ISD - Febelfin comments on the CESR first draft document on possible implementing measures of the MIFID Directive (1st mandate)

Febelfin is the Federation of six trade associations from the Belgian financial industry: the Belgian Bankers' Association (BBA), the Professional Union of Credit Providers (PUCP), the Belgian Asset Management Association (BEAMA, which regroups from 25/03/2004 the former Belgian Association of Investment Funds and Companies and the former Belgian Association of Wealth Managers and Investment Advisers), the Belgian Association of Stock Exchange Members (BASEM), the Belgian Asset Managers Association , the Belgian Leasing Association (BLA).

Febelfin welcomes the opportunity to provide the views of our members on the Consultation Paper issued by CESR for the 1st mandate of the implementing measures of the Markets in Financial Instruments Directive (MiFID).

As the deadline for comment on the Best Execution and Pre- and Post-trade Transparency parts of the CP has been changed to October 4th, we shall express our view on those sections later on in a separate paper.

We are pleased to send you our remarks as stated below. The first part of this text consists of our general remarks, whereas the detailed remarks on the contents of the document are given in the second part.

<u>Febelfin general comment :</u>

We think that in certain matters, the CESR advice is much too detailed and goes beyond what is required in the Directive (in particular with respect to client agreement and reporting requirements). The rules proposed in these matters should be reviewed with a view to leaving the detailed rules and requirements to level 3 and best practices. However, the shifting from Level 2 to Level 3 should be carefully planned, since this must not impair the cross-border provision of services.

Furthermore, we assume that a lot of the rules proposed are largely inspired by the taking into account of the customers’ point of view and by the fact that a lot of communications, agreements and disclosures have to be taken care of by the investment firms. However, although we are not opposed against client protection and information, we think consideration has to be given also to the fact that clients must act diligently, something which should also be reflected by the rules (e.g.. in some cases, information should not necessarily be sent automatically to the client, but should be available or provided to him at his own request; in this way, the (massive) burden put on the investment firms would be somewhat less heavy). In our opinion, the fact that the client must take some initiative does not preclude him from protection.

We cannot accept that in several parts of the advice, CESR seems to allow the possibility for member states to impose additional requirements. This contradicts with the level 1 legislation and in any case undermines the objective of achieving a single market. Financial intermediaries are increasingly working on a European (and even broader) scale either through the free provision of services or through a branch with cross border business lines. However, diverging national rules/standards continue to hamper the development of these business models which is to the detriment of the overall European financial market.

Another key need is the ability to standardise basic client information. This is clearly made possible under article 19.3. of the Directive but CESR seems not to recognise this in certain areas. Also a clear distinction must be made between the general information requirements under article 19.3. and the more extensive requirements under 19.4. and 19.5.

To a certain extent CESR takes into account the need for calibration for smaller investment firms. This is particularly important for them. In particular in the area of best execution, conflicts of interest, disclosure of information and reporting, the burden on smaller institutions, if their calibration is not adequate, may drive them out of the market.

We cannot accept the suggested reversal of the burden of proof (negative proof) with respect all the firm's obligations under the MIFID and implementing measures. Such a reversal of proof would be against the established legal tradition in Belgium (and as we believe a lot of continental European systems).

Finally, the Level 2 measures must be fully consistent with and take into account (in order to avoid duplication) other EU legislation. In particular with respect of conflicts of interest, the Market Abuse Directive should be taken into account.

<u>Febelfin detailed comment</u>

Below you will find our detailed comment on the draft advice.

<u>Section I – definitions</u>

3. Relevant person

The sentence ‘where such inclusion is appropriate in view of the nature of the arrangement and individual’s role’ should refer to the four points under 3 ((i) to (iv)).

4. Personal transaction - point (iii)

This point gives the impression that there are more guarantees when the transactions are carried out by a portfolio manager outside the group. The opposite is more likely, i.e. there is extra protection (and monitoring) when personal transactions are carried out by the portfolio manager inside the group within the framework of a portfolio management contract. Consequently, (independent) portfolio management within the group to which the relevant person belongs, should not be excluded.

We would like, for clarification, the following text insertion in the second indent under (ii): ” – <u>with respect to the transaction concerned</u>, there is no prior communication…”.

4. Personal transaction – point (iv)

We would delete the first bullet, as the fact whether or not an undertaking is subject to supervision, is not relevant to determine if the relevant person could indirectly control his transactions i.e. whether his transactions are carried out on an independent basis. The latter is guaranteed by the second bullet.

