Banca Intesa

International and European Affairs

**Banca Intesa's response to**
**CESR's call for evidence**
**on the European Commission's second set of mandates**
**for implementing legislation under Directive 39/2004**

## 1. Introduction

The Intesa Group is the largest Italian banking group and one of the main players at European level, 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 call for evidence on the second set of mandates (i.e. the CESR–European Commission formal mandate of 25 June 2004, hereinafter the "Mandate") on level 2 measures of the Directive on Markets in Financial Instruments (CE 39/2004, hereinafter the "DMFI").

## 2. The Principles that CESR should take account of

Banca Intesa shares and agrees with the principles set forth at the beginning of the Mandate, inasmuch as they envisage an effective and to-the-point effort to promote the concrete establishment of a fair, competitive, transparent, efficient and integrated financial market in the European Union.

This is in line with the scope of the DMFI to "provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services through the Community, being a single market, on the basis of home country supervision" (Recital 2).

The European Commission has invited CESR to find a good balance between the different needs of the "protection of investors and market integrity", the "promotion of competition" and the balance between harmonisation and respect of management and organisation of investment firms (§ 2.3 of the Mandate). Banca Intesa agrees with the Commission's approach. This is fully consistent with the DMFI and it should be the main reference for the CESR's task. Indeed, according

§ 2.1 of the Mandate, CESR's advice should be "comprehensive" so to satisfy all the goals set by the DMFI and, consequently, by the Commission.

## 3. Comments on the advice CESR is invited to provide

### 3.1 Level of detail and regulatory prescription

In Banca Intesa's view, since the DMFI provides for the single passport for investment firms, all EU based investment firms should be subject to the same rules, as far as it is possible.

Otherwise, either some investment firms could suffer from a remarkable competitive disadvantage because of the different national implementation of DMFI, or – even worse – the practice of regulatory arbitrage would be pushed forward, discriminating those Member States which have implemented the DMFI in the strictest way.

Therefore, we invite CESR to fully develop the call for harmonisation of the Mandate by providing detailed and comprehensive advice. This would entail the European Commission to be free to choose the degree of harmonisation and detail of level 2 measures. In particular, we believe that CESR should not implicitly foster a choice of the Commission for a *de minimis* level 2 measures by providing it with technical advice limited in scope and detail. In fact, it is only for the Commission to decide the level of harmonisation and, according to the scope of the Mandate, it is likely that it will adopt a pro-harmonisation attitude, in line with the overall *rationale* of the DMFI.

### 3.2 Conduct of business rules

The above remark is well clarified by the Mandate on the conduct of business rules (art. 19 DMFI). Looking at the diversity of markets within the European Union, we observe that the greater the difference between the level of sophistication of markets, the more disruptive the effect of a minimum harmonisation can be. In fact, in a scenario of minimum harmonisation, investment firms coming from advanced markets - where investors need less protective rules - would be able to operate also in less mature environments, being subject to their light home regulation. This could lead to the exposure of investors of less developed markets to potentially unsuitable conduct of business and investments. This, in turn, could lead those investors to lose their confidence in the market. For this reason we invite CESR to provide detailed technical advice on this point.

Furthermore, we are convinced that the general obligation of investment firms to act "fairly, honestly and professionally" should be implemented by level 2 measures, which further clarify the extent and the practical effect of this important general provision (§ 3.3.1 of the Mandate).

## 3.3 Transparency

It is evident from the Recitals of the DMFI (No. 44 and ff) that the general admission of systematic internalisers and the general abolition of the concentration rule have to be coupled with stringent transparency requirements, not to have as a result a non-liquid, non-deep and fragmented financial market. It is in this light that all provisions of the directive have to be interpreted and subsequently implemented.

It follows that the definition of "systematic internaliser" (art. 4.1.7 DMFI) needs to be detailed and implemented in the same manner all over the European Union. Since the rules on pre-trade transparency apply only to investment firms which are systematic internalisers, it is implied in the rationale of the DMFI that all and every investment firm carrying out the same business are bound to the same transparency obligations. Since the rules established by the DMFI on this point are quite generic, it is necessary that detailed and non-ambiguous level 2 measures are set in this matter.

It is a general feeling of the industry that CESR should take into duly account the overall transparency requirement, which the DMFI clearly sets, though without imposing excessive burdens and costs on the industry. Finding a balance between these two necessities makes the task of CESR not easy.

The consolidation of price information (§ 3.7.2.4 of the Mandate) requires an innovative approach to be taken by CESR. In order to come up with viable solutions in this respect, CESR should refer to the Commission to clarify how the reference to "proprietary arrangements" should be interpreted.

Another concept where CESR is clearly asked to find a balance between the need of transparency and market practice is the definition of standard market size (§ 3.7.2.2 of the Mandate). In fact the establishment of SMSs needs to take into consideration both some practical elements (e.g. number of share classes, frequency of updating, IT and cost issues connected to firm quotations) and the significance of SMSs (i.e. too low SMSs would *de facto* vanish the whole pre-trade transparency obligations). Neither element should prevail over the other. A very careful survey of existing market practice and market structure, also with the support of statistical data, could possibly be the key to draft properly this material implementing measure.

## 3.4 The time issue

Banca Intesa appreciates the importance of the time factor in the implementing phase of the DMFI and understands that some measures have to be considered as a priority over other rules.

Still, we believe that a reasonable, logic and comprehensive implementation of DMFI should not be sacrificed merely because of time pressure. Furthermore, the time of implementation of crucial issues, such as pre-trade transparency, should not be left to national legislators to decide; otherwise, mismatches in the timing of the DMFI implementation would cause a competitive advantage of the investment firms based in the Member States transposing the rules as last.

As a second remark, a non-uniform timeframe would bring with it situations of legal uncertainty, which are *per se* non desirable.

## 4. Conclusion

These comments reflect the position of Banca Intesa and are widely shared by other Italian credit institutions and investment firms, since they are based on and driven by the very features of the Italian financial market.
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