Banca Intesa

International and European Affairs

BANCA INTESA'S RESPONSE TO CESR'S FIRST CONSULTATION ON ITS DRAFT ADVICE TO THE EUROPEAN COMMISSION FOR IMPLEMENTING LEGISLATION UNDER DIRECTIVE 39/2004/EC

INDEX

A. INTRODUCTION

Banca Intesa is the holding of the Intesa Group, which is the largest Italian banking group and one of the main players at European level, also active in new Member States like Hungary, where Central-European International Bank - CIB is the fourth largest bank, and Slovakia, where Všeobecná úverová Banka - VUB is the second largest bank. Our comments reflect also the position of Banca Caboto, the investment arm of the Intesa Group.

Banca Intesa welcomes the opportunity to respond to CESR's first consultation on its draft advice to the European Commission concerning possible implementing measures (hereinafter the "Level 2 Measures") on the Directive on Markets in Financial Instruments (Dir. 39/2004/EC, hereinafter the "DMFI").

In accordance with CESR's schedule, this paper deals with Section II (save for the best execution) and Section III C. The response concerning the best execution and Section III B will be provided by 4 October 2004. It is understood that the general principles hereunder apply to both responses, since they reflect the general position of Banca Intesa on the DMFI and the Level 2 Measures as a whole.

This is our first set of comments on the issues at stake and we will appreciate an extensive CESR's second consultation on the Level 2 Measures, which will provide to all interested parties a second chance to further develop their arguments and suggestions.

B. GENERAL PRINCIPLES

The FIMD will apply to all 25 Member States, whose markets differ significantly and have a different degree of sophistication. Hence the Legislator should ensure that the interests of all stakeholders are duly taken into account.

Since the FIMD has, *inter alia*, established the conditions under which trading venues can compete with each other and has enhanced the use of the European passport for the provision of investment services, Banca Intesa believes that:

1. It is of the utmost importance that Level 2 Measures **apply uniformly** to all competitors in the EU in order to:

   a. Create a level playing field for all European investment firms, thus avoiding regulatory arbitrage;
   b. Foster fair competition among European investment firms;
   c. Ensure that all investors enjoy the same rights and the same level of protection, irrespective of their country of residence.

   Therefore Banca Intesa believes, that - where possible - the Legislator should seek to establish **maximum harmonization rules**, so to create a level playing field for European investment firms and markets. This is

consistent with the overall goal to build an integrated single market for financial services governed by a single set of rules.

2. Although the choice of the legal instrument lies in the hands of the Commission, we would like to advocate the **use of regulations**, as far as possible. This would prevent any difference to arise in the timing of the implementation of the FIMD. In turn, this would give to national Regulators the possibility to interpret the same set of rules in all Member States and therefore to apply the FIMD and the Level 2 Measures consistently throughout the European Union. It would be beneficial for the market itself, since rules - unlike high level principles - are predictable and remove any uncertainty as to their application and outcome.

3. In general terms Banca Intesa agrees with the **level of detail** of the proposed CESR's advice. We appreciate that CESR has stricken a balance between the need of uniformity and the need of flexibility. When a trade off between these two elements has arisen, CESR has opted for uniformity. We fully support this policy.

4. The issue of opportunity/necessity of **transitional measures**, deferring the full application and transposition of FIMD and the relevant Level 2 Measures after 30 April 2006, in order to give the industry more time to adapt to the new rules and procedures, has been raised at the CESR public hearing of last July. Banca Intesa acknowledges that FIMD will entail substantial changes for the industry. However, we believe that it does not make sense from an economical perspective to introduce a third set of rules, i.e. transitional measures besides the existing rules and the rules fully implementing the FIMD, for the very simple reason that it would cause a duplication of compliance costs.

   We are convinced that the rules concerning the structure of investment firms (e.g. those on compliance (article 13.2), internal systems and outsourcing (art. 13.4 and art. 13.5), conflicts of interests (art. 13.3 and art. 18), safeguarding of clients' assets (art. 13.7 and 13.8)) should enter into force without any delay. In fact, these rules pertain to the stability of investment firms and therefore should be given preferential lane for their implementation.

