ASSOCIAZIONE BANCARIA
ITALIANA

ANSWERS TO CESR CONSULTATION PAPER ON IMPLEMENTING MEASURES FOR DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS

(September 2004)

CONTENTS

GENERAL CONSIDERATIONS

The Italian Banking Association, ABI, which with 800 member banks represents virtually the entire Italian banking system, appreciates the current consultation procedure initiated by the CESR on the paper setting out proposed measures for implementing Directive 2004/39/EC on markets in financial instruments.

All in the all the proposals are acceptable. Among other things, they generally reiterate obligations to which Italian banks are already subject under national law and regulations. However, there are some problems of a general nature and others of a more particular character. First, let us consider the general ones.

As for their general profiles, it is considered necessary that the future rules, which will have a material impact on the daily action of banks and thus their clients, must not favour some States over others and must facilitate adaptation by intermediaries and banks so that the transition is smooth.

However, there is a substantial risk that this may not occur, given the heterogeneous regulations and the different financial and market cultures found in various Member States. Given these conditions, intermediaries have long since designed and instituted specific relations with clients and with supervisory authorities. Obviously, these relations different from country to country, and sometimes very sharply indeed. The same goes for the degree of “financial culture” of clients. Finally, in this context the differences are further accentuated by the structural characteristics of the intermediaries and national financial markets, in that some are mainly wholesale and others mainly retail.

Just consider how greatly the relationship with clients can be affected by the presence or absence, in legislation, of a principle such as the regulated market trading requirement (in effect in Italy for fifteen years now) or by different regulatory approaches (essentially the principle-based or the detailed-provisions approach) Equally important are supervisory approaches.

In the light of this, and as no regulatory model is demonstrably “superior”, while for some countries to adopt one rather than the other would require substantial changes with major repercussions on relations between intermediaries and supervisors, and with clients, the need is for rules that are, as much as possible, neutral and equitably demanding.

To achieve this, the implementing measures be the result of a symmetrical convergence between existing regulatory models. In this regard, we are concerned over the possibility, repeatedly affirmed in various matters for regulation, that intermediaries may institute their own alternatives to the rules, providing they conform with the principles ([1]).

As to the inevitable process of adaptation by intermediaries and clients alike to the new rules, it could prove not only longer and more complex but also riskier than would be reasonable, especially in countries where the market is massively retail, i.e. dominated by the most vulnerable and "uninformed" clients, hence less responsive and perceptive of changes. With regard to the Italian market, in effect, the paper imagines cases that could weaken the safeguards for clients, allowing flexibility to intermediaries that may be exceeding with respect to the clients' ability to comprehend the underlying risks.

Just think of the doubts concerning the reversal of the burden of proof, the possibility of handling conflicts of interest outside the system of rules, the possibility of not executing orders in sequence and with time priority; the possibility of aggregating proprietary orders with client orders. Nor should we neglect, in this framework, the end of the requirement to trade on regulated exchanges, the vagueness of "best execution" and the introduction of internalization of orders.

Aggressive marketing policies in retail markets that are not highly involved financially and not able to discern the quality of the intermediary or the financial instrument could serious harm client interests.

We need, accordingly, to design:

- first, a certain and neutral regulatory framework that can both clarify uniformly the principles of correctness and transparency for intermediaries' dealings with clients and effectively put all intermediaries on an equal footing;

- only subsequently, once the adjustment has been completed and any accidents along the way have been assessed at European level, adopt approaches gradually allowing intermediaries more freedom to determine how to comply with the principles of client protection and market integrity.

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The rest of this Section consists in:

1 In addition, at page 27, in relation to the reversal of burden of proof, it emerges that some CESR members feel that the "principle based approach" inform the present draft advice.

- “Highlights” presenting the most important observations;

- “Detailed considerations,” giving ABI’s answers to the CESR’s questions (repeated for the reader’s convenience) and, where appropriate, some comments on the substance of the proposals. This part follows the order of sections and paragraphs in the CESR paper.