7. ‘depository’

We would like to add, for clarification purposes: “means third parties, <u>including clearing and settlement institutions</u>, with whom an (…) “.

13. “marketing communication”

The fact that information to more than one person is considered as “issued to the public” seems strange and contradictory to existing definitions of “public distribution”. Therefore, we think it is appropriate to quantify at a substantial level when something would be considered to be issued to the public.

21 'durable medium'.

We do not understand what is meant with the last part of the definition referring to internet websites. We assume that items/information which can be downloaded and saved e.g. on the hard disk, fall within this definition.

Section II – Intermediaries

Compliance and personal transaction

As a general remark we would like to underline the need for calibration for smaller firms. Outsourcing of compliance for these entities is not a solution. Immediacy and integration in the firm's business are key elements to ensure compliance efficiency.

Policies and procedures to ensure compliance.

- Box 1, Point 2 (a)

We are of the opinion that financial groups must be allowed to centralize compliance function and therefore that no extra rules should be applicable to a group compliance function.

- Box 1, Point 2 (c)

In our view, this obligation should be limited with respect to supervisory purposes. Therefore, we would insert the following text: 'be able to demonstrate to the supervisory authority that it has effectively implemented such policies and procedures (…)'.

- Box 1, Point 2 (d)

We think it is important to consider that the independence of the compliance function is ascertained when the enumerated criteria are met (instead of giving a number of minimum criteria). There may however be other ways in which the independence of compliance could be organized.

- Box 1, Point 2 (d) (ii)

We suggest to make it clear that the remuneration must not be linked up with specific services they monitor, but may be based on overall results of the investment firm (or consolidated group to which the firm belongs).

The compliance function is an essential part of the firm and it would be discriminating and demotivating not to link it to the overall performance of the firm as well.

- Box 1, Question 1.1.

In our view, the degree of independence should only be required where it is appropriate and proportionate in view of the complexity and scope of its business.

- Box 1, Question 1.2.

In our view, the answer should be positive.

- Box 1, Point 7 (b)

We think that prior notification and authorisation such as stipulated in section 7 (b) should be one but not the only mechanisms. Other mechanisms yield the same results while being less of an administrative burden, for instance the prohibition to trade for certain persons in certain instruments (during specific periods) mentioned on a list which is distributed to the personnel of the firm e.g.. by compliance. This implies that they may trade (without burdensome prior notification and authorisation) in other instruments or outside the relevant period.

- Box 1, Point 9 (b) – Question 1.3.

We are of the opinion that the guarantees under 9 (b) and (g) of the outsourcing advise should be sufficient. The end of the sentence however should read as follows 'which is applicable to operational outsourcings'.

Obligation to avoid undue additional risks in case of outsourcing

Requirements should not diverge with CEBS and IOSCO .

We are of the opinion that only material outsourcing agreements should be notified to the competent authority and only after they have been entered into (a posteriori control).

Box 3, Point 4 Scope

The obligations with respect to outsourcing in an intra-group context should be less stringent. Intra-group outsourcing should not require extensive screening of the service provider, it should not be documented in a formal written agreement.

We assume that this is meant by 'shall take this situation into account accordingly'. Further specification is needed in view of legal certainty.

Record keeping obligations

Box 4, Point 2 (b)

- The voice-recording of telephone orders of clients is a novum. We strongly oppose this new requirement. Recording of telephone trades/orders should be limited to the dealing rooms. .

- Any supplementary recording obligation would seriously affect banks, which have a lot of branches.

First of all, this will lead to the elimination of certain services offered by banks to retail investors. Banks will only offer "execution only services" through their call centers, because only in this way it will be possible to avoid large investments (the installation of tape recording systems and recording capacity on a branch level). Furthermore, banks which offer (occasional) advisory services to retail investors will stop this kind of service. This is not to the benefit of the retail investor.

Since local branches offer various services to retail clients, most of which may involve a telephone conversation, such an obligation would necessitate to tape all telephone calls of every branch (including those which are not related to securities transactions). This will multiply the need for recording capacity exponentially.

Secondly, we are of the opinion that this measure is out of proportion as far as privacy protection is concerned (especially if no distinction between securities transactions and other business can be made). This may also imply that autorization will have to be asked from all bank customers (necessity to review all customer agreements). Our experience is that the clients (esp. natural persons) are opposed to have their telephone calls be taped.

- If CESR would hold on to the need of voice recording of orders received in the dealing rooms (professional clients), the one year record keeping covers a very long period.and does not seem to be in accordance with market practices (e.g. 6 months).