   On the other hand, we suggest that CESR should advice the Commission to grant a deferral, for instance of six months, for the application of the rules concerning the relationship between investment firms and clients (e.g. best execution (art. 21), client agreement (art. 19.7) and reporting to clients (art. 19.8)). This would allow a smoother transition to the new regulatory framework, for example allowing time for the designing and testing of IT systems.

C. SPECIFIC COMMENTS

Section II – Intermediaries

1. Compliance and personal transactions (article 13(2))

Introduction

According to Banca Intesa, sound compliance is the cornerstone to ensure that any and all investment firms incur only into "physiological" risks and are properly managed. Ultimately the preservation and enhancement of the soundness of financial markets largely depend on the compliance regime of investment firms. In fact, compliance is the most effective system to identify and manage conflicts of interest linked to the nature of "universal bank" of credit institutions, as well as any pathological situation which can arise.

For this reason, we believe that all investment firms in the European Union should undergo the same prescriptive, stringent and uniform compliance rules. This is one of the areas where it is clearest that the trade off between uniformity and flexibility has to be solved in favour of the first. Since a smooth functioning of financial markets essentially depends on the trust and confidence of investors, because of the overwhelming argument of waterfalls, no exceptions should be made whatsoever. What **matters** in this respect is the **status of "investment firm"** and the confidence attached to it by investors, **rather than its dimension or scale**.

Since the compliance function plays a pivotal role in the architecture of credit institutions, it is necessary that it is defined clearly. To this extent the list made under paragraph 3) of Box 1 could be the basis of a definition of compliance to be inserted for the sake of clarity under Section I – Definitions of the proposed .

BOX 1

Independence of the compliance function – Questions 1.2 and 1.2

Since independence is a feature inherent to the compliance function, Banca Intesa does not agree with the proposal to graduate the degree of independence of the compliance function. **The compliance function needs to be independent in absolute terms, irrespective of any factor, be it the complexity of the business, its nature or its scale.**

In fact, given that the tasks of the compliance function do not change depending on the dimension of the investment firms, it follows that the features of the compliance function cannot change either. Therefore, full independence is a condition to allow the compliance function to carry on its tasks, to the benefit of its investment firm and ultimately of its clients and investors.

In such a context, Banca Intesa wishes to restate the need to ensure the full independence and autonomy of the compliance function, especially from

business structures.

In a manner consistent with the above reasoning, Banca Intesa believes that a deferred implementation of the rules on independence is not a viable solution.

Outsourcing of investment services – Question 1.3

Banca Intesa agrees with the proposal of CESR to extend the scope of the *Standard* 127, so that also investment services and activities can be outsourced. However, we believe that service providers should be authorised entities since they ensure, because of their status, a sound management, a professional performance and a high level of care. Provided that outsourcing is carefully made, in our view, it is a worthy device, since it allows investment firms to optimise their organisation in relation to their business.

We believe that the outsourcing of investments services and activities should not be neither mentioned in the contract with the clients, nor *a fortiori* approved by the latter. As a matter of fact – at least according to Italian law – a consensus of the client *per se* would not serve to limit the civil liability of the investment firm. Indeed only an express limitation of liability would effectively work to this effect, but such a clause would then be qualified as abusive both under national law and in the meaning of the Community law protecting consumers (Dir. 93/13/EC). As a final remark it is worth mentioning that the client's consensus would not be appropriate from a business perspective.

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

Banca Intesa generally agrees with the proposals set out under Box 2 and does not have any specific comment on this matter.

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

Introduction

Banca Intesa agrees with the CESR basic distinction between outsourcing of investment services and activities, and outsourcing of "operational functions": indeed the first indirectly concerns the relation with the client, whereas the second is an *interna corporis* of the investment firm.