HIGHLIGHTS

Of the many topics dealt with in the CESR consultation paper, we consider that the following are of special importance:

- **Compliance and personal transactions - Obligations related to internal systems, resources and procedures:** The substance of the compliance and audit functions, and their mutual functional independence, need to be more clearly defined.

- **Conflicts of interest:** We consider it indispensable, for purposes of a level playing field, that the CESR set clear rules that are prescriptive and not merely illustrative, with reference both to the obligations to avoid conflicts of interest and to their modes of compliance. In this regard it is therefore necessary to remove the possibility, reiterated a number of times in this paragraph, for the intermediary not to obey the rules where it can demonstrate that it has instituted other arrangements that can prevent conflicts of interest.

- **Information to client:** There must be express provision that the rules do not apply to professional clients. It would also be good to distinguish pre-contractual information to clients from that to be supplied for each transaction and provide a single and separate regulation for the advertisement.

- **Client agreement:** Considering that the contract must be readily readable and comprehensible to the client, the information items laid down by the CESR appear to be too numerous and detailed.

- **Client order handling:** We think that the proposed grouping of orders for own account with client orders should not be allowed.

DETAILED CONSIDERATIONS

SECTION II - INTERMEDIARIES

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

ABI welcomes CESR's proposals contained in this section. Nevertheless, we wish CESR could better define the contents of compliance and audit functions as well as their reciprocal independence considered in functional rather than in organisational terms.

Question 1.1

Must the compliance function in every investment firm comply with the requirements for independence set out in paragraph 2(d), 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?

Answer: We believe no derogations from the principle of independence of the function based on size or complexity of business should be allowed, as the need for investor protection does not change with those factors.

Question 1.2

May deferred implementation of requirements for independence be based on the nature and scale of the business of the investment firm?

Answer: No, for the same reasons as for question 1.1

Question 1.3

Should the current text of CESR Standard 127 be retained or should its scope be extended to the outsourcing of all investment services and activities or should paragraph 9(b) be deleted and reliance be placed on the status and responsibilities of the outsourcing investment firm?

Answer: CESR standard 127 (which governs delegations for portfolio management, hence the outsourcing of an investment service) should be extended to all investment services in order to permit rational outsourcing of all investment services and business. However, the CESR must:

- *require, in line with standard 127 on portfolio management, that investment services be outsourced exclusively to intermediaries authorized to perform such services;*

- *introduce the obligation, already envisaged in part by standard 127 on portfolio management, for intermediaries to provide suitable information to clients, requiring that: i) in the contract with clients it be specifically provided that the intermediary may use the services of other intermediaries; ii) clients be informed in advance and in writing of the name of the intermediary to which part of the investment service is outsourced.*

This means that in the case of outsourcing of:

- *investment services and activities (sometimes called investment services mandates), in addition to the provisions of the CESR consultation paper (BOX 3), the person delegated to perform the service be authorized; and adequate information must be given to investors;*

- *support activities, the provisions of the consultation paper (BOX 3) appear correct.*

Record keeping obligation (Art. 13(6))

Question 4.1

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

Answer: We do not think it is necessary to require the intermediary to demonstrate, by special accounting entries apart from those set out in § 2 a) – d) that it has not acted in breach of the rules; not only is this not envisaged in the Directive or in the 2002 rules of conduct, but it would imply substantial information activity.

Question 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.?

Answer: If by "nature of the record keeping requirement" we mean the type of documentation and the mode of conservation, then for all the types of activity set out in the question both electronic and paper documents for each transaction can be envisaged.

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

Question 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?

Answer: For purposes of investor protection, we believe that it should never be possible to use and unregulated depository.

Question 5.2

Should a requirement be imposed that the records of the investment firm must indicate for each client the depository with which the relevant clients' 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 that the aggregate figures correspond with each other in accordance with paragraphs 11(c) and 13(b)?