- In practice, any discussion about the content of the telephone order will take place immediately thereafter, as afterwards the discussion will be related to the documentation which is provided to the customer (e.g. order receipts, transaction confirmations.

Box 4, Point 2 (c)

- Reproduction method: we would like to broaden the methods and replace the text "on paper" by "on a durable medium".

- We would like to have an indication of the limited items that should be searchable through those records.

- The requirement to be able to reconstitute "each" stage of the processing seems to be over burdensome. Currently, a lot of intermediate records (of intermediate stages) are kept for a limited time only (as they are replaced by the final stage).

Box 4, Point 4 – Question 4.1.

No, the sector cannot accept this proposal. A reversal of proof would in practice mean that the firm is burdened with a negative proof. Practically speaking, it would indeed be impossible for the investment firm to prove that it has not acted in breach of its obligation. Moreover, article 15 of Directive 2002/65/EC on distance marketing of financial services only deals with very specific situations. The scope of this directive is far more limited and the principle must not be extended within the ISD2.

Furthermore, we believe that the reversal of proof would be illegal and/or unconstitutional in some countries.

Box 4, Annex – minimum list of records to be maintained

- Categorization of each client:

  We are opposed to a imposed annual review; This should only be done upon a material change in the relationship (e.g. services offered, status of client,…). Furthermore, a grandfathering clause with respect to existing clients should be provided

- An aggregated transaction that includes a client order:

  We consider that the possibility to cumulate a client and own account order, should be equal in every country.

- Financial instruments held for clients used for stock lending activities: We don't see what added value there would be in keeping a specific recording with respect to "instruments available for lending" and therefore would delete "are available to be lent, and those which".

- Marketing communications and investment research:

  The requirement is quite extensive. We are of the opinion that with respect to marketing material a limitation to specific market communication used for direct retail marketing communications is necessary. . Recording of all marketing material and investment research would require enormous recording capacity. We are of the opinion that a restriction is necessary to specially targeted communications (direct retail marketing communication).
  Furthermore we assume that website information does not fall within the scope as this would have unrealistic consequences (IT-investment, capacity,...).

Box 4, Question 4.2

Since especially ii) and iii) are not regulated services under Mifid, a lot of market players would not be subject to record keeping obligations nor supervision. This would harm the level playing field. Furthermore, we are of the opinion that any record keeping with respect to all the activities mentioned in question 4.2. should be determined by the investment firm, as this will be related to the specific e legal environment the investment firm and/or its clients are working in.

Safeguarding of clients' assets

Box 5, Point 5 c)

We would like to add: 'the document in which that client's consent is requested by the investment firm or the document to which it refers".

Box 5, Point 7

Where the investment firm resolves not to deposit clients' funds with a central bank but to deposit them with a bank, established in Europe or in countries with a similar degree of supervision, the supervision of those banks is adequate and there is no reason whatsoever to impose additional conditions. Therefore, we are of the opinion that the last sentence of point 7 should be deleted .

Box 5, Question 5.1.

We think that the selection of a regulated depository should be mandatory unless no such regulated depository exists in the relevant country.

Box 5, Question 5.2

We are of the opinion that the system as described in section 9 is sufficient.

Box 5, Question 5.3

We are in favour of the second option mentioned on page 33, because only this option is conform with the Belgian legal system of fungibility.

A direct link between the client and the depository of his financial instruments is in contradiction with this principle of fungibility (which implies a co-ownership of all clients with regard to all identical financial instruments (without the possibility of any identification of specific financial instruments for specific clients)). This principle is essential for (I)CSD's such as Euroclear and CIK.

Box 5, Question 5.4.

We fully support option (a). However as regards (ii), an exception with regard to a group member acting as global custodian should be inserted because otherwise this would lead to an unjustified difference in treatment. If the investment firm itself would directly (direct appointment) use the same external (end)custodian as the global custodian, group member, the investment firm would be able to exclude its liability. Should the end-custodian be appointed indirectly via the group member/global custodian(indirect appointment), an exclusion of liability would not be possible. This outcome could have a major effect on the business model used by financial groups.

Box 5, Point 12 first paragraph

We would add "this contract <u>or the document to which it refers</u>, must include..".

Box 5, Point 12, b.

We accept that an investment firm is obliged to give a full description of its own national legal system with regard to pooling.

However, it would be impossible to provide a description of the risks and the content of pooling with respect to (in principle) every country in the world (where securities are kept). Furthermore, due to changes this would cause a need for legal opinions for all of the countries concerned and for their constant updating. .