BOX 3

Box 3, page 23, paragraph 2 – The materiality test referred to thereunder in our opinion could be either useless or even misleading. As a result it would actually exclude some forms of outsourcing from the controls provided for under this Box 3 on the basis of a preliminary and possibly superficial assessment. A better alternative would be to consider all forms of outsourcing

subject to monitoring, without any exception. The frequency, accuracy and degree of this monitoring would then be proportionate to the materiality of the outsourced function. This second approach has the advantage that a third party (i.e. the entity monitoring) decides whether an outsourced activity is material or not and adjusts the monitoring accordingly.

Box 3, page 23, paragraph 4 – Bearing in mind the ever growing consolidation process among European banks, it is foreseeable that intra-group outsourcing and synergies will become more and more important and frequent. For this reason Banca Intesa invites CESR **to specify further the special regime of intra-group outsourcing**. In our view, a mere decrease of the general duties in case of groups supervised on a consolidated basis is too elastic and not precise enough. We would expect detailed provisions explicit the meaning of the "accordingly" in question.

4. Record keeping obligation (article 13 (6))

Introduction

Banca Intesa believes that a clear distinction should be borne in mind between the reporting to clients and the reporting to Supervisors. While the first do not have the possibility to access the data of an investment firm, the latter have strong powers of inspection, which allows them to access the premises and systems of investment firms. As a consequence, the onus of proof needs to reflect this distinction.

BOX 4

Question 4.1

Banca Intesa agrees with the members of CESR, who believe that sufficient safeguards are already provided by article 13 (6) of FIMD. In particular, we consider that the **reversal of the burden of proof on investment firms** related to the investment firms' obligation to keep records **would be disproportionate** in respect to the Supervisors' necessity and duty to monitor the compliance of investment firms in their relationship with clients.

Question 4.2

Banca Intesa believes that the **record keeping requirements** in relation to the services mentioned in this question should be **defined in the same terms**, as much as possible. The recording obligations for the capital market business, the investment banking business and the M&A business should be similar to those already provided for in relation to the other investment services and activities, as far as time, support and kind of information are concerned. This would considerably help investment firms to implement homogeneous and effective procedures for record keeping, hence allowing them to save costs, time and personnel.

5) Safeguarding of clients' assets (article 13 (7) and (8))

Introduction
Banca Intesa is in full agreement to set a strong uniform foundation within the European Union with respect to organisational structure to safeguard the ownership rights of client assets in the normal course of business and under eventual insolvency proceedings. To achieve this, these measures need to **foster the separation of proprietary assets from client assets,** consistent bookkeeping and reconciliation processes for assets and use of client assets by an investment firm only when expressly mandated.

BOX 5
Sub deposit of client assets – Question 5.1 Investment firms should **no**t be allowed to use **unregulated depositaries**. The usage of a regulated depositary provides comfort that adequate asset protection and compliance measures are in place as dictated by the local regulations that the depositary and the financial instruments are subject to. Regulated depositaries are usually proactively involved in providing contributions to the issuing of applicable norms regulating the financial instruments and markets and hence would be in a better position to adhere to the new rules. Unregulated depositories could potential lag behind in adhering to such rules.
Pooling of financial instruments held by an investment firm for more than one client - Question 5.2 An investment firm should maintain internal accounting records which record individually and reconcile on an ongoing basis the total amount of lent assets making up pooled assets of clients, who have given consent to enter into lending arrangements. Requirements should be posed on Investment firms to insure that **adequate audited bookkeeping procedures** are in place to insure that individual and aggregate lending records are reconciled continuously so that exceptions are resolved immediately if the reconciliations are out of balance.
Appropriate record keeping/ clarity of ownership identification - Question 5.3 An investment firm should not be obliged to maintain accounting registration so that an indication of the end depositary is identified on the holdings for each client. Investment firms should be required to maintain reconciled aggregated figures with respect to the total client assets against the total of the same assets held at each depositary. Requirements should be posed on investment firms to insure that adequate audited bookkeeping procedures are in place and that these aggregated records are reconciled continuously so that exceptions are resolved immediately if the reconciliations are out of balance.

Clarity of responsibilities – Question 5.4

The provisions of a client contract should specify particular words of liability if the investment firm did not use adequate prudent measures and skill in selecting appointing and monitoring its depositaries.