Answer: For better protection of investors' interests, but also in order to prevent disputes, we believe that the investment firm should keep records, for each client, showing the depository where his assets are held. This is necessary above all in case of bankruptcy of the investment firm, where it is crucial to identify the assets of each single investor as quickly and accurately as possible.

Question 5.3

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

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 and 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 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?

Answer: We maintain that the investment firm must never be allowed by contract to exclude or limit its liability to the investor for losses caused by the depositor that the investment firm chooses.

Conflicts of interest (Arts. 13 (3) and 18)

In general, it would be good if the sub-paragraph on "identification of conflicts" included a reference to possible conflicts inherent in the case of financial products "issued" by one company and "placed" by another company belonging to the same group.

Also in general, we think it is essential to the level playing field that the CESR set clear rules that are prescriptive and not merely illustrative, with reference both to the obligations to avoid conflicts of interest and to their modes of compliance. In this regard it is therefore necessary to remove the possibility, reiterated a number of times in this paragraph, for the intermediary not to obey the rules where it can demonstrate that it has instituted other arrangements that can prevent conflicts of interest. Such an option, whose conformity with the rules will presumably fall under the jurisdiction of national supervisory authorities, would result in different approaches being taken in different countries, creating organizational distortions of competition in a sphere that is especially important for the proper conduct of business.

Further, in identify abstract cases of conflicts of interest, a quantitative principle could be introduced, identifying "thresholds" above which the conflict of interest becomes concrete.

Question 6.1

Should other examples of methods for managing conflicts of interest be referred to in the advice?

Answer: We have not additional examples to suggest.

Question 6.2

(a) Should paragraphs 8(a) to (f) (or the 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?

Answer: We think the measures proposed by the CESR should represent the minimum base of each intermediary's conflict-of-interest policy. As noted, above, we oppose the possibility of "alternative arrangements".

Given the need of the investment firm to control legal risk, one must consider the need to predetermine, as strictly as possible, the principles under which it can be judged whether the *investment firm has acted properly as regards the prevention and handling of conflicts of interest. As a consequence, we think that the regulations should introduce legal presumptions concerning correct conduct on the part of these intermediaries. These presumptions should be triggered by organizational procedures such as to implement a degree of independence such as to correctly manage conflicts of interest, once such measures have been recognized by the supervisory authorities.*

Question 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?]
(ii) analysts must not be supervised by a natural person who has responsibilities or interests that might reasonably be considered to conflict with the interests of the clients to whom the investment research is published or distributed;
(iii) the remuneration of analysts must not be determined by a person who is prohibited from supervising them under sub-paragraph (ii), nor should it create any incentive which is inconsistent with the analyst's objectivity, or could reasonably be considered to be so;
(iv) analysts must not become involved in activities other than the preparation of investment research (such as participating in investment banking activities such as corporate business and underwriting, attending pitches and participation in issuer marketing or "road shows"), where such involvement is inconsistent with the analyst's objectivity, or could reasonably be considered to be so; and
(v) the investment firm's relevant persons with a material interest in the subject matter of investment research, may only be permitted to review draft research for the purpose of verifying the accuracy of factual statements made in that research. This draft research must not include the recommendation or the target price.
(First option)
17. Having made assiduous efforts to comply with the standards laid down in paragraph 16(f), the
investment firm may, without prejudice to the other obligations imposed in this advice and the Directive, issue research that was not prepared in accordance with paragraph 16(f) provided that:
(a) the nature and scale of its business prevents the investment firm from the implementation of those standards, and (b) the conflicts of interest potential within the particular business of the investment firm is of a minor nature (e.g. the investment firm does not provide investment banking).
18. Given the circumstances mentioned in paragraph 17, the investment firm must disclose that the investment research was not prepared in accordance with all of the conflict of interest standards for the preparation of investment research laid down in the level 2 measures and that the investment firm has taken alternative measures in order to address conflicts of interests related to the preparation of research.
19. Upon request of the competent authority, the investment firm must comprehensively demonstrate why it was not able to comply with the standards laid down in paragraph 16(f) and which alternative measures it has taken.]