Since the ISD1 has already obliged every Member State to provide for sufficient safeguards with respect to the protection of ownership rights, this principle is sufficient for the holding of securities with subcustodians established within the EU. For subcustodians outside the EU, the obligation to give a general warning in order to inform the customer that it should be possible that less protection exists in case he obtains non EU-securities, should be sufficient.

Moreover, this does not make sense, because one ise often faced with a cascade of subcustodian relationships (e.g. assets are deposited with Euroclear, which redeposits them, etc.). Also, the relevant client relationship is with the investment firm and not with the depository.

Box 5, Point 12, d:

More or less the same arguments as made under point 12 (b) make it also impossible to describe the investor protection schemes in foreign countries. This would indeed necessitate a world-wide and permanently updated database of foreign legal systems (and this within quasi each investment firm) so that a client's request can be fulfilled. Furthermore we do not see the relevance of such documentation as a client is no longer an individual beneficiary under such system if an investment firm has subdeposited the securities with a (local) depository in a foreign jurisdiction.

Box 5, points 13 & 14 :

The requirements on appropriate controls are equally applicable to credit institutions and investment firms. They are that far reaching that they may prescribe a separate accounting system for securities held by a firm. This would have major implications for credit institutions which in a number of EU countries (including Belgium) do not keep a separate securities accounting system. These implications cannot be the outcome of level 2 legislation but have to be explicitly provided in level 1 EU legislation (which is not the case in MIFID).

Conflicts of interests

Point 8 (e)

Apparently, this provision is very extensive. It should be refined and explained more into detail.

Box 6, Question 6.1

We do not see any.

Box 6, Question 6.2

We think it is appropriate for each investment firm to work out the most adequate and effective conflicts of interest policy taking into account its organisation and business specificities. Therefore in our view the list under point 8 should only serve as examples (option under a).

Box 6, Point 11 (a)

CESR advises that where inducements are permitted the investment firm must inform the client in writing in the precontractual phase, of its policy on inducements. We do not agree with this principle requirement. Information on the policy regarding inducements should solely be given upon explicit request, not automatically.

Box 6, Point 11 (b)

CESR advises that at least once a year, the client must be informed of the relevant details of such inducements . We cannot accept this requirement.

We acknowledge the need for more transparancy of the costs and understand that the client should receive at least once a year an overview of all the different types of remuneration and fees paid in relation to the management of its portfolio. In this respect, a standard reporting (consisting of transaction costs, custody fees, management fees and other cost, if any) giving an indication of the average costs per client, would be provided.

Because inducements are considered as rebates granted to the asset manager (for placing large volumes of orders or for having set up advantageous computerised routing and settlement systems) and are not to be considered as a remuneration or fee paid by the client, there is no need to include them in this annual reporting.

An automatic reporting of inducements would lead to additional accounting, administrative and IT-costs obliging the asset manager to recoup these costs from its clients.The core business of an asset manager is to reconcile the object of profit maximalisation (in order to be able to compete) and to act in the best interests of the client. It cannot be the purpose to spend a great part of its human and financial resources on reportings.

Box 6, Point 13

Does the "nature of the recipients" refer to the distinction between retail and professional customers or are other categories envisaged. We request further guidance.

Box 6, Point 15

Please clarify what is meant by "types of research". Does this refer to the general category of the buy- or sell side research or does this refer to the kind of documents such as reports, notes, flashes, etc… (and if it is the latter, what's the added value?)

Box 6, Point 16 (f) (i) – Question 6.3

We only see the absolute need to have an information barrier between analysts and the corporate finance department. It may be useful, depending on the organization of the firm, to have others, but this would preferably be left to the firm (and the relevant competent authority) to assess.

Box 6, Point 16 (f) (ii)

Please specify more into detail what is meant by supervision. Does this only relate to direct supervision, if not to what degree of distance/levels would this prohibition be applicable (ultimately the CEO or president 'supervises' anyone in the firm)? We request further guidance as such a broad wording may imply that analysts should de facto operate in a department seperated from any other business of the financial intermediary.

Box 6, Point 16 (f) (iii)

We suggest to make it clear that the remuneration must not be linked to specific business lines, but don't see the need to prohibit a link with the overall results of the investment firm (or consolidated group to which the firm belongs). Analysts are an essential part of an full service investment firm and such firms should be able to remunerate them (partly) on the overall performance of the firm.

