European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

COMMENTS ON

"CESR'S ADVICE ON POSSIBLE IMPLEMENTING MEASURES OF THE DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS" OF JUNE 2004

- PART 1[1] -

17 SEPTEMBER 2004

[1] Not including the issues of "best execution" and "post-trade transparency", for which the period for the submission of comments has been extended until 4 October 2004.

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I. Introduction

The European Association of Cooperative Banks (EACB) welcomes the opportunity to comment on the CESR Consultation Paper on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments published by the Committee of European Securities regulators on June 17, 2004.

The European Association of Co-operative Banks is one of the main associations of the European banking industry, representing over 4.500 co-operative credit institutions active in all the EU Member states and serving over 100 Million customers, in more than 50,000 business points.

II. Basic remarks

We have carefully taken note of the recommendations proposed by CESR for possible technical implementing measures in relation to the Directive on Markets in Financial Instruments (MiFID) of 17 June 2004 and would like to draw your attention on our observations as outlined below:

1. Scope: compliance with the provisions of the MiFID

Our first concern regards whether the CESR draft is in line with the requirements of the MiFID, since in numerous places, it appears to go beyond the unambiguous wording of the Directive. A significant example is the provisions on "inducements", which seems not to be in line with the MiFID's requirements in many respects (in relation to the partial ban on "inducements", the content of the obligations to supply information, frequency and form of the obligations to supply information). Furthermore, the intention of the directive legislators seems also not heeded. For example, while the MiFID under art. 19 par 3 cites that "information may be provided in a standardised form", thus the intention of the legislator is to provide for an option; CESR transforms the option, into an obligation providing for the general obligation of standardised written information.

Furthermore, the different MiFID obligations seem not to be distinguished from each other clearly enough; thus implying double regulations issues in several occasions. For example, the recommendations on "marketing communication" (Art. 19 Par. 2 of the MiFID) sets the obligation to supply information about the financial instrument or service acquired, even though the obligations to supply such information are already and conclusively provided for in Art. 19 Par. 3.

2. No special right under civil law in the area of application of the MiFID

It appears that CESR recommendations are not limited to the field of supervision law, but, rather, repeatedly extend to the field of civil law. It is doubtful that Art. 19 Par. 7 of the MiFID gives an entitlement to intervene in the existing contractual practice of the institutions to such a profound extent as provided for in the CESR recommendations. Additionally, in

Europe there has not been so far a harmonisation of civil law or contract law in particular. Even where European provisions already exist, these seem to be disregarded by CESR recommendations (e.g. European data protection provisions in relation to the requirement for voice records of orders issued by telephone). In other cases additional requirements are provided for in the area of application of the MiFID (e.g. marketing communication, obligations to supply information concerning the existence or non-existence of withdrawal rights) without any recognisable need for them. This results in a specific law being created under civil law for services in financial instruments. Ultimately the overlapping requirements could hardly be implemented in addition to the general civil law and special supervision law requirements already existing. This is particularly true for universal banks, active in other business spheres besides services in financial instruments.

3. Recommendations far too detailed

Finally, we would like to express some reservations about the excessive level of detail of CESR recommendations, which seems opposed to the provisions of the European Commission's mandate of 20 January 2004. We take the liberty of recalling the following comments made by the Commission under 2.3:

> "In giving its advice on possible implementing measures, CESR should take full account of two key objectives:
>
> 1. The promotion of fair, competitive, transparent, efficient and integrated financial markets as well as the promotion of competition: this goal should be furthered by implementing the *ground rules* governing the negotiation and execution of transactions in financial instruments on organised trading systems and marketplaces, and by investment firms.
>
> 2. CESR should also pay particular attention to striking *the right balance between the objective of establishing a set of harmonised conditions* for the licensing and operation of investment firms and regulated markets *and the need to avoid excessive intervention in respect of the management and organisation of the investment firms*. The *amount of detail* included in the advice *should be very carefully calibrated case by case*; the *advice should* ensure clarity and legal certainty but *avoid formulations which would lead to over-prescriptive, excessively detailed legislation, adding undue burdens and unnecessary costs to the firms and hampering innovation in the field of financial services.*"

Moreover the Commission, in the mandate relating to the individual provisions of the MiFID, only calls for "*the necessary, minimal conditions*" to be provided and for the CESR recommendations to be "*proportionate*" and "*avoid excessive detail*" (cf. 3.1, 3.2, 3.3 and 3.6 of the mandate, for example).

Another reason why CESR should only provide for minimum requirements is that supervisory practices in the individual Member States still differ greatly. While individual Member States are familiar with the practice of an annual external auditing, including the deriving threat of

sanctions for infringements (e.g. fines), other Member States limit themselves to the principle of internal auditing procedures that apply to investment firms.

4. Conclusion

This Association earnestly calls on CESR to take account of the MiFID and Commission's mandate in its recommendations. It is otherwise to be feared that smaller and medium-sized investment firms, which are generally recognised successful in conducting investment business with retail clients, will no longer be in a position to do so because they will no longer be able to maintain their services on competitive terms due to the high fixed costs associated with implementing the CESR recommendations. Small investors, in particular, could be stopped from transacting investment business at all due to the high costs, which will also force a large number of investment firms exiting the market and will lead to high entry barriers for new investment firms.

We have assessed what we consider to be the essential recommendations in greater detail in **Annex 1**. You will also find our answers to the questions explicitly put forward by CESR in **Annex 2.**

We would be pleased provide you with further explanation on EACB's comments to CESR Consultation Paper. Should you have any question please do not hesitate to contact us (secretariat@eurocoopbanks.coop).

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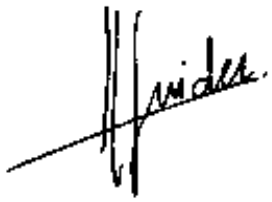

Secretary General

Annex 1

Assessment of the essential recommendations

1. Box 1: Compliance and personal transactions (Art. 12 (2))

a) Introduction

With regard to the recommendations concerning compliance requirements, it should be avoided as much as possible a "one size fits all" approach. For this reason, it is crucial in our view to take account of the different sizes of and differing services provided by investment firms. We therefore expressly welcome the statement included in the explanatory notes that "*smaller firms will not be able, nor will they be required, to devote the same amount of resources to compliance infrastructure as a large investment bank*" (page 12). Unfortunately, this finding is not always made clear in the wording of the recommendations. We feel that there is a need for the terms "*procedure*", "*policy*" and "*compliance function*" to be defined. In relation to the term "compliance function", it is still unclear to us whether it is to be understood as a functional responsibility in accordance with the definition given by the Basel Committee on Banking Supervision in its Consultative Document entitled "The compliance function in banks" or whether an organisational unit is meant. It should be ensured that the association with the function is taken into account.

b) Individual recommendations

Policies and procedures to ensure compliance

- *No. 2 (b) and no. 6 ("compliance policy" and "code of conduct")*

The general standard in no. 2 (b) should be made more precise. It is so far unclear whether investment firms must also always have "compliance policies" and a "code of conduct" within the meaning of no. 6 in addition to "compliance procedures". Said "policies" and "code of conduct" are most likely requirements originating from the Anglo-Saxon environment, which have up to now only, been familiar to larger investment firms operating cross-borderly. In the case of investment firms that have conflicts of interest or price-sensitive information in individual cases at most, there should be no need for such requirements. This applies particularly where "compliance policy" is understood as "compliance manual". Such a requirement in addition to the "compliance procedures" that exist in any case would be excessive for the investment firms mentioned above. As far as the "code of conduct' is concerned, moreover, this is not even provided for under the provisions of the MiFID, Art. 13 (2) of which simply requires "policies and procedures".