or
(Second option)
17. Without prejudice to the other obligations imposed on it under the Directive, including under Articles 13(2) and (3), 18 and 19(2) and (3), an investment firm may issue investment research that is not prepared in accordance with paragraph 16(f) provided that: (a) a warning is included with due prominence in the investment research making it clear that the information should not be relied upon as objective investment research because it was not prepared in accordance with all of the conflicts management standards for the preparation of objective investment research laid down in the level 2 measures and also referring to the information specified in sub-paragraph (b) below; (b) separately from the above warning, the investment research contains a substantive description of each of the requirements in paragraph 16(f) that was not complied with in its preparation; and (c) none of the circumstances relating to the distribution or presentation of the investment research would lead a reasonable person to whom it was directed to rely on it as objective investment research.]

Answer: An investment firm that publishes investment research should have "Chinese walls" whose nature is consistent with the provisions under point 9 of the CESR paper between analysts and at least the corporate finance, portfolio management, and proprietary trading divisions. Certainly it would be good to specify other banking functions as well, such as lending.

Question 6.4

Should the derogation from the 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?]

Answer: We oppose any derogation from these requirements. Compliance with them is a necessary condition for distribution to investors of investment research and analysis. It is unthinkable that investors would have the sophistication to comprehend and properly evaluate the content of complex research where the conflict-of-interest rules are not complied with, even if this is stated in the research.

Inducements

Though there are not specific questions, the following observation is relevant.

Using the notion of inducements given in Section 1 of the CESR paper, we think the content of BOX 6 (III) on inducements needs to be supplemented to specify that these do not include commission rebates, which are a technical form of compensation for an investment service, as in the restitution by mutual fund management companies to the intermediaries that market fund units.

Disclosure

Again, we feel the following observations are relevant.

The indication in BOX 6, point 12, should be eliminated. This introduces a general disclosure requirement on conflict-of-interest policy that is not founded in Article 18(2) of the Directive, which requires that intermediaries inform clients of conflicts of interest only where there is not a reasonable certainty that they can manage such conflicts so as not to harm clients' interest. To disclose the organizational arrangements in place to deal with conflicts could unduly harm the more innovative and efficient firms; what is more, it has not additional value to the client, given that disclosure would in any case be provided only in general terms.

Fair, clear and not misleading information (art. 19 (2))

Even though there are no specific questions, the following observations are relevant.

- *Separate rules are needed for commercial communications to clients (marketing communication, retail marketing communication, direct offer retail marketing communication), which as such are intended to induce the client to use the investment firm's services or to purchase given products. Marketing communication has special features, compared with information to clients when an investment service is being provided. These special rules should better specify the difference between "advertising" and "solicitation".*

- *In contrast with the Commission's mandate, the proposed measure in point 3 of Box 7 does not determine the standards for judging whether "marketing communications" and information in general are fair, clear, and not misleading (as well as "probably" comprehensible to the average client). Rather, it is up to the intermediary to say what information is relevant to that judgment. We think that these standards must be fixed in advance.*

- *The requirement under point 5 of Box 7 is too strict and should thus be eliminated; it requires that the investment firm guarantee that "marketing communication" to clients must contain at least the telephone number and other appropriate details for contacting it.*

- *As to point 7) in Box 7), the standards that the supervisory authorities use to determine whether it is appropriate to require the intermediary to submit proof of accuracy of its factual claims in the framework of marketing communications;*

- *Display of past returns and the requirement to communicate them to investors must be limited to individual portfolio management services (and asset management companies), given that only those services permit calculation of performance in the course of the relationship. Further, in individual portfolio management accounts, reporting the portfolio yield is misleading unless it is referred to the individual client, which obviously prevents it from being released in a marketing communication. The CESR should according specify that such information is to be released on in the framework of account statements.*

Information to client (Art. 19 (3))

Again, though there are no specific questions, the following observations are relevant.