Box 6, Point 16 (f) (iv)

It seems that attendance of analysts to pitches or 'road-shows' is considered by CESR as being inconsistent with his objectivity. This has already been extensively discussed and we are not convinced that this is always the case (his expertise bringing in an additional value to a discussion). The commercial role of analysts is very important and must be maintained so they can participate together with salespeople to commercial actions related to primary and secondary market transactions , provided, of course, that they can act in an objective and independent way. As such we would like to delete those two items from the list of examples (which by being included in a European implementing measure gives a bias thereto).

Given the more disparate European financial markets, a full independent analyst department whereupon a firm cannot leverage in other commercial actions is not yet feasible (as is maybe more the case in some bigger and more integrated markets which has led to some important intermediaries such as in the US). In such markets one is maybe able to split certain functions (e.g. independent analyst / sales (research)assistant, whereby the independent analyst is the one providing external research.) We fear that if we preclude analysts to use his expertise for other departments (such as sales) of a firm, there would be no incentive any more to bear the cost of such analysts and this is even more the case in less liquid securities or smaller markets. One should consider that research is not provided for free (but on a quid pro quo basis) and one should not crush this activity.

Box 6, Point 17 – Question 6.4

Neither option is suitable in our view. We can accept the principle of having a disclosure if the strict organization as described herein can or is not respected. However the conclusion that if one cannot guarantee all those organizational requirements, one is distributing *non-objective* research is not proven and anyway can only be viewed case by case. The result of the proposed disclosure is that one should use a self accusatory statement (which may even not be correct). Furthermore, CESR must take into account a firm's disclosure requirements under the Market Abuse Directive. Clearly a right balance needs to be found between organisational requirements (controlled by the competant authority) and disclosure obligations vis-à-vis the investors.

One could think of a general disclosure to the effect that “not all organizational requirements as imposed by Mifid to enhance the objectivity of the analysts have been applied” in the specific documents, which in our view would warn the reader sufficiently.

Fair, clear and not misleading information

Generally speaking, for both the chapters on the information given to the client and client agreement, the intention here should be to achieve maximum harmonization of the principles. Consequently, we cannot agree with sentences such as ‘member states may impose additional requirements in relation to the subject matter of his advice’.. However the level of detail is too extensive. A lot of the elements given below are to be worked out (if needed) on level 3

The Directive explicitly allows the firm to provide information in a standardized form under article 19.3. Therefore throughout the section on information to clients, the notion of ‘financial instrument’ should be changed into that of ‘type of financial instrument’ and the notion of “transaction” into “type of transaction”.

Also, CESR should carefully re-consider the information requirements taking into acount the type of service (19.4. and 19.5. versus 19.6) provided and the moment at which the information is provided (detailed information requirements are only justified at the moment the service is “offered”)

Finally, given the scope of the new requirements, one cannot do without a transition period (new form of contract mandatory for new clients only – phasing out of old contracts at the moment the clients requests for additional services or requests to terminate certain services)..

p. 49 explanatory text, 2nd paragraph

The notion of ‘securities research’ being incorporated in the list of subject documents is confusing, because of its close resemblance to ‘investment recommendations’. The fair presentation of those is sufficiently regulated under the Market Abuse Directive and no additional requirements should be imposed.

Box 7, Point 5 c)

This general requirement should in our view be limited to written documents and not to other channels (such as radio spots in which it would obfuscate the message).

Box 7, Content of specific and direct offer retail marketing communications (pt 8 – 10)

We would prefer to have these kind of detailed rules to be handled at level 3.

Box 7, Point 8 and point 9 :

In the title reference is made to direct offer retail marketing communications which is a well-defined term and constitutes a personalised offer of a financial instrument. This term is not used in the body text. We can only accept the level of detail required under 8 if indeed we are faced with a direct offer retail marketing communication related to a well-defined product/service.

We would add the following word: “..”when an investment firm makes a direct retail…”.

Box 7, Point 8 a) (i)

‘illiquidity’ is in our view a too subjective concept and should be deleted. In this respect we also refer to the recent Prospectus Directive and its implementing measures (which enumerate all information that should be incorporated to give investors all relevant information on which to base their investment decision) which do not require this item to be given and/or described.

Box 7, Point 10 :

In our view this requirement goes too far. In case of a direct retail market offering communication , the information required under article 19.3. will in most cases be given already to the client because there is a pre-existing client relationship. Consequently this more general information should not be included into the marketing documents. In case there is no pre-existing client relationship, the information required under 19.3 should not necessarily be incorporated in the marketing communication. It should be allowed to incorporate a reference to the documents that have been or will be given to the client at the appropriate moment which would, in our view, not deprive the client of any protection, and still enable the use of compact marketing documents.