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- *No. 2 (d) (Requirements of the independence of compliance)*

With regard to no. 2 (d), we suggest it be made clear that the requirements concerning independence, only apply insofar as members of staff perform compliance functions. The background to this is that the employees frequently do not exclusively carry out compliance functions; they also perform other duties (e.g. money-laundering prevention, data protection). We assume that "compliance function" is deemed to mean solely the responsibility for compliance functions in accordance with the definition given by the Basel Committee on Banking Supervision in its Consultative Document entitled "The compliance function in banks" from October 2003 (p. 1, footnote 2). If it is to be interpreted as meaning one's own organisational unit, however, we regard the proposed reservation of "where appropriate and proportionate in view of the nature, scale and complexity of its business" as indispensable.

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

a) Introduction

From the point of view of universal banks like co-operative banks, it is particularly important when drawing up organisational requirements that these are in accord with the relevant requirements under the banking supervision law. Although the recommendations proposed in the Consultation Paper do not appear to pose problems in this respect, it should be particularly significant how these are interpreted at Level 3 and, building on it, how they are applied by the authorities.

b) Individual recommendations

Risk management policy

- *No. 5 (a) (Risk control)*

The recommendation contained in no. 5 (a) on controlling *all risks* appears to be too far reaching. This can be interpreted as each individual risk occurring must be recognised and managed. This is a requirement that would clearly be excessive. It means, for example, that each individual investment advice affected by shortcomings would have to be identified. Even with the maximum possible effort, this would be an impossible undertaking and is not justified in objective terms either. The important thing in risk control is that an investment firm recognises the risks that could normally arise. We propose therefore that no. 5 (a) be amended by replacing "all risks" with "all material risks".

Information processing system

- *No. 6 (a) (Access to data)*

We furthermore point out that the possibility provided for in no. 6 (a) for making use of search functions opens up very broad scope for interpretation. It is self-evident that the data have to be stored in such a way as to enable uncomplicated access by an auditor. However, the wording chosen by CESR appears to go beyond this, requiring the use of certain technical search routines determined by the authority. We would, for this reason, like to point out that the implementation of such routines can be associated with high costs without making the use of data in the inspection any easier. We feel that clarification to needed in this respect.

3. Box 3: Obligation to avoid undue additional operational risk in the case of outsourcing (Art. 13 (5) first sub-paragraph)

The CESR proposals for implementing the Directive on Markets in Financial Instruments provide in part for detailed supervisory requirements in relation to outsourcing. In addition to CESR, the Committee of European Banking Supervisors (CEBS) and the Joint Forum (Basel Committee on Banking Supervision, IOSCO, IAIS) are also working on the elaboration of principles for outsourcing. It is of crucial importance for the co-operative banks that supervisory standards developed in different areas and at different levels are in harmony with each other. There is therefore an urgent need for coordination between the different institutions working on the drawing-up of outsourcing rules in order to prevent any parallelism of different or even contradictory regulations. We enclose in the form of an **annex** a copy of the position of the European Association of Co-operative Banks vis-à-vis CEBS dated 30 July 2004 in relation to the latter's Consultation Paper entitled "High Level Principles on Outsourcing", with a request for the comments to be considered in the course of further discussions.

4. Box 4: Record-keeping obligation (Art. 13 (6))

a) Introduction

We consider crucial to constantly bear in mind when specifying Art. 13 (6) of the MiFID in greater detail what the point and purpose of this regulation is, i.e. "to enable the authorities to verify the investment firm's compliance with the applicable rules" (cf. (1) of the Commission's mandate). It would not be in line with the above the fact that investment firms would be obliged to provide proof of compliance with the obligations of the MiFID and the more specific provisions enacted in relation to it (in greater detail below concerning no. 4 and Annex 2, question 4.1).

Also of central importance is a second aspect addressed both in recital no. 43 of the MiFID as well as in the Commission's mandate. Recital 43 of the MiFID calls on the Member States to protect "the right to privacy of natural persons with respect to the processing of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data". In accord with this, the Commission in the mandate calls on CESR to take account in its recommendations of "any relevant provision of Community Law and in particular those referring to data protection". This point is important for the question of the extent to which the recording of telephone orders on a voice recording system is permissible at all (cf. no. 2 (b)).

b) Individual recommendations

- *No. 2 (a) (Record keeping period)*

The proposed record keeping period of 5 years is too long. The point and purpose of the obligation is to facilitate audits by the competent authority. There is consequently no further practical justification for the record-keeping obligation after an audit. In those Member States subject to audits, at least, the recommendation should be limited to keep the records until the end of the audit following the recording.

- *No. 2 (b) (Recording of telephone orders)*

The obligation to record telephone orders by means of a voice recording system as provided for in no. 2 (b) is not in within the provisions of the MiFID and the Commission's mandate.

It should first be made clear that each telephone order is recorded just like any other order it is therefore a matter of an additional requirement in those cases where the orders are accepted by telephone, i.e. recording the telephone conversation by means of a voice recording system. However, Art. 13 (6) of the MiFID does not make any distinction between different forms of communication. In particular, no entitlement to subject any individual form of communication to a specific regulation can be inferred from Art. 13 (6) of the MiFID.

Voice recording is also inconsistent with the evaluations of the European data protection provisions, which are characterised by the endeavour to guarantee a consistently high level of data protection, towards the principle of data prevention and data economy (recital 10 of Directive 95/46/EC of 24 October 1995 and Art. 8 (4) c) of Directive 2002/21/EC of 7 March 2002, which places the national regulatory authorities under an express obligation to guarantee a high level of data protection). Hence, ordering of a legal commitment within the meaning of Art. 7 c) of Directive 95/46/EC for recording purposes must, in turn, be necessary *per* se. Otherwise, the principle referred to above would be undermined. However, for the reason mentioned above, the necessary requirement would appear not to exist.

Furthermore, there would be stringent requirements with regard to the technical infrastructure of recording processes (cf. recital 46 of Directive 95/46/ EU), so that this additional record keeping obligation ought to be opposed also with a view to the cost-benefit considerations.

Independently of these legal considerations, there is also no practical need for an obligation to make additional recordings in telephone orders with retail clients. There have so far not been any indications that the low error rate relating to retail client orders issued over the telephone is higher than in the case of orders given over the counter or in writing, etc.. Furthermore, such recording would interfere with the business model of the decentralized co-operative banks and their philosophy of the greatest possible personal proximity to their clients. The proposed recording obligation would force them to set up centralised call centre, to minimise the cost burden, to which client will have to refer. Thus interfering indirectly in the banks business policy. Finally, it should be noted that especially smaller and medium-sized banks like many co-operative banks would be affected by such a regulation by virtue of the high fixed costs associated with implementing this measure. We therefore strongly urge CESR to dispense with an additional obligation to record orders issued by telephone.

- *No. 4 (Proof of acting in accordance with the legal stipulations)*

We have already pointed out in the introduction that it would be incompatible with the point and purpose of Art. 13 (6) of the MiFID "to enable the authorities to verify the investment firms' compliance with the applicable rules" (cf. (1) of the Commission's mandate) if investment firms were placed under the imposition of having to furnish proof themselves that they have complied with the obligations under the MiFID and more specific provisions enacted in relation to it. In the case of investment firms that are subject to regular audits, there is, moreover, no need whatsoever for such an obligation. Added to this, such an obligation would be legally questionable in those Member States where non-compliance with regulations can lead to sanctions (fines) being imposed under supervision law since nobody is obliged to incriminate oneself. We therefore strongly urge CESR to dispense with no. 4.

- *Documentation required in the Annex*

With regard to the requirements concerning documentation relating to the **retail client agreement**, we consider clarification to be urgently necessary in that where reference is made to other documents or legal texts, there cannot be any obligation to store these documents separately for every single client. It should be sufficient that these documents are being documented for the clients as a whole. Art. 19 (7) of the MiFID expressly stipulates that the rights and obligations of the parties to the contract can be included by reference to other documents and legal texts. The aim of this provision – leaner individual agreements - would not be achieved if subsequently extensive client-related recording obligations would arise for all documents which were referenced in the retail client agreement. It is

sufficient that the competent authority would verify what contractual agreement is in force for the client at which point in time.