6. Conflicts of interest (article 13 (3) and 18)

Introduction

Conflicts of interest can vary upon a number of factors, such as the dimension of the investment firm, the client, the investment services provided, the contingencies and factual circumstances. This implies that there cannot be a "one-fits-all" rule and the rules should then provide for a certain degree of flexibility.

Such a tailored identification of conflicts of interest should be coupled with a strict regime of their management, thus preventing any discretion in the application of the relevant rules. **Therefore we adverse a "comply or explain" regime and are in favour of prescriptive rules**.

BOX 6

Box 6, page 46, paragraph 12 – We suggest that the investment firms' duty of disclosure of their conflict policy in writing to investors should be dropped. In fact, article 18.2 of the FIMD does not provide for any such duty and simply mandates the disclosure of conflicts of interest whenever its organisational or administrative arrangements are not sufficient to ensure, with reasonable confidence, that risks of damage to clients' interests will be prevented.

II. Conflicts policy – Question 6.1

We do not have any further example to provide CESR with: we believe that the proposed list is exhaustive.

Question 6.2

We share CESR's approach to introduce a list of methods to prevent conflicts of interest from affecting the interests of clients.

However, we believe that in the advice it should be clearly stated that the methods from (a) to (f) are to be referred to as a **list of possible mere examples** of methods to prevent conflicts of interest from affecting the interests of clients. It has to be clear that shall new types of conflicts of interest arise, intermediaries are bound to implement further different arrangements to this extent.

In our view, the anti–conflict of interests **measures** should be **tailored** in accordance with the dimensions, business and peculiar features of both the investment firm and the client. In our experience a big universal bank needs to implement a more stringent conflict policy than a small bank devoted to a

single line of business. Consequently, we suggest that all banks should take into account all the potential conflicts and then weight each potential conflict factor (in a scale from 0 to 100%) against their "benchmark", i.e. their factual conditions. We believe that the compulsory explicit full introduction of all anti–conflict of interests measures in the conflict policy of every investment firm is not advisable, in that it would spoil the meaning of such conflict policies, by standardising them.

V. Investment Research – Contents of the Conflicts Policy - Question 6.3

Research has become more and more important in the last years: now it is recognised that its role is crucial. Investment strategies and decisions largely depend on research, so that it can be said that the latter has a value equal to its influence on the market and on the price formation mechanism.

Level 2 Measures proposed by CESR on this matter have to be seen in this perspective. They are aimed at guaranteeing a correct behaviour of analysts and the completeness, independence and clarity of their researches. In our view, **it is essential to this goal that the research department is separate from the rest of the bank.**

A mere organisational separation would not do; we believe that stronger **information barriers** are to be introduced between the analysts and the other divisions, such as corporate finance, investment banking, shareholding and credit.

Question 6.4

We think that researches not complying with the applicable conflict policy should not be published at all.

In order to put investors in a position to rely on researches, these need to be fully independent: the compliance with the conflict policy is a necessary condition to achieve such independence. As a matter of fact, investors are hardly in a position to assess correctly a research made in a situation of conflict of interests: a disclaimer would not help them in this assessment and the final result is that they would rely on the research anyway. Then, if something goes wrong, they would simply lose their confidence in the analyst and eventually in the investment firm. These arguments lead to the conclusion that any research not complying with the conflict policy should not be published *tout court* and released to investors.

7. Fair, clear and not misleading information (article 19.2)

Introduction

In our view and from our experience, the disclosure obligations set out under Article 19 of FIMD are not excessively burdensome for investment firms. As a matter of fact the Italian legislation is already in line with CESR's proposals (e.g. Box 7: General and specific obligations; Box 8: timing and form of information).

Anyway, we would like to underline the fact that too much information on financial instruments and services does not necessarily help investors, especially retail investors, to make the right choice in terms of investments. Therefore we believe that also Regulators should **focus more on quality and clarity of information, rather than on quantity of information**. More specifically they should make sure that the message fits its addressees, i.e. that the financial information is appropriate and effective taking into account the nature of the client. This should be the first main criterion to identify the information to be provided.