Information to client

Box 8, Point 2

We would prefer not to have a definition that may be interpreted in diiferent ways and consists of very subjective elements and therefore would prefer to delete point 2.

Box 8, Information about services, financial instruments and costs and charges (point 7 to 15)

See our remarks under point 8 & 9 above : the reference should each time be ‘type of financial instruments’ instead of ‘financial instrument’ and consequently ‘transactions’ should be replaced by ‘type of transactions’. Indeed, it must be allowed to provide the customer with standardised information.

Box 8, Point 6, litt. I:

Only an outline of the conflict policy is required whereas under point 12 of the 'conflicts of interest'-advice the whole policy seems to be required to be provided, please clarify.

Box 7, Point 7 a) ii) and point 12:

We refer to our remark under point 8 (a) (i) on the previous page with respect to the undesirability of the liquidity-item.

Box 8, Point 13 (a)

We do not see why this information should be provided. It creates the false impression that a client would benefit directly from clearing house protections which is hardly the case. Clearing house protections are to the benefit of the members (intermediaries) of the clearing house (not to the customers of such firms). Thus this kind of information is irrelevant in the retail customer relationship.

Box 8, Point 13 (c) :

We assume one is referring to the insolvency of the investment firm with whom the client has a contractual relationship (as one cannot describe the insolvency rules allover the world – if one has agents or depositors in other countries).

Box 8, Point 15.

This item needs clarification. Are unsollicited orders in connection with a public offer in which the investment firm is not involved also subject to this requirement (such orders not necessarily known as such by the investment firm)? Furthermore, as is more and more the case, the distribution of prospecti may be prohibited outside certain (mostly home) countries or subject to rules not always known by the non-participating investment firm.

Client agreement

Box 9, Point 4, litt. i)

Such a requirement is not feasible because it would be subject to constant change (as e.g. the trading platform, an intermediate broker, or the IT-system of the investment firm itself mayprovoke a change in such types). This would necessitate numereous changes/updates of the client agreement and require each time the client's consent. Moreover if one uses other intermediaries for certain markets, one does not know necessarily that the types of orders have been changed. or such information is not always available. In that case, this obligation would lead to a limitation of types of orders (because the investment firm will only describe these kind of orders of which he is sure that they always exist (and thus the investment firm will not give the opportunity to the customer to use all types of orders available).

The administrative burden and follow-up is disproportionate on market on which the investment firm is less active. Such information (linked to a specific timing) is in our view not appropriate in the client agreement. One could consider to make such information available on request (but then it should be included in the CESR advice under 'information to client')

Box 9, Point 4, l)

"on how they are to be calculated" : We assume one does not expect detailed information on how price fixing is done by the investment firm (information of a competitive nature).

Box 9, Retail client agreement involving trading in warrants or derivatives

In our view there are no additional risks for listed warrants and so these should be excluded.

Box 9, Point 10 c)

We wonder what the relevance of setting a benchmark is for the private customers market. It is only an objective to strive for (no guarantee). In our view only professional clients have the resources and connections to evaluate different asset managers on how close they performed to such objective.

Box 9, Point 11

We would like to replace the text by the following :

"The retail client agreement referred to in paragraph 10 must include a specific procedure for reporting in case of substantial loss of value of the portfolio. This means that, as for losses, one must agree about a limit which implies that the customer must be infomed if the loss goes beyond that percentage. One must also agree about the time needed to inform the customer, whereby the performance loss disclosure may be calculated on the basis of the annual starting period instead of the latest reporting date, provided there are performance limits in addition to the first limit, as for the obligation to inform the customer. The agreement may include a clause according to which the performance will be measured only once a month, which implies that the disclosure can only be made only once a month at the very best.)"

Reporting to clients

In general and giving the substantial change in volume and scope of what has to be reported, we request that all those informations should not necessarily be sent by the investment firm. The only important objective in our view is that clients can access (and be able to keep a copy) of such information and so we would prefer to provide in a system whereby information is accessible and downloadable for a certain time by the client via electronic means and potentially may be sent on request (but not automatically).

Question 10.1

Reporting requirements including a periodical assessment of the portfolio should be restricted to contractual investment advice (i.e. paid advice).

Box 10, Point 1

We do not see the relevance of this point as it is covered in detail by the other points. Consequently we would delete this point.

Box 10, Point 2 c)

We assume that the 'time of execution' is not 'available' when one has not carried out the order oneself ?

Box 10, Point 2 i)

In our view this applies only to OTC transactions and internalisation. This should be added in the text.

Box 10, Point 3

Written confirmation for non-executed orders as well as the notification obligations with respect to orders that are or cannot be executed (points 13 and 14) , puts in doubt a system (e.g. as known in Belgium) where no costs or expenses are charged with respect to non-executed orders. These costs are not trifling if one considers the postage-expenses, personnel needed to keep close track of such orders and to establish and send out the information(and will of course be relatively heavier for smaller orders) . Systems (esp. continental ones) enabling clients to give orders that remain effective for long periods, give rise to a lot of 'absurd' limits (to 'anticipate' even an unlikely event) and at the end of the day also a lot of unexecuted orders.

The need for limit orders is however especially handy for less liquid securities, which are pre-eminently a retail customer market, and so the most important impact of charging for non-executed orders will be on less liquid securities and on retail clients (lower amount orders).

Statements of clients' assets

Box 10, Point 8 (c) :

This requirements puts a non-justified burden on the investment firm. Also the client needs to act diligently and follow-up on its transactions. It is not up to an investment firm to duplicate any information the client has already been given. In this respect we are strongly opposed to repeat the movements of client assets during the reporting period, as the client has already been given confirmation notices each time there was a movement. The yearly reporting should only give the status of the client assets with the investment firm at the closing time of the reporting period.

The same goes for the collateral and the assets which have been lent (a confirmation has been sent in the past). Besides, there is no real added value in this.

Box 10, Notifications obligations

Box 10, Point 13 and 14 :

See above under Box 10, Point 3.

Point 18 :

This is an overlap with point 16 d) and should be deleted. If the aim is to provide this information with respect to each retail customer, this is simply not possible. What would be the criteria ? It would be totally arbitrary.

The following could be of guidance for CESR (in accordance with project of CBFA's Asset Management document) :

1.1.a) Asset management agreement

1. *when payments or returns (hard commissions) are received from third parties, this must be mentioned in the agreement. For each type of instrument, the regular indirect advantages must be indicated as well as the margin comprising the potential amounts paid by third parties to the asset manager.*

2. *when the institution acting as an asset manager receives a benefit in kind (soft commission) on the basis of an agreement as a compensation for its calling upon the investment services or other services provided by an intermediary or a custodian, this must be mentioned in the agreement with the customer, together with the nature of the benefits in kind as well as the company's policy for receiving this kind of benefits. .*

1.2.b) Reporting

1. once a year, the asset manager must provide the customer with a survey of all of the benefits paid by the latter within the framework of the asset management, i.e. management expenses, transaction expenses, custody fees, if any, as well as any other type of compensation charged to the customer. This is taken as a basis for calculating the ***individual average operational cost ratio*** *for the customer.*

Data concerning the customer's portfolio

Expenses	***Amount***
Management expenses (*)	
Transaction expenses	
Custody fees	
Other expenses, if any	
Total	
AUM	
Average Operational Cost Ratio customer	

Reporting is done at least quarterly. However, reporting must be done monthly, if a substantial part of the portfolio holds a higher risk due to instruments or positions such as :

- highly volatile financial instruments;
- leverage transactions;
- securities loan and repurchase agreements;
- transactions calling for credit granting, payment of margins or other guarantees.
- uncovered positions. Uncovered positions are positions taken with financial instruments involving the possibility for the third party to impose on the customer the obligation to provide securities or cash not included into the portfolio.

Client orders handling

Febelfin

Box 11, Point 15

This item seems to have to move to "reporting to clients". We have already commented on the potential extra costs for non-executed orders.

Sections III – MARKETS

Since the deadline for comment on these items has been changed to October 4, we shall reply later on, more particularly as for the chapters on Pre- and Post- trade transparency.

C . admission of financial instrument to trading (page 96 up to 100)

Point 2 draft level advice

The expected trading activity of the instrument – what is the interest ? Does a provision such as this imply that a minimum of trading activities a minimum risk to be imposed and will be taken into account for the admission of a financial instrument on an RM ? Does this apply to bonds ? What about admitting some types of bonds which are for example now quoted on the Luxemburg Stock Exchange, where there are practically no trading activities ? Obviously, this would be disadvantageous, because the admission of those securities to an RM also constitutes a quality label.