With regard to the record-keeping obligation concerning **marketing communication**, it should be clarified that this would not have to be kept in a client-related manner. The purpose of such record-keeping obligation is to enable the competent authority to verify whether the investment firm has met the requirements of Art. 19 (2) of the MiFID. This does not require taking account of the individual client.

5. Box 5: Safeguarding of clients' assets (Art. 13 (7) and (8))

The contents of the requirements for the protection of securities are reasonable to a great extent.

However, insufficient account is taken of the fact that the requirements have already been regulated by law in individual Member States. *No. 4 (Contractual agreements)* and *no. 12 (Terms of contract),* for example, provide for points already regulated by law and which are therefore applicable to the contractual relationship anyway to also be expressly regulated in the contract. The requirement of contractual regulations should, however, be waived in such cases. If this is not done, a large number of old contracts (35 million deposit contracts in Germany alone) would have to be adjusted without this being associated with any value added for the clients; rather, clients would have to bear the costs for having the contracts adapted accordingly.

Furthermore, insufficient account is taken of the market conditions in business with professional clients. For example, professional clients do not need the protection intended under *no. 5 (a) and (c) (Requirement of the written form and duty to provide information)* and *no. 12 (Requirement of the written form)*. For this reason, we consider an exemption for business with professional clients to be necessary

No. 12 (d) (Description of legal relationships in the jurisdiction of custody) would place an excessive burden on investment firms with regard to the obligation to provide legal advice without any need for this having been established on the client side. This could only be carried out at a high cost – which would be unavoidably transferred to the client. We would suggest that this recommendation would be withdrawn for cost-benefit reasons.

6. Box 6: Conflicts of interest (Art. 13 (3) and 18)

a) Introduction

The requirements dealing with conflicts of interest seem to go into excessive detail and are, in parts, not in line with the statement of CESR in its explanatory notes according to which particular structures should not be prescribed (page 40). This

especially applies to no. 8 in the version of the first alternative. Furthermore, there appear to be no legal basis for the provisions proposed in relation to inducements. It would also seem doubtful that there is any more leeway for additional requirements within the context of the MiFID in respect of investment research in addition to the Market Abuse Directive and the Implementing Directive enacted in this regard.

b) Individual recommendations

First, we consider it necessary to refer to "organisational and administrative arrangements" rather than "conflicts policy", according to the terminology used in Art. 13 (3) and Art. 18 of the MiFID. This would also avoid possible misunderstandings that could arise within the context of the recommendations through differing use of the term "policy" (see, for example, the recommendation concerning Art. 13 (2), where we are of the impression that the term "policy" has a different meaning to that here).

Conflicts policy

- *No. 5 (Requirements)*

It is to be viewed as positive that no. 5 provides for a distinction according to the "*nature, scale and complexity*" of the investment firm's business activity with regard to the specific requirements for arrangements.

- *No. 8 (Arrangements)*

With regard to no. 8, we are in favour of the greatest possible flexibility and therefore support the second alternative that would be in accord with the declared aim of CESR not to stipulate any particular organisational structure (cf. explanatory notes, page 40 of CESR's Advice).

Inducements

- *Nos. 9 - 11 (Requirements)*

The CESR recommendation on inducements in nos. 9 – 11 are clearly exceeding the provisions set in the MiFID.

This applies first of all to the prohibition on inducements provided for in nos. 9 and 10. Whatever one's position on inducements is, it is in not possible to derive a prohibition from Art. 18 (2) of the MiFID since this article only provides for obligations to supply information.

Nor is the obligation of having to supply information on "its policy on inducements" provided for in no. 11 (a) covered by Art. 18 (2) of the MiFID. Art. 13 (3) and Art. 18 of the MiFID do not provide for any policy on inducements, while Art. 18 (2) only requires an obligation to supply information on the inducements. As far as the

obligation to provide information about the inducements themselves is concerned, no. 11 (b) also goes beyond the stipulations of Art. 18 (2) of the MiFID in two respects:

- While no. 11 (b) provides for an obligation to supply information about the "relevant details" of the inducements, Art. 18 (2) of the MiFID only requires information on the "general nature and/or sources" of the inducements.
- While no. 11 (b) provides for an obligation to supply information "at least once a year", Art. 18 (2) of the MiFID require information "before undertaking business on its behalf".

We strongly urge CESR to adapt the recommendations on inducements to the provisions of the MiFID.

Disclosure

- *Nos. 12 und 13 (Disclosure of conflicts policy)*

Nor is the obligation to disclose the conflicts policy provided for in nos. 12 and 13 covered by the MiFID. Under the provisions of Art. 13 (3) and Art. 18, there is not even a provision for any conflicts policy and most certainly not any obligation to publish such a conflicts policy. Under Art. 18 (2) of the MiFID, conflicts of interest need to be disclosed, but not a conflicts policy.

Investment Research – Contents of conflicts policy

- *No. 15 - 17 (IOSCO-Standards)*

We are critical of the CESR approach of extensively implementing the "Principles for Addressing Sell-Side Securities Analyst Conflicts of Interest" set down by the IOSCO without any modifications within the context of the implementing measures for the MiFID. With the EU Market Abuse Directive and Commission Directive 2003/125/EC on the implementation of said Directive as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest, the area of investment research has been subjected to extensive regulation, which has to be implemented in the Member States by the middle of October 2004. The central regulatory area of these provisions is the disclosure of potential conflicts of interest. The European legislative bodies have thus decided on a concept of disclosure in relation to the management of such conflicts of interest. This applies expressly to the conflicts of interest of the respective legal entity as well as to all natural persons working for the respective firm and involved in drawing up the investment research. The firm responsible for the investment research can accordingly decide freely whether it discloses its own relevant conflicts of interest and the conflicts of interest of its employees or prevents such conflicts of interest from the outset through internal arrangements. It would be inconsistent with this approach adopted by the European legislator to now exclude, through detailed stipulations within the context of the implementing measures for the MiFID, a large number of the potential conflicts of interest to be disclosed

under the Market Abuse Directive from the outset by way of mandatory organisational stipulations.

In any case, it should be made clear that the requirements relate to the preparation of research and consequently do not apply to investment firms outsourcing research to third parties and passing it on unaltered to its clients. Such clarification is required because the wording of *nos. 15 and 16*, which takes account only of publication or distribution ("issues", "publishes or distributes"), is open to misunderstanding.

7. Box 7: Fair, clear and not misleading information (Art. 19 (2))

a) Introduction

The recommendations concerning Art. 19 (2) are among the more specific items that are clearly not in line with provisions of Art. 19 (2) of the MiFID and the Commission's mandate– at least with regard to marketing communication.

It is first pointed out that, under Art. 19 (2) of the MiFID, the only regulations that can be made are of the type relating to how information (including marketing communication) has to be presented. The Commission's mandate therefore only requires CESR under (1) to specify in detail "the criteria for assessing the fairness, clearness and not misleading character" of marketing communication and other communications to clients. Recommendations concerning the content of marketing communication / other communications are not compatible with this, however. This is supported by the statutory system, under which recommendations regarding content are only possible on the basis of Art. 19 (3) of the MiFID. Insofar CESR's recommendations relating to Art. 19 (2) of the MiFID contain provisions relating to the content of marketing communication or other communication; these are consequently neither covered by Art. 19 (2) of the MiFID nor by the related Commission mandate.

