. Transaction limits

Question 11.2.: Would there be 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? If so, what form should they take?

We do not think it necessary for the CESR to make more detailed recommendations, in that each systematic internalizer will determine such limits on the basis of its own characteristics, risk propensity, and internal policy.

9. Display of price limit order

Question 7.1.: In your view, what types of arrangements other than RMs and MTFs could be considered as complying with article 22.2?

Today, in our view, only RMs and MTFs ensure sufficient visibility of client limit orders, so we do not advocate the provision for alternatives to those types of venue. Nevertheless, some degree of flexibility in the legislation of level 2 could be maintained, so as to make it easier to supplement the rule in the future to adapt it to market developments.

Question 7.2.: Do you consider the proposal on publishing the client limit order in a quote driven system appropriate?
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Yes, it is appropriate.