SECTION IV – COOPERATION AND ENFORCEMENT

Transactions reporting

We strongly oppose on an obligation to reporting transactions on financial instruments not admitted to trading (as considered under recital 45). A reporting of those transactions would be difficult and costly to implement. As those instruments are not (widely) traded we do not see the interest for the competent authorities to get this information. They do also not get any information about private asset deals or mergers. We think that any supervision over that kind of transactions has to be left with the courts. Moreover a transaction relating to "private" financial instruments can be entered into without the intervention of an investment firm e. The investment firms so would be disadvantageous vis-à-vis the non-regulated entities.

Question 15.1

We are in favor of the possibility for the relevant competent authority to waive the requirement. Every investment firm should have the possibility to fulfill its reporting obligations by means of a hard copy and this should not be the exception to the rule (electronic filing). It would be very expensive to develop electronic reporting sheets for every single financial instrument in which an investment firm trades; some trades are indeed "one offs".

Question 15.2.

Given the investigations needed as well as the need to adapt the infrastructure, the implementation of reporting systems for bond and commodity derivatives would require a transitional period.

Question 15.3

Opinions between members are divided. Some argue that level 3 better suits their local organization, while others feel that a European standard would help harmonization.

Question 15.4.

The end responsibility of reporting of transactions remains with the investment firm also in case of outsourcing. One could consider that for transactions executed in a central order book, the responsibility would shift to the market operator. [2] An SLA between the investment firm and a reporting channel should be a standardised framework agreement and not differ from market to market (level 2 preference).

Question 15.5

Individual trades in a structured capital market operation (i.e. individual allocations in an IPO or capital increase of a listed company) should, in our view, be excluded from the reporting obligations. (A reporting is made on an aggregate basis (which is already in most cases done through the press notice that – at least in Belgium – has to be reviewed by the competent authority). The requirement to report on a trade by trade basis (i.e. e report the individual allocations made) would be a competitive disadvantage as regards to non EU Investment Firms who would not be subject to such reporting even for European companies.

Furthermore, it is not clear to us which intermediary is required to report in case an an order is transferred for execution from one intermediary to another (consecutive intermediaries). We assume that the reporting obligation would bear on the "executing" investment firm.

With respect to the publication of the list of the competent authority of the 'most relevant markets in terms of liquidity' we draw again CESR's attention on the fact that this could harm the competition between markets (as in one way or the other such market would get an additional cachet; the obfuscating system – as suggested in item 21 - of disclosing the authority but not the market will not work in practice as by such disclosure everyone will be able to deduct the relevant market). This 'status' together with the best execution requirement (which will probably take liquidity as an important factor into account) makes it nearly impossible for any competitor/market to acquire sufficient additional liquidity to lead to a change of the 'most liquid market'. We see the usefulness of the information to be centralized at one competent authority, but the if the one who centralizes scannot be kept confidential only to be disclosed to the relevant departments of the other competent authorities are afraid of the negative consequence with respect to competitivity between markets (freezing the current situation).

Question 17.1

We are strongly in favor of a standardised/harmonized approach at EU level.

Question 17.3

We strongly disagree with the list of proposed fields as being far to extensive. The reporting only serves to make the competent authorities aware of the transactions in the market. If this would lead to an investigation and if the relevant investigating authority deems it necessary and only then, it may request further information, but such extra information does not have to be provided automatically. Time identifier, instrument type, Price Multiplier and Value Notation can be derived from the Instrument Security Code. Underlying Instrument Code : it is not relevant whether or not a security is underlying so the field should be deleted (relevant is that a financial instrument has a unique instrument security code).

We think that the only information needed for the purpose of supervising the integrity of the market is limited to :

- the identification of the reporting firm
- the trading day
- the trading time, but limited to minutes (not seconds which would complicate the systems drastically)
- the buy/sell indicator (what is meant by "from the perspective of")
- the trading capacity of the firm (agent / own account)
- the instrument security code
- the price (taking into account that the remuneration of the firm may be incorporated in the price and as such the reported price is deviating from the then current market price) (with respect to bonds it should be specified whether the interest is incorporate or not)
- the quantity
- the trading venue

Question 17.4.

We assume CESR is referring to trading capacity. We would refer to the definition laid down in the second paragraph of Trading Capacity under Annex B.

Question 17.5

Febelfin

We do not see the advantage of requiring a field « client identification code » in transaction reports. The client of the transaction can always be identified within the records of the investment firm and disclosed to the competent authority upon request in the framework of an investigation. We are strongly opposed to a pan-European code for client/customer identification, as we do not see what added value this would bring and are afraid that these would lead to (unnecessary) extra administrative requirements, potentially a European organisation monopolising such code-distribution etc. We also believe that such action does not fall within CESR's mandate.