Concerning marketing communication, it is not considered the fact that this has already been dealt with in specific terms under European and national competition law. In its mandate, the Commission expressly calls on CESR to take account of existing Community law in this domain. However, it cannot be inferred from the recommendations and explanatory notes that CESR has met the Commission's request. In fact, the CESR recommendations concerning marketing communication go far beyond the general requirements of competition law. The borderline between requirements of marketing communication on the one hand and obligations to supply information under Art. 19 (3) of the MiFID on the other hand is almost completely blurred. In this way, a specific law for services in financial instruments is proposed for the area of marketing communication without there being any recognisable need for this. It would be difficult for universal banks, in particular to comprehend whether they have to fulfil different requirements in the area of marketing communication for their business areas in the future.

b) Individual recommendations

- *Nos. 2 and 3 (Information in the context of marketing communication)*

Nos. 2 and 3 contain recommendations that are reasonable in relation to meeting the obligations to supply information under Art. 19 (3) of the MiFID, but not with regard to marketing communication. They completely ignore the fact that marketing communication has a different function to the obligations to supply information under Art. 19 (3) of the MiFID. In the case of marketing communication, it is firstly a matter of directing the attention of clients to a product or service offered by the investment firm. However, it is not the function of marketing communication to give "a fair indication of the risks", for example. Where assertions are put forward in marketing communication or promises given, competition law already stipulates that such claims must be accurate and that the institute must keep to its promises (cf. no. 7 of the recommendations). We therefore expressly request CESR to apply the requirements under nos. 2 and 3 only to the obligations to supply information under Art. 19 (3) MiFID, thus exempting marketing communication from such requirements.

- *No. 8 a) and no. 10 (Information under Art. 19 (3))*

We strongly oppose the requirement provided for in no. 8 a) and no. 10, according to which the information due under the provisions of Art. 19 (3) must be contained in the marketing communication itself. This represents an impermissible mixing of the requirements under Art. 19 (3) and Art. 19 (2) in the case of marketing communication. Apart from the fact that – as already pointed out – it is not the function of marketing communication to take account of the obligations to supply information under Art. 19 (3), this requirement leads to redundancies in cases where clients have already received the necessary information in accordance with no. 1 ff. of the recommendations in Art. 19 (3). However, it must still be possible for investment firms to also fulfil their obligations to supply information under Art. 19 (3) outside of marketing communication.

- *No. 8 b) (Information concerning rights of withdrawal)*

The requirement in no. 8 b) to provide information about the existence or non-existence of a right of withdrawal and, if a right exists, to provide the relative details, also goes beyond the regulatory domain of the MiFID. The recital of the MiFID (n. 38), explicitly stresses that the terms and conditions relating to the possible right of withdrawal in specific categories, such as the door-to-door selling, should not be addressed by the MiFID itself. However, the same also applies to other potential rights of withdrawal (e.g. for distance marketing of consumer financial services). In actual fact, there is no need for such a recommendation since an extensive explanation concerning the duration and conditions of the right to withdrawal have to be given anyway where such a right exists. It should also be possible where withdrawal rights exist that the explanation of such rights could also be given outside of marketing communication. Finally, it will depend on the

respective circumstances of the individual cases to assess definitively whether a right to withdrawal exists or not, which means that information concerning the existence or non-existence of a right of withdrawal cannot be provided within the context of general marketing communication.

8. Box 8: Information to clients (Art. 19 (3))

a) Introduction

Compared with the Commission's Proposal for ISD2 on November 2002, the MiFID now published in the Official Journal of the European Union provides for two essential changes in Art. 19 (3):

Firstly, the general description of requirements after the list has been changed to the effect that the term "financial instrument" has been replaced by "type of financial instrument". This makes it clear that in principle no product-specific information is required, rather only information on the type of investment. Secondly, Clause 2 has been inserted ("*This information may be provided in a standardised format*."). This addition is also intended to make it clear that only information about the type of investment is required. It is, at the same time, designed to offer the investment firm the possibility to maintain the proven practice that exists in individual Member States of providing this information by means of standardised brochures. The word ("may") itself indicates that this is merely an option and not intended to establish an obligation to supply the information in a standardised form.

As far as the level of detail of content of the information is concerned, in its mandate the Commission merely requires "minimum information".

b) Individual recommendations

Timing and form of information provision

- *No. 1 (Requirement of the written form)*

In view of what has been outlined above, the general requirement of the written form provided for in no. 1 meets with considerable misgivings. No requirement of a written form can be inferred from Art. 19 (3) of the MiFID, which only requires information "in a comprehensible form". In principle, this can also be verbal information. Furthermore, a general requirement of the written form would be much too rigid. Although the basic information is already provided by way of standardised brochures in individual Member States, there is a need for a flexible arrangement when new types of financial instruments come onto the market until the brochure is updated. It must at least be possible in such cases to also provide clients with the necessary information in a different form (e.g. verbally, especially in the case of telephone orders, which are the norm nowadays). Receiving such information in a timely manner before acquiring the new type of financial

instrument would be preferable to the subsequent information provided for in no. 5. We therefore strongly urge CESR to dispense with any (general) requirement of the written form.

- *No. 4 (Information by telephone communication)*

"Voice telephone communication" is a means of telecommunication within Directive concerning the distance marketing of consumer financial services, which also contains a concluding provision for the Area of services in financial instruments. This means that no separate provision is needed in the MiFID. Additionally, the provision in no. 4 goes beyond the above-mentioned Directive in that it again requires corresponding information for each individual conversation. However, under the provisions of the Directive concerning the distance marketing of consumer financial services, providing the client with information once only before concluding the framework agreement is sufficient, for example, where such a framework agreement exists for the business relationship concerned. Additional provisions in the MiFID should be dispensed, to prevent regulations which differ from the Directive concerning the distance marketing of consumer financial services,. If necessary, a reference to this Directive could be considered.

Information about the investment firm and methods of redress

- *No. 6*

No. 6 contains an abundance of detailed information, though it would appear questionable whether this information really helps the client. In any case, the MiFID does not provide any basis for the information required in no. 6 g) - k). Many of the obligations to supply information are likely to have already been covered by the Directive concerning the distance marketing of consumer financial services (including no. 6 a), b) and e)). It should at least be ensured in this regard that differing provisions do not arise when being incorporated into the MiFID. Such inclusion can, however, only ensue insofar as Art. 19 (3) form a legal basis for this.

Information about services, financial instruments and costs and charges

- *No. 7 (Product-related information)*

In view of the standardised information expressly permitted in Art. 19 (3) of the MiFID, we consider the recommendation proposed in *No. 7 a)* difficult to accept. Not only no. 1 provides for information in writing –without any legal basis as referred to above –, furthermore n. 7 a) even requires that such information has to be product-related. This would not be possibly achieved in a standardised manner since It would presuppose that written information material would have to be obtained in advance for each individual product that a client might wish to acquire, that is quite unrealistic in practice.

The issue of appropriateness also arises in relation to *no. 7 c) - g)*. In its recommendations, CESR has adopted the obligations to supply information in

accordance with the Directive concerning the distance marketing of consumer financial services without considering that it must also be possible for these to be provided in a standardised manner in accordance with Art. 19 (3) of the MiFID. Moreover it should be considered whether relevant information can be required at all on the basis of Art. 19 (3) of the MiFID. The obligations to supply information provided for under d) – g) seem to lack any legal basis.

- *No. 8 (Amount of commissions and fees)*

No. 8 likewise goes beyond the provisions of Art. 19 (3) of the MiFID since this detailed information cannot be provided in a standardised form. The precise amount of commissions, fees or charges and the relevant currency is a matter of contractual agreement in the individual case concerned and should therefore also only be regulated in that way (cf. also no. 4 l of the recommendation concerning Art. 19 (7) of the MiFID). Additionally in the case of charges the investment firm does not have any influence on them. However, they are shown separately in the contract note and can therefore be verified by the client.

- *Nos. 9, 10 and 13 (Product descriptions; details of guarantor and guarantee; type of risk assessment and custody)*

Nos. 9, 10 and 13 also need to be generalised (e.g. "type of financial instrument" instead of "product"; general information on a possible issuer risk rather than "sufficient detail about the guarantor and the guarantee"; description of general risks and circumstances of custody).