Whereas Article 19 of Directive 2004/39/EC requires that clients and potential clients be provided appropriate information in comprehensible form, the CESR paper specifies the content of such information exclusively with reference to retail clients. Considering that Article 24(2) of the Directive allows that professional clients may request application to themselves of the rules for retail clients, we think that if distinct information levels for different classes of client are not expressly provided for, the obligations currently in place for retail clients will be, de facto, applicable to professional investors so requesting. This might require even investment firms that do business exclusively with professional investors to prepare and adapt their informational arrangements to comply with the CESR requirements; this would entail a cost unwarranted by any need for investor protection.

It must therefore be expressly specified that these rules do not apply to professional investors.

As to the identification of those who as "retail clients or potential retail clients" must be given the information, we must observe that although the definition enables us to see that the information is "pre-contractual" there is no express distinction between the information that must be given to clients before signing the contract for investment services (in this case we have a potential or "pre-contractual" client relationship) and the information to be provided before the start of services or before single transactions.

The wording of the CESR paper in Box 8, no. 7 point a)[2] *– generically referring to "retail Client or potential retail Client" – envisages a level of detail on the financial instruments that cannot be achieved in the pre-contract phase, where information on risks will necessarily be elementary, designed to lead to a minimum level of awareness, necessarily in general terms, on the part of the investor.*

In view of the foregoing, it would be more advisable to locate information on the particular risk of any given financial instrument in the investment execution phase, requesting that the CESR distinguish between the different informational moments. Information on the characteristics of the services offered could be given in the pre-contract phase.

[2] A description of the main characteristics of the relevant financial instruments and/or investment services, including:

- The nature of the financial commitment
- Whether or not the instruments involved are: 1) liquid, and or 2) traded on a regulated market or an MTF, unless such a reference would be inappropriate in view of the nature of the financial instruments or the arrangements made for the retail client to liquidate his investment; and
- The risks involved.

As to information on costs, the degree of detail appears to be particularly great, entailing obligations whose true informational value is unclear. The reference is to information on the taxation of financial instruments, something that the intermediary cannot manage independently but that is determined at national level and is thus irrelevant to a comparison of the terms the investor can obtain from other market agents.

More consideration should be given to including a clear statement that pre-contractual information is not binding if the conditions specified therein change between the provision of the information and the actual signing of the contract. In this case – while obviously the client will have to be given new pre-contractual information – it must be unequivocally clear that there is no obligation on the intermediary to stipulate a contract based on the initial information. All the more so in that it is expressly provided that pre-contract information must be given to the client "in good time," hence with a possible time gap between information and contract.

Even though the CESR proposes to define the meaning of "in good time" in view of the urgency of the situation, the time that the retail or potential retail client needs to absorb the information and respond and the terms of business agreed with clients, the criteria are too generic and leave the intermediaries open to evaluations after the fact that are open to abuse.

If it is not considered that "in good time" is complied with simply by the fact of the information's being given in advance, then the CESR should propose to establish a time limit to be taken as "normal" (or several limits, based on business agreements between intermediary and client) by which the intermediary must supply the information, in view of the nature of the client requesting it.

Further, Box 8, point 3, requires the intermediary to inform the client "in good time" of any change in the information provided under Article 19 of the third MIFID, where such change is "material" with respect to the service that it continues to provide. Again, the definition of "good time" is too generic for the intermediary to respect it. The fact that the "materiality" of the change must be determined by the intermediary, moreover, exposes the latter to an excessive, disproportionate risk of legal action.

Finally, the clause (Box 8, point 15) on orders received on the occasion of public securities offers does not appear to be consistent with the general argument of the section. It should thus be deleted.

Client agreement (Art. 19 (7))

While we are in general agreement with the CESR's observations here, we think that in the implementing measures should:

- *eliminate the expression "in good time prior to providing", which introduces an element of uncertainty; instead, it should be provided that the contract be submitted to the client prior to beginning to provide the investment service;*

- *provide that to facilitate compliance with the requirