
POPULAR

COMMENTS ON THE CONSULTATION PAPER
CESR'S ADVICE ON POSSIBLE IMPLEMENTING MEASURES OF THE DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS

Section 1 – DEFINITIONS

Of the different definitions contained in this section of the document, the definition of a "*relevant person*" is particularly significant due to the effect it has on the personal transactions carried out by the directors, employees and agents of the investment firm.

More specifically, the generic definition includes the individuals who work for an investment firm or those whose services are placed at the disposal of the investment firm.

We believe that the definition of the people affected by the provisions of article 13 of the Directive should be more clearly specified, to the extent possible.

Compliance and personal transactions [article 13(2)]

BOX 1 – Point 2 (d) Polices and procedures to ensure compliance

On this point an alternative is established, indicating that the standards of independence that must govern the actions of the regulatory compliance departments shall only apply "where appropriate and proportionate in view of the nature, scale and complexity of the investment firm's business".

The regulatory compliance departments will obviously have different structures depending on the complexity of the investment firm's business, but what does not make sense is that the most important feature of these departments - their independence - as the departments in charge of verifying compliance by the rest of the

firm's departments according to the Directive, is obligatory for certain entities but not for others.

It is our understanding that independence is essential and that no investment services firm, regardless of its activity, should be exempt from meeting the independence requirements.

The proposal which we consider most appropriate, and which is feasible and permitted by the Directive, is that those investment firms whose structures do not allow them to have their internal regulatory compliance department should outsource these services.

Obligation to avoid undue additional operational risk in case of outsourcing [article 13(5) first subparagraph]

BOX 3 - Point 3

Among the outsourcing arrangements which the document considers should be included in the scope of application of article 13.5 are those of the human resources departments.

The outsourcing of the operational functions performed by these departments would never affect the quality of internal control nor unduly increase operational risks, as stipulated in the Directive and the consultation paper itself in the previous point. We therefore believe it should be eliminated.

BOX 3 – Point 7

Investment firms must provide prior notification of their intention to enter into outsourcing arrangements.

Since the Directive does not establish any obligation in this regard, we believe that it should not be imposed now.

In our opinion, it is sufficient that the supervisory bodies have the power to request information on outsourcing agreements from investment firms at any time, as established in this document in the second part of this point. We therefore consider that the notification obligation, prior or otherwise, should be eliminated.

Record Keeping obligation (article 13(6))

BOX 4 – Point 2 (b)

Keeping records of telephone orders placed by clients for a period of at least one year seems excessive, particularly when the point on "Reporting to Clients" establishes that investment services firms will also be obliged to notify clients immediately of the execution, non-execution or partial execution of the orders received.

Since clients will obviously have the chance to make a claim once they are notified of the execution of the order placed by telephone, the obligation to keep telephone records for such a long period of time seems superfluous.

Question 4.1 ***Should there be a separate obligation for the investment firm to be able to demonstrate that it has not acted in breach of the conduct of business rules under the Directive?***

There is no doubt that the answer to this question must be no, since the burden of proof on investment companies cannot be inverted. This would violate the principle of the presumption of innocence established in European constitutions.

Furthermore, the burden of proof which this obligation would impose on investment firms is a diabolical one in that it requires them to prove a negative event.

Conflicts of interest [articles 13(3) and 18]

BOX 6 – VI DISCLOSURE Point 14

It is our understanding that the information on the investment firm's conflict of interest policy should be broad and should describe all suppositions involving the risk of a conflict of interest. In our opinion, the possibility of subsequent communications to clients about conflicts if that policy is not guaranteed "*with reasonable confidence*" should be minimised.

The proposal contained in the document is worded in such general terms that it would oblige investment firms to repeatedly make this type of notification, which would mean assuming the responsibility under most of the circumstances in which no such notice is given.

Information to clients [article 19(3)]

BOX 8 Timing and form of information provisions

Point 2 states that the meaning of "*in good time*" should be determined taking into consideration the urgency of the situation and the time necessary for the client to absorb and react to the information provided.

In our opinion, the scope of this definition is unclear and therefore needs to be more specific.

A more specific definition is essential for the development of all of the obligations regarding information to clients, since it is the term used to determine when such information needs to be provided and when the client's signature is required.

Client agreement [article 19(7)]

BOX 9 – Point 10.

The information to be provided to clients with whom portfolio management contracts are signed includes two points that will be difficult for investment firms to comply with, bearing in mind the diversity of the management agreements and the financial instruments involved.

Hence, point c) states that an appropriate "*benchmark*" must be set, against which the performance of the portfolio can be compared. Whilst it is true that for certain clients this type of information essential and will be provided to them upon request, this is not always the case. We do not believe that the client's objective in any case is to obtain performance levels that are similar to those of any *benchmark*.

Moreover, we believe that on many occasions it will be extremely difficult to make a reliable comparison and that consequently the establishment of such comparisons should be left to the discretion of the parties.

With respect to the valuation of financial instruments and the inclusion of information on valuation formulae and dates, such information must obviously be limited to that relative to the types of financial instruments that may be included in the portfolio and these must be stated in the contract pursuant to letter b) of point 10.

We are therefore of the opinion that this information should only be included upon the client's request.

BOX 9 – Point 13.

In our opinion, investment services firms should not be required to keep a portfolio management contract in force in those cases where, after duly notifying the client at least two weeks in advance of the company's decision to terminate the agreement, the contract is prolonged, at the client's request, for the time it takes to liquidate the securities in the portfolio.

It is important to remember that liquidation can be prolonged in time and that in the meantime the investment firm, despite having decided to terminate the

agreement, must comply with all of the obligations imposed on it, such as the information obligations referred to in BOX 10, point 15.

Furthermore, this prolongation of the provision of services may give rise to discrepancies between the client and company in charge of liquidating the securities liquidation procedures, valuations, etc.) which in turn may create a situation of conflict between them.

Reporting to clients [article 19(8)]

BOX 10 Point 2

This point establishes the obligation of notifying the client in writing of the execution of an order no later than one business day after the execution.

We believe that the deadline should be extended, particularly in view of the fact that one of the objectives of the directive is to ensure that investment firms execute the transactions on the market or system the offers the best price. Such markets or systems do not always guarantee that the investment firm will have the information on the execution of the order quickly enough to notify the client the next business day.