9. Box 9: Client Agreement (Art. 19 (7))

a) Introduction

According to its wording, Art. 19 (7) sets an obligation to keep records concerning documents agreed between the investment firm and its clients. It can also be inferred from the Commission's mandate that only one further obligation to keep records needs to be established in addition to that already provided for under Art. 13 (6) of the MiFID (cf. mandate heading relating to this provision "Client records"; plus the mandate itself, which says that only the "minimum content of the client records, in particular the client agreement" needs to specified in detail and the Commission's demand to link the request relating to Art. 19 (7) to that concerning Art. 13 (6)). In the mandate relating to Art. 13 (6), it is also stated that the records must be sufficient "to enable the authorities to verify the investment firm's compliance with the applicable rules."

This means that, neither a requirement of the written form for contracts (including the client's signature) nor the possibility to make stipulations part of the contracts, can be inferred from Art. 19 (7) or from the Commission's mandate. This also appears due to the fact that, so far there has not been any harmonisation of civil law or contract law in this regard. In terms of supervisory law, it should be

sufficient to verify that the investment firm has adhered to the agreements made with its clients. Considering that the CESR recommendations also have to be implemented in relation to existing clients (e.g. for 35 million deposit contracts in Germany alone), it is clear what bad consequences the extensive interpretation of Art. 19 (3) of the MiFID by CESR would also have for clients. In the end, the clients would have to bear the costs of having the contracts adapted, though without deriving any recognisable value added.

b) Individual recommendations

Basic retail client agreement

- *No. 1 (Requirement of the written form)*

No. 1 standardises the requirement of a written agreement, including the client's signature, for any service ("any investment service or, where appropriate, ancillary service"). This is not in line with the principle of freedom of form of contracts, which applies in Europe. Not even the Directive concerning the distance marketing of consumer financial services with its wide-ranging provisions specifies any mandatory form for contracts. Although, in practice, framework agreements like deposit contracts are agreed with the client in writing, including the client's signature, on establishing the business relationship, a corresponding written agreement is not normally made at the time of the conclusion of individual contracts subsequent to this. In these cases, the order is, however, at least recorded in the system, guaranteeing verifiability for the purposes of supervision or possible civil litigation. In the case of investment advice, there is not even a need for any express contract conclusion; rather, the advisory agreement can also apply (e.g. by the investment firm adhering to the client's wish for advice). In this instance too, an internal record is kept of whether an advisory agreement has been concluded or not so as to be able to verify for the purpose of supervision or possible civil litigation whether the respective requirements have been met.

In the case of investment advice, it is certainly not laid down in detail – as provided for in no. 1 a) – what rights and obligations exist. Nor would this make any sense, as there is an obligation under both supervisory and civil law to provide investor-an object-/investment-oriented advice on conclusion of the advisory agreement. What individual obligations arise from it depends on the case in question, i.e. the investment objectives, experience, knowledge and financial situation stated by the relevant client (cf. Art. 19 (4) of the MiFID) and which product is advised to the client by the investment firm. Consequently, it is not possible to contractually specify the rights and obligations for investment advice in a standardised form.

Added to this, the general standard is a possible gateway for liability cases because of its uncertainty (cf. no. 1 a) "and all other items of information necessary for the proper understanding and performance of the contract").

- *No. 4 (Stipulations concerning the content of contracts)*

There also appears to be a lack of legal basis in the provisions concerning the content of contracts. In fact, they also result in a specific law in services in financial instruments without there being any need for this. Furthermore, individual points are already provided for in the obligations to supply information under Art. 19 (3) (cf. *b), h), m*) and reporting obligations under Art. 19 (8) (cf. *j)*, for example), with the result that no additional contractual regulation seems needed.. Insofar risks of double regulations also exists, as provisions of the Directive concerning the distance marketing of consumer financial services have been adopted (cf. *c), d), n), o), r),* for example), Under the above mentioned Directive, the information has to be given in good time before the client's contractual declaration, while inclusion in the contract itself is provided for additionally. With regard to the requirement in *f)* ("description of any withdrawal right or cooling-off period") it should be considered that this couldn't be included in a contract in a standardised manner. Only individual cases can determine whether and to what extent a right of withdrawal or cooling-off period exists.

- *No. 8 (Record keeping obligations)*

The record keeping periods provided for under no. 8 appears excessive. First of all, the commencement of the record keeping period should be adjusted to the expiry of the respective agreement and not to the duration of the business relationship. On the question of the duration of record keeping and the record keeping of documents incorporated by reference, please see our comments on no. 2 (a) and the Annex to Art. 13 (6) of the MiFID, box 4.

Finally, there is no objective need for the provision under which clients are to be given a new copy of the contract at any time on request if they have already received a copy immediately upon conclusion of the contract. The same applies where clients issue their orders by telephone as they then receive information shortly afterwards under the provisions of Art. 19 (8) of the MiFID.

Retail client agreement involving trading in warrants or derivatives

- *No. 9*

It is not possible to specify when concluding a contract "whether the relevant instruments are admitted to trading on a regulated market or not" (*no. 9 a)*). It can only be regulated in a general manner whether over-the-counter futures transactions can also be effected in addition to stock exchange transactions. A reference in the contract to the information to be supplied in any case under Art. 19 (3) of the MiFID can likewise be dispensed with.

Nor is it possible to make any statements in a contract relating to "envisaged transactions" (*no. 9 b) - d)*). Furthermore, the requirements in *no. 9 b)* should be subject of Art. 19 (8) of the MiFID.

An "appropriate warning" – as provided for in *no. 9 d)* – can also only be given in individual cases and cannot be specified in the contract in advance. Any statement

in the contract itself relating to experience and knowledge etc. would again confuse the obligations under Art. 19 (7) with those in Art. 19 (4) and (5) of the MiFID. Moreover such a requirement would result not feasible in the practice, since if the contract would include such a degree of details any amendment would result in a cumbersome process, implying client's prior signature, even where changes would result from the client's conduct (e.g. deterioration of its financial situation). Furthermore, stating the financial situation is only required in the case of investment advice and portfolio management (cf. Art. 19 (4) of the MiFID). Finally, numerous clients are not concerned exclusively with investment advice or execution-only-orders but, rather, avail themselves of both services as an option. Establishing the obligations under Art. 19 (4) and (5) of the MiFID in the framework agreement would consequently be not appropriate

10. Box 10: Reporting to clients (Art. 19 (8))

With regard to the recommendations concerning the reporting obligations under Art. 19 (8) of the MiFID, the following aspects are of particular importance to us:

It should first be avoided an obligation provide clients with information that they already possess. This would result in costs that cannot be justified. We are therefore critical of *no. 8 c) (Information in statements of clients' assets)*, according to which clients are to be informed again in these statements about details of effected purchases and sales although they have already received corresponding information in the contract note under no. 2. The same applies analogously to individual details of the recommendation in *no. 12 (Information in the monthly statements for contingent liability transactions). Also* in this case, clients are already informed in the contract note of "any incidental costs connected with the exercise" (no. 12 a)), "each payment made by the client as a result of the margin requirements in respect of the open positions" (no. 12 b)) and "the resulting profit or loss arising from positions closed during the period" (no. 12 c)). The exemption provided for in no. 9 does nothing to help the end result in this respect. What is needed, rather, is a general exemption for those cases where the information has already been given elsewhere.