Banca Intesa generally agrees with CESR's proposed rules and approach. As mentioned in our preliminary remarks however, we strongly suggest that CESR sets, whenever possible, **maximum harmonization rules**, so that all retail clients, irrespective of the Member State of residence, enjoy the same level of protection.

BOX 7
Box 7, page 50, par. 2) As to the general obligations, Banca Intesa in particular believes that investment firms should always not only inform retail clients of the potential benefits related to a financial instruments but also provide them with clear and not misleading statements and warnings on the related risks. We also believe that – where possible – **a differentiated regime should be provided for according to the nature of the service**: for instance an execution only service should have a lighter regime than investment advice.
Par. 7, par. a) We agree with the possibility that the competent authority may require an investment firm to furnish evidence that it has complied with the rules on marketing communications. However, we would like that the Level 2 Measures provide competent authorities with for harmonized rules related to their "powers of intervention."
Box 7, page 52, par. 9) We believe that the exceptions to the information duties of paragraph 8), provided for under paragraph 9), letters g) and h) should be deleted. In fact the mere provisions of "a generic description or statement about the **financial instruments**" and "**the price and yields** of financial instruments and the charges" are likely to be misleading for retail investors, in that they are too specific and cannot be referred to as general and generic information. For this reason we advice that **such information should be included in, and governed by the rules under paragraph 8).**

8. Information to clients (article 19 (3))

Introduction

According to the FIMD all investment firms authorised in a Member State can provide their investment services and activities in the whole European Union. It is not to forget, however, that there are about 300 million citizens in the Union and 25 different markets. Hence the only sensitive differentiation of the information duties appears to be based on the place where the service is provided, i.e. on the features of the addressees of such information, rather than on the place of incorporation of the investment firm.

The statement "Member States may impose additional requirements in relation to the subject matter of this advice" (p. 55 of the CESR advice) should be read taking into consideration the differences mentioned above. However, under this interpretation, the forthcoming regime would resemble the one of the former Investment Services Directive (art. 11, Dir. 93/22/EEC). Since one of the goals of the FIMD is "to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market" (Recital No 2), the logical consequence is that such a graduation is not desirable. Therefore we suggest removing this possibility and providing for **a standardised regime of information applying throughout the European Union**.

Information is one of the very areas where the difference between retail clients and professional ones is greater: as a matter of fact the diverse level of sophistication mainly results into a different command of information and data. In order to adjust the rules to the very significant difference in the asymmetry of information between the client and the investment firm, we suggest that there should **be different rules according to the nature of the clients.**

BOX 8

Box 8, point 7), c) Retail clients: Banca Intesa supports the proposal for a full transparency on commission charges, fees, costs and taxes and therefore agrees with CESR's proposed Level 2 Measure. In this respect, the cost of the breaking down is justified by the need to protect retail investors. Furthermore, this is one of the areas where competition among investment firms is tougher, so that clients need to be in a position to compare prices and charges.

Professional Clients: Although at first glance the proposed Level 2 Measure seems to ensure a higher degree of transparency, we believe that the cost of breaking down fees, commission charges, expenses and taxes does not outweigh the investor's benefit deriving from an enhanced transparency. This is due to the fact that all IT systems would need to be reset and re-programmed. At the end of the day, the cost of transparent information would be material and would be borne by investors.

9. Client Agreement (article 19 (7))

Introduction

Banca Intesa is convinced that too long and detailed agreements with clients are not effective and do not benefit them, since they do not make clients focus their attention on the most significant clauses. Consequently, we strongly advice that **agreements should explicitly set forth only the terms and conditions that are left to the contractual freedom of the parties**. Mandatory rules provided for by laws and regulations should be at most mentioned by way of cross references. This would have the further advantage that all agreements with clients would automatically adjust to any changes of laws and regulations.