Furthermore, only the information which is covered by Art. 19 (8) of the MiFID and for which there is an actual need can be required. It is thus not comprehensible in the case of *no. 2 c) (Stating the time of execution)*, for example, why investment firms have to supply this information in future since they have no influence on the time of execution. They are only required to forward the order to the stock exchange in good time. We assume, moreover, that contemporary execution is monitored by the authority in charge of supervising the stock exchange. There should consequently be no need for such a provision. Nor is there any need for the recommendation in *no. 2 k) (Time limit an procedure for the settlement of the transaction)*, as this depends on the respective stock exchange practices, which form an integral part of the contract with the client. Additionally, investment firms in individual Member Sates assume responsibility vis-à-vis their clients for the due and proper settlement of the transaction. In the latter case, at least, there is no

need to provide the client with detailed information of the time and procedure of the settlement. The same also applies to those cases where investment firms assume responsibility vis-à-vis their clients for the due and proper choice of the counterpart. Stating the counterpart – as provided for in *no. 2 i)* – can be dispensed with in such cases.

The information provided for in *no. 8 a) and b) (Information in the annual statements of clients' assets)* concerns the general lending process and collateral definition. This has no link with the custody and management of securities, for which separate contracts exist, where applicable. It is therefore not necessary to provide for corresponding information in the above-mentioned statement.

The obligation to supply information contained in *no. 16 d) in conjunction with no. 18* in relation to each remuneration received by the investment firm from third parties in the context of portfolio management comes under the regulatory domain of Art. 18 (2) of the MiFID ("conflict of interest") rather than Art. 19 (8) of the MiFID. With regard to the restrictive requirements of Art. 18 (2) of the MiFID, please see our detailed comments on nos. 9 - 11 of the recommendation concerning Art. 13 (3) and Art. 18 of the MiFID (Box 7), according to which, in particular, no obligation to supply information of "details" or periodical information is provided for. A separate provision in Nr. 16 d) and Nr. 18 should therefore be dispensed with.

Finally, *no. 3* is also problematic insofar as it requires stating the "time of reception" plus the "date and time of transmission" in the confirmation. This information is already recorded internally at present for auditing purposes (as in recommendation nos. 18 b) and 20 d) concerning Art. 22 (1) of the MiFID "Client order handling", Box 11)., however, if this information now also had to be included in the confirmation, huge additional costs would be incurred. This would imply that a record would have to be kept in the system, i.e. stating the time of acceptance of the order on an order form, for example, would no longer be sufficient. Furthermore, interfaces to the confirmation would have to be created for each and every item of information. In addition, the orders normally have to be executed within one day. The very substantial technical adjustments described above would thus have to be carried out for only a small number of cases. Finally, the need for a confirmation cannot normally – as evidently assumed in no. 3 – be ascribed to the order not being forwarded in good time but, rather, normally because it has not yet been possible to execute the order on the stock exchange underthe terms and conditions stipulated by the client (e.g. price limit). We therefore strongly urge CESR to dispense with the stating of "time of reception" and "date and time of transmission" in the confirmation in addition to existing record keeping requirements.

Box 11: Client order handling (Art. 22 (1))

Record keeping

- *No. 20 b) (Recording the person to whom the order was transmitted)*

This recommendation is not suited to group organisations, at least, in which the local bank transmits all orders via its central bank for execution on the stock exchange. In such cases, , the systems are already designed in such a way that the order is automatically transmitted to the central bank on release by the local bank. We therefore suggest that the following amendment be made to no. 20 b):

> "b. The person to whom the order was transmitted, unless the orders are transmitted automatically;"

11. Box 15 and 17: Transaction reporting (Art. 25)

a) General approach of CESR

We expressly support CESR's commitment set out on page 101, third paragraph to avoid unnecessary new requirements for the investment firms concerned when implementing the MiFID which would give rise to considerable additional costs. We therefore propose using the option of maintaining existing reporting procedures as widely as possible. Unfortunately, after having carefully studied the provisions made in the Consultation Paper, we are very much concerned that CESR is not going to meet this goal. The fields and field descriptions set down in Annex A, in particular, are designed in such a way that they are likely to lead to a substantial need for adaptation even in Member States that already have highly developed reporting systems.

We see the main cause for this in the fact that CESR does not provide exclusively for a uniform minimum standard at the level of exchange of reports between the competent authorities (Annex B) but, rather, also applies this to the reports of the investment firms to be submitted to the competent authority (Annex A) up to and including the question of what information has to be supplied with what field. It must be possible, however, to keep to the field assignments that already exist at national level for reporting by investment firms insofar as it is guaranteed that the minimum content specified for the exchange of data between the authorities is available or can be easily inferred by the competent authority from the data received. The advantage would be that not all investment firms would be forced to expensively adapt their respective reporting systems but, rather, only the national authorities would ensure harmonisation with regard to the exchange of data between the authorities, where necessary by converting the data received from the investment firms.

We would also like to point out that, for the time being, implementation of the considerable changes with which investment firms are faced at Level 2 of the MiFID will not be possible within the implantation deadline set forth under the Directive (for more detailed comments, see reply to question 15.2, Annex 2).

With regard to Level 3, we particularly support the recommendation to avoid duplicate reporting obligations. This implies that competent authorities make use of waiver rules to the greatest possible extent. These waiver provisions should, wherever possible, already be applied at the level of the investment firms concerned and exempt them from their reporting obligations.

b) Branches abroad

We understand Art. 25 (6) of the MiFID to mean that legally dependent branches abroad will be under an obligation in the future to report their on-exchange and off-exchange transactions to the competent authority of the Host Member State. The latter, in turn, should send this information to the authority of the Home Member State unless the latter waives its right to receive such information. This means that the investment firms are obliged by the MiFID to link up with particular local reporting practice for each branch, which will lead to prohibitive additional costs and huge logistical burdens because of highly heterogeneous reporting infrastructure across Europe. Until there is any further harmonisation of the reporting systems in the EU, a transitional regime modelled on present practices should therefore be seriously considered.

c) Level 3 measures

We would like to clarify that the scope of Level 3 under the Lamfalussy procedure merely extends to interpretation issues and does not provide for CESR's setting out new provisions beyond those of Level 1 and Level 2. Furthermore, we would welcome a public consultation on possible Level 3 measures.

Annex 2

Replies to CESR questions

1. Box 1: Compliance and personal transactions (Art. 13 (2))

Q 1.1.: *Must the compliance function in every investment firm comply with the above requirements for independence, or should this degree of independence only be required where this is appropriate and proportionate in view of the complexity of its business and other relevant factors, including the nature and scale of its business?*

Reply: Provided that "compliance function" refers exclusively to responsibility for compliance functions and not a separate organisational unit, the requirements for independence can also be fulfilled by smaller and medium-sized investment firms. The restriction "where appropriate and proportionate in view of the nature, scale and complexity of its business" is not required here in this case. It is indispensable from the viewpoint of smaller and medium-sized investment firms to make clear that they are not forced to also introduce a "compliance policy" and a "code of conduct" in addition to existing "procedures" and provisions concerning personal transactions (cf. comments already made on no. 2 (b)) in Annex 1).

Q 1.2.: *May deferred implementation of requirements for independence be based on the nature and scale of the business of the investment firm?*

Reply: If "compliance function" were deemed to mean a separate organisational unit, a mere deferment of the implementation of the requirements set out in no. 2 (d) would not be sufficient. In this case, a permanent limitation as "where appropriate and proportionate in view of the nature, scale and complexity of its business" would be necessary.

2. Box 4: Record keeping obligation (Art. 13 (6))

Q 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?*

Reply: No. For reasons, please see the detailed comments already given in relation to no. 4 of the recommendation concerning Art 13 (6) of the MiFID (Box 4).

Q 4.2: *What should the nature of the record keeping requirement be in relation to i) capital markets business such as equity IPOs, bond issues, secondary offerings of securities; ii) investment banking business such as mergers and acquisitions; and iii) general financial advice to corporate clients in relation to gearing; financing, dividend policy etc.?*

Reply: The background to this question is not clear.

3. Box 5: Safeguarding of clients' assets (Art. 13 (7) and (8))

Q 5.1.: *Where the jurisdiction in which financial instruments have to be held regulates the holding and safekeeping of financial instruments, should investment firms be required to subdeposit their clients` financial instruments with such institutions in all cases or are there cases in which overriding considerations to the contrary mean that it would be permissible to use an unregulated depository?*

Reply: We are in favour of the second alternative as it can happen in exceptional cases that shares, for example, are held exclusively by the issuer himself; such circumstances would *de facto* rule out any possibility to sub deposit their clients' financial instruments with an institution as contemplated by the first alternative.

Q 5.2.: *Which appropriate systems and controls an investment firm has to put in place to ensure that only financial instruments belonging to clients who have given their consent are used in those arrangements?*

Reply: The principles of due and proper accounting are already in existence and practised by the investment firm under their own responsibility. We see no need for any additional supervisory regulation beyond this existing legal regime.

Q 5.3.: *Should a requirement be imposed that the records of the investment firm must indicate for each client the depository with which the relevant client assets are held, or is it sufficient that the investment firm should maintain records of the amount of each type of asset held for each client and of the amount of each type of asset held with each depository and ensure the aggregate figures correspond with each other in accordance with paragraphs 11 (c) and 13 (b)?*

Reply: We are in favour of the second alternative. In practice, "loro-nostro" assignment of individual client assets to the depositories is not carried out in the first one. Furthermore, we feel that there should be no formal obligation to do so, either. This is due to the fact that, in the final analysis, the decision as to if and which depositories to involve, will be incumbent upon the bank; contrary to this, the client has no influence on such a decision and he does not know the depositories, either. From the client's point of view, the main point is that a bank chooses the depository/depositories carefully and monitors the latter on an ongoing basis. Additionally the clients' bank shall always be in possession of enough holdings to maintain the cover. If and when the case should occur where securities are no longer found in the holding maintained as cover within an individual depository, and if the respective depository should not be able to accept responsibility for this (notably due to an insolvency) and if the client's bank should furthermore not be culpable with respect to careful selection and ongoing monitoring of the depository, then it will be appropriate that all clients who have holdings in the securities class concerned shall share the loss in equal proportions

Q 5.4.: *If the client's assets may be held by a depository on behalf of the investment firm, should:*

(a) the investment firm be (i) prohibited from purporting to exclude or limit its responsibility for losses directly arising from its failure to exercise all due skill, care an diligence in the selection and periodic review of the depository; and (ii) required to accept the same responsibility for a depository that is a member of its group as it accepts for itself; or

(b) must the contract between the investment firm and the client state that the investment firm will: (i) in any event be wholly liable for any losses the client suffers where the investment firm is directly or indirectly linked to the depository, and (ii) be liable in whole or in part, according to the circumstances, for any such losses unless the investment firm shows that it has exercised all due skill, care and diligence in the selection and periodic review of the depository?

Reply: We are in favour of the first alternative (a) because we consider it to be clearer in terms of content.

4. Box 6: Conflicts of interest (Art. 13 (3) and 18)

Q 6.1.: *Should other examples of methods for managing conflicts of interest be referred to in the advice?*

Reply: No. The examples should be sufficient.

Q 6.2.: *(a) Should paragraphs 8 (a) to (f) (or final list of measures for managing conflicts of interest adopted in response to question 1) be stated as examples of arrangements that may, depending on the circumstances referred to in paragraph 5, be effective methods of providing an appropriate degree of independence in respect of persons engaged in different business activities?*

(b) Alternatively, should there be a requirement for an investment firm to include these measures in its conflicts policy to the fullest extent possible unless it is able to demonstrate that it has implemented alternative arrangements for effectively preventing conflicts of interest from adversely affecting the interests of clients?

(c) If the answer to question (b) is yes, which of these measures should be subject to the requirement referred to in that question?

Reply to (a): Yes, because only in this way can sufficient account be taken of the differing business structures of investment firms.
Reply to (b) and (c): Not applicable in view of the reply to (a).

Q 6.3.: *(a) Is it appropriate for an investment firm that publishes or issues investment research to maintain information barriers between analysts and its other divisions?*

(b) If so, which divisions should be separated by information barriers in order to prevent analysts` research from being prejudiced?

Reply: We do not see any need to differ from the general recommendations set out in no. 8 (a) - (f). These recommendations should also apply to investment research.

Q 6.4.: *Should the derogation from requirements in paragraph 16(f) (i) to (v) be available if:*

(a) the investment firm complies with the requirements in paragraphs 17, 18 and 19 of the first option set out below; or

(b) the investment firm complies with the requirements in paragraph 17 of the second option?

Reply: We reject any provision within the meaning of the second option. However, we also have reservations against a regulation in accordance with the first option. If the respective investment firm decides to disclose potential conflicts of interests regarding its investment research in accordance with the provisions of the Market Abuse Directive, there are no reasons for additional organisational provisions or the additional reference that the research does not comply with such additional organisational provisions. The Market Abuse Directive already contains extensive and, therefore, conclusive provisions.

5. Box 10: Reporting to clients (Art. 19 (8))

Q 10.1: *What type of reporting requirements relating to the provisions of investment advice should be included in the advice to the Commission? When should such requirements apply and what concrete requirements should be imposed?*

Reply: It would be inappropriate to provide for reporting requirements in the case of investment advice. Investment advice always relates to the moment, i.e. the investment advice ends with the recommendation. It is consequently the client's responsibility to keep monitoring the performance of the financial instrument and, if desired, to call again for investment advice.

6. Box 11: Client order handling (Art. 22 (1))

Q.1: *Do you agree with the definition of prompt fair and expeditious execution of an order from a client? Do you think that it is exhaustive? If not, can you suggest any elements to complete this concept?*

Reply: We agree with the definitions and consider that they are sufficient.

Q.2: *Do you think that the details of the orders included under paragraph 2 of the draft technical advice should apply also to professional clients?*

Reply: No. 2 should not apply to professional clients because their situation is not comparable. In transactions with professional clients, for example, the name of the

representative is not recorded; rather only his authorisation is verified via an agreed authorisation feature.

Q.3: *Which arrangements should be in place to ensure the sequential execution of clients' orders?*

Reply: No additional "arrangements" are needed. It can be established on the basis of the date and time to be recorded in relation to when the order was received and executed / transmitted (cf. recommendation nos. 18 b), 19 d) and 20 d) to Art. 22 (1) of the MiFID, Box 11) only whether the clients' orders were executed / transmitted in the order in which they were received.

Q.4: *Do you agree with the reference in paragraph 7 of the draft technical advice to prevailing market conditions that make it impossible to carry out orders promptly and sequentially?*

Reply: Yes. It might make sense in the case of illiquid markets, for example, to wait before executing the orders.

Q.5: *Do you think that the possibility that the aggregation of client orders could work to the disadvantage of the client is in accordance with the obligation for the investment firm to act in the best interest of its clients?*

Reply: Yes, because despite sufficient precautions for acting in the clients' best interests, it may afterwards turn out that the aggregation was unfavourable for the client.

Q.6: *Do you think that the advice should include the conditions with which the intended basis of allocation of executed client orders in case of aggregation should comply or should this be left to the decision of each investment firm?*

Reply: This decision should remain at the investment firm's discretion. Transparency for the client is guaranteed by the fact that he will receive prior information on the allocation principles of the investment firm. The investment firm pursuant to item 9 shall record these principles.

Q.7: *Do you consider that CESR should allow the aggregation of client and own account orders? Do you think that other elements (i.e. in respect of the arrangements in order to avoid a detrimental allocation of trades to clients) should be included?*

The aggregation of client and own-account orders should be permitted because it may also be in the client's interest (e.g. more favourable conditions). Additional "arrangements" are not needed.

Q.8: *Do you think that paragraphs 15 and 16 of the draft technical advice should only apply to retail clients?*

Reply: Yes, because professional clients do not have any need for corresponding provisions since they should be able to adequately assess the associated risks and obstacles.

7. Box 15 and 17: Transaction reporting (Art. 25)

Q 15.1.: *Should competent authorities be able to waive the requirement for investment firms to report transactions in electronic format? Should such an exemption be limited to exceptional cases, and what cases would those be in your view*?

Reply: We support the general possibility for competent authorities to waive the requirement for reporting transactions in the stipulated electronic format in exceptional cases, e.g. for small institutions effectuating only a small number of transactions per year which are subject to the reporting obligation. We do not see any need to specify this case in greater detail. Instead, we think that a broader scope of action for the competent authorities is adequate.

Q 15.2.: *In respect of bond markets and commodity derivatives markets, new systems for reporting financial transactions will probably have to be put in place in many Member States, in order for investment firms to be able to meet the requirements of the Directive and Level 2 advice. (Note that Article 20(1) (b) of ISD1 already requires investment firms to report all the transactions covering bonds and other forms of securitised debt to competent authorities, though Member States have the right to provide that this obligation only applies to aggregated transactions in these instruments. To what extent should the implementing measures allow market participants more time to implement these proposals ("transitional regime")? What could be legitimate reasons for such a possibility*?

Reply: Harmonisation – even if this is confined to minimum standards – will lead to greater or lesser adjustments for all market participants. Even those Member States that already have highly sophisticated reporting systems and have fully implemented the provisions of the ISD 1993 will be forced to make a number of adjustments (e.g. owing to enlargement of the group of instruments subject to reporting to include all financial instruments; reforms for foreign branches; changes and additions to the fields and field descriptions, cf. Annex A). It cannot be estimated as yet how long this will take; it will likely depend on the final content of the specifications. We hope for a few improvements in this respect (cf. our comments under Annex 1). Whatever happens, it is likely that this will not have been implemented by the time that the deadline period for implementation of the MiFID has expired. We consider it necessary for the implementation period to begin only once all necessary specifications for IT adjustments have been laid down in a legally binding way in relation to the regulated parties as the latter, for reasons of legal certainty and to avoid unnecessary costs, can only begin the implementation process at that particular time. We strongly urge CESR to take account of this in its final proposals to the EU Commission.

Q 15.3.: *To what extent should CESR investigate the possibility for future convergence between national reporting systems? What are the advantages and disadvantages of harmonising at EU level the conditions (including format and standards) with which all the reporting methods and arrangements have to comply in order to be approved, instead of, as proposed by CESR, harmonising the conditions at a national level? What impact might harmonisation have on existing national reporting channels, national monitoring systems and on the industry?*

Reply: It is not possible to give a conclusive answer to this question from the present perspective. From the viewpoint of institutions operating cross-border, there are certainly reasons that favour further harmonisation (e.g. only one reporting system for foreign branches). Yet, what would clearly speak against a full harmonisation of reporting obligations is that this does not result in any significant value added but instead in significant added costs for the purely national reporting system which relates to domestic transactions in domestic financial instruments. It should not be overlooked that the business in financial instruments – particularly in the field of retail clients – is largely not of a cross-border nature. Particularly under the aspect of an adequate cost-benefit ratio we therefore feel that a maximum harmonisation of reporting obligations would not be a constructive move. In our view, it is necessary to wait and gain experience in order to verify which impact the harmonisation approach laid down in MiFID will have in practice. Based on such an inventory and an extensive cost-benefit analysis, a decision should then be made to what extent further harmonisation would be useful. However, we consider of utmost importance that the national authorities refrain from any purely nationally oriented innovations or amendments of the reporting systems during this period. If there is no such self-limitation on the side of the national authorities, harmonisation of the reporting process is likely to be pushed far into the future, especially as the market participants cannot be reasonably expected to have to carry out renewed adaptation of their reporting systems within a very short time.

Q 15.4.: *Do you agree with the set of the general minimum conditions suggested? If you do not agree, what other general conditions would be more appropriate in your view? In particular, taking into consideration the responsibilities of investment firms on the one hand and third parties and other reporting channels, on the other, do you think that CESR and a reporting channel in the list of general minimum conditions, or would this be better addressed at Level 3? What is your view on the border line as to the responsibilities for reporting if done by a third party acting on behalf of an investment firm or be a reporting channel?*

Reply: We support the minimum conditions referred to under Box 15, no. 1, p. 104. In general terms, we consider appropriate for a party subject to the reporting obligation to bear responsibility of the reporting regardless of the channel of communication used to comply with its reporting obligations. In this context, we also see no need to draft further requirements beyond the regular outsourcing agreements for credit institutions concerning the use of other reporting channels in relation to the "standard level agreement" addressed. Correspondingly, we neither see any need for further work at level 3 of the Lamfalussy procedure.

Q 15.5.: *What other issues, if any, should CESR take into account when responding to the Mandate concerning the "methods and arrangements for reporting financial transactions"?*

Reply: Related to the mandate given to CESR by the Commission, we do not consider any further amendments or additional requirements necessary with regard to the points addressed in the recommendations.

Q 17.1.: *Do you agree with the approach to standardise/harmonise the list in Annex A to this draft advice only at a national level in order to be able to keep reporting systems that are already in place? If you do not agree, what approach do you think would be more appropriate?*

Reply: We strongly support the goal of CESR to retain existing reporting systems at national level as far as possible. However, the recommendations submitted by CESR in relation to Annex A do not, unfortunately, meet this goal (for more detailed comments, see Annex 1).

Q 17.2.: *What are advantages/disadvantages of moving towards harmonisation at EU level as regards the standards or format of the list in Annex A to this draft advice? To what extent would harmonisation at EU level of the standards or format of the list in Annex A to this draft advice impact the existing national data collection mechanisms and national transactions databases? Do you see merits in having an EU harmonised regime for the content and format of transaction reports, taking into consideration whether future and immediate long-term benefits could compensate the initial costs of harmonising the transaction reports?*

Reply: The recommendations in Annex A interfere too much in the existing national reporting systems by also stipulating at the level of the market participants what information has to be supplied, which field. We further refer to our reply to question 15.3 in this regard.

Q 17.3.: *Do you agree with the proposed field in Annex A and B to this draft advice? If you do not agree, what other fields would be more appropriate in your view?*

Reply: As the reporting systems differ greatly in the individual Member States, we cannot, unfortunately, as a European association, give you a concrete answer to this question. In general terms, however, it can be said that some of the fields in Annex A are superfluous as the items of information relevant to the report are already covered by other fields or can be inferred by the competent authority without difficulty from the data received from the market participants. As already emphasised on several occasions, it opposes the declared goal of changing the existing reporting systems as little as possible if it is provided in Annex A what information has to be supplied with which field. It should, rather, be possible for one field in Annex A to be illustrated by several national fields as well as different fields in An-

nex A to be illustrated by one national field. Last but not least, individual fields should not be necessary at the level of the market participants, but only at the level of the competent authorities.

Q 17.4.: *How would you define the field "agent/propriety"?*

Reply: No comment.

Q 17.5.: *What are the advantages/disadvantages of requiring the field "client identification code" in transaction reports, bearing in mind the objectives of transaction reporting? What are your views on making the client/client identification field mandatory in transaction reports? What are your views on the idea to promote a pan-European code for client/client identification? Do you see any legal impediment to the introduction of such a code in your Member State?*

Reply: We doubt whether a client identification code is really necessary within the context of minimum harmonisation. In addition, there is, in fact, no clearly recognisable legally permissible standardised link in Europe in this respect. Finally, a standardised pan-European client identification code is also to be rejected on cost-benefit considerations.

Q 17.6.: *What other issues, if any, should CESR take into account when responding to the Mandate concerning the "minimum content and the common standard or format of the reports to facilitate its exchange between competent authorities"? Will this approach serve the objectives pursued?*

Reply: We see no need for action concerning the recommendations proposed by CESR. We consider it necessary, rather, to refrain from a harmonisation of "standard and format" at the level of the market participants.