BOX 9
Box 9, page 61, number 3) The wording "clear and easily understandable by the client" should be rephrased. Since investment firms need to use technical vocabulary and precise terms and conditions in order to describe and govern their services, the consequence is that their contracts cannot always be easily understandable by people without a specific background (i.e. the average retail client). Therefore we would **simply** suggest the **introduction of a duty of investment firms to provide retail clients with a glossary** of the terms used in the agreements.
Box 9, page 61, number 4), letter b) The mandatory provision of the insertion of the telephone number in the agreement with clients would be burdensome for our bank, since all the formats should be updated and upgraded. On the other side, the telephone numbers of all branches can be easily found both in the white pages and in the web-site of the bank.
Box 9, page 61, number 4), letter e) Under Italian civil law, the power of attorney is an autonomous legal act, separate from the contract to which it can refer. It can be granted, amended and withdrawn at any time and can have a different scope than the contract. For this reason, we suggest CESR **not to introduce any mention to voluntary agency** and let the matter be purely ruled by national law. As far as **companies** are concerned, there are already very clear and strict rules on the **power of attorney** (e.g. register of the Chamber of Commerce and Company Register), which have proven to work well and to be effective. Also bearing in mind that attorneys can change quite frequently, we suggest **dropping** any CESR **Level 2 Measure** on this matter.
Box 9, page 61, number 4, letter n) As retail clients are often natural persons "acting for purposes which are outside his trade, business or profession", this rule would conflict with Dir. 93/13/EEC on consumers - at least as interpreted by the Italian Supreme Court (decision of *Cassazione Sezioni Unite* No. 14669 of 1 October 2003) - as far as it leaves the choice to

the parties. Therefore we suggest either **dropping** this provision **or** simply inserting **a cross reference to the relevant national civil and civil procedure law**.
Box 9, page 61, number 4), letter p) As said in the introduction to this box, we suggest that contracts should not set forth any procedure for their amendment, since such a procedure (i.e. that any amendments has to be made in writing) is governed (at least in some Member States) by mandatory law.
Box 9, page 62, number 5) Banca Intesa believes that it would be appropriate to provide for the possibility to make cross references also to provisions applying to retail client agreements by virtue of law, besides the cross references to mere contractual documents. This would avoid the drafting of lengthy and over-detailed agreements. It goes without saying that all laws and regulations are public and easily accessible, so that investment firms should not be obliged to provide clients with any copy of them. We would invite CESR to seize this opportunity to make clear that **cross references to usages and bank and financial practices are not allowed and** any such clause is deemed to be **void**.
Box 9, page 62, number 6) We consider it is not appropriate that the contract with the retail client must "contain an adequate indication of the rights and obligations of the parties, including the provisions relating to the exercise of corporate actions […] and the exercise of voting rights relating to the securities held". Banca Intesa believes that this matter should be governed, as far as it pertains the contractual relationship and is not mandatory, by the deposit agreement executed between the investment firm and the depositary.
Box 9, page 62, number 8) While Banca Intesa agrees on the rule that "a copy of the retail client agreement, any related contractual documents and any amendment to the agreement […] must be provided to the client immediately after signing", we do not believe that the investment firm can be asked at any time to provide the client of a subsequent copy of the documentation. We can hardly find a reason to draw a distinction between the duty of care of the investment firm and one of the client, in respect to the keeping of documents.
Box 9, page 63, number 10), letter d) In line with the introduction to this box, we believe that as far as the evaluation of financial instruments is concerned, CESR should allow investment firms to **make a cross reference to the relevant regulations**, instead of providing a thorough explanation, which would anyway plainly replicate the applicable regulations.

10. Reporting to Clients (article 19 (8))

Introduction

Banca Intesa agrees with the rationale of the FIMD, i.e. that reporting requirements depend on the type of investment service and on the nature of the client. It fosters CESR to reflect such a rationale in Level 2 Measures as far as possible. In order to limit costs and IT investments, Banca Intesa would like to suggest that **reporting (i)** should be defined **according to the kind of investment service and to the nature of the client** and **(ii)** should be **as standardised as possible**.

BOX 10
Question 10.1 It is the view of Banca Intesa, also on the basis of its experience based on the regime in place at the moment in Italy (see Consob Regulation No. 11522/98, as amended, art. 30), that the specific features and connected needs of investment advice are different from those of the other investment services. The service of investment advice is indeed more personal and specifically client driven than other investment activities; it varies according to the client, to the business and ultimately to the personal relationship between the investment firm and the client. In our experience this services cannot be standardised by definition and should not be standardised either. This leads to the conclusion that the **content and features of record keeping in connection with investment advice should not be regulated by EU prescriptive rules**. The rules should **simply** impose on investment firms to agree in the **contract** with the client the investment firms' duties and obligations in connection with reporting.
Box 10, page 66, number 2) Banca Intesa notes that the timing for sending a contract note or confirmation notice, i.e. one business day, is too short, as it will entail massive and costly investments in the IT systems. It is to mention that currently in Italy investment firms have 7 business days to send such a confirmation.
Box 10, page 68, number 19) As the costs to upgrade IT systems in order to enable investment firms to provide a double scheme of reports, i.e. per transaction and on a periodic basis, are substantial, Banca Intesa believes that such an **alternative reporting** should **be agreed contractually** on a bilateral basis and not imposed unilaterally by clients on investment firms.

11. Client order handling (article 22 (1)

Introduction

In this respect, Banca Intesa supports the view that Level 2 Measures should clearly provide for the **segregation of orders** for own and client accounts.

This would mainly benefit investors, since their assets would be segregated from the investment firm's also while being handled. Since this rule constitutes an effective tool to limit the bankruptcy and illiquidity risks on investors, we believe that it should be **applied in all Member States, with no exceptions.**

BOX 11
Box 11, page 82, 12) In our view the aggregation of orders for own and client accounts should not be allowed. In fact, a client order handling rule providing for the sole aggregation of orders for client account (i) ensures the effective segregation of the clients' assets from those of the investment firm; (ii) enhances the protection of investors in case of bankruptcy or insolvency or illiquidity of both the investment firm and the counterparty. From an operational perspective, Italian investment firms are already bound to comply with such a segregation rule (see Consob Regulation No. 11522/98, as subsequently amended, article 33, paragraph 3) and it has proven not to be too cumbersome.
Question 11.1 We agree with the definition of prompt, fair and expeditious execution as proposed.
Question 11.2 We do not deem appropriate to apply the details of the orders under paragraph 2 to professional clients. Banca Intesa indeed wishes to approach clients orders according to the nature of the client (e.g. retail or professional client).
Question 11.3 In order to ensure the sequential execution of client order, the investment firm should put in place a register of the orders.
Question 11.4 We agree with the Level 2 Measure in question, since "prevailing market conditions" is a typical example (among others) of *force majeure*, which can justify a deviation from the standard performance of the investment firm in the handling of client orders.
Question 11.5 We acknowledge that in some case the aggregation of the client orders can work to the disadvantage of one client; however taking into account all client orders being aggregated and all factors (e.g. price, speed of execution and likelihood of execution) **order aggregation** works to the benefit of clients and therefore should be **allowed**. A further advantage of such aggregation is that client orders, as aggregated, are dealt with and executed with priority versus

orders on own account.
Question 11.6 We share the CESR's proposed rule according to which, if an aggregated order is only partially executed, allocation to clients should be done on a proportional basis, unless the client has been informed that a different criteria has been applied. Therefore we deem appropriate to leave a certain degree of flexibility to investment firms for the choice of the allocation criteria, provided that the same allocation criteria are applied to the same typology of clients.
Question 11.7 For the reasons mentioned in the comment above in this box 11, we believe that CESR should not allow the aggregation of client and own account orders.
Question 11.8 Banca Intesa agrees with the provisions of paragraphs 15 and 16, provided that they only apply to retail clients.

Section III – Markets

C. Admission of financial instruments to trading (art. 40)

Introduction

Banca Intesa agrees with CESR's approach **not to provide for any additional requirements for admission to trading to regulated markets, other than the basic requirements aimed at making fair and orderly trading possible**. This would ensure that no overlapping occurs with the provisions of other directives, like the Prospectus Directive, the Market Abuse Directive and the forthcoming Transparency Obligations Directive.

BOX 14
Box 14, page 98, paragraph 4 We support the CESR's proposal that the main initial disclosure obligation should be the verification of the approval of the prospectus by the competent authority of the home Member State of the issuer.
Question 14.1 We agree on the requirements for admission to trading as provided for in the relevant Level 2 Measures and do not think that any further criteria should be added.
Question 14.2 We agree with the role proposed by CESR to RM to ensure the compliance with initial, ongoing and *ad hoc* transparency requirements. As a matter of

fact, we deem that the arrangements provided for in the Level 2 Measures are sufficient to ensure that issuers of securities - admitted to trading on a RM - comply with their obligations under Community law.

Section IV – Cooperation and Enforcement

Transaction reporting (Article 25)

Methods and arrangements for reporting financial transactions (page 103)

We would like to underline the **difficulties that Supervisors** might face in managing the data transmitted to them, because of the **considerable flow of information to be reported**. Therefore, we suggest adopting at EU level the system currently in force in Italy, which has proved to be efficient and enables Supervisors to access data in real time. Article 10 of Consob Regulation No. 11768/98 (Recording requirements for regulated markets) provides for that (i) companies managing the market are required to set up electronic procedures to record executed transactions; and (ii) the supervisory authority has access to and can consult the above mentioned information at any time.

BOX 15

Question 15.3

We agree with CESR's approach to consider the existing arrangements for transaction reporting as a working basis and to **refrain from imposing** unwarranted **new requirements**, which would bring about excessive additional costs for the entities concerned. Therefore we support the provision of a common minimum content of transaction reports, which are however in line with the FIMD rules.

Criteria for assessing liquidity in order to determine the most relevant market in terms of liquidity of financial instruments (page 105)

We support CESR's assumption that the competent authority of the most liquid market for each particular financial instrument is entrusted with the responsibility of developing a complete overview of the activity regarding a financial instrument across Europe to ensure market integrity.

BOX 16

Question 16.1

We agree with the "proxy approach" as proposed by CESR because it is cost effective and simple.

Box 16, page 109, paragraph 2 - 7

Question 16.2

Generally speaking we agree with the proxies proposed for shares, equity-linked derivatives, derivatives on equity indexes, bonds and interest rate-linked derivatives on government bonds. However we believe that Level 2 Measures should expressly state that (i) **rules from paragraph 2) to 6)** of Box 16 should be applied **first** and (ii) shall those rules not lead to a satisfactory result, **then the rules under paragraph 7)** should apply.

In this respect we suggest CESR to insert the "**average traded size**" as a third residual criterion to assess liquidity, to be mentioned in paragraph 7).

CESR should also propose a **priority** between the criteria under paragraph 7). According to our view, "average traded size" seems to be the most significant criteria for assessing liquidity, followed by "turnover" and last "volume".

An example of a case where the criteria to be applied first does not lead to satisfactory results is the following. In the bond market, the domicile test will not work for bond of non-EU issuers, which are traded OTC in a place different from where they are listed, e.g. bonds of an US issuer, listed in Luxembourg but traded OTC across the Union. Applying the criteria under paragraph 5) Luxembourg would be the proxy, but this result would not really identify the relevant centre of liquidity.

Question 16.3

We agree with the suggested revision procedure.

Question 16.4

We believe that the cases where the proxy approach does not work should be addressed by Level 2 Measures.

Another case of non-functioning of the proxy approach is the one of international bonds listed in more than one market and traded OTC.

Question 16.5

When responding to mandate concerning the criteria for assessing liquidity in order to define the most relevant market in terms of liquidity for financial instruments, CESR should take into account also other issues such as (i) the large amount of data which will have to be transferred among Regulators on a daily basis, and (ii) the additional costs connected with the reporting activity.

* * *

For any further comment or question, please contact:

Alessandra Perrazzelli
Head of International and European Affairs
Banca Intesa
Square de Meeûs, 35
B – 1000 Brussels
alessandra.perrazzelli@bancaintesa.it

Francesca Passamonti
Responsible for EU Affairs
Banca Intesa
Square de Meeûs, 35
B – 1000 - Brussels
francesca.passamonti@bancaintesa.it

Brussels, 17th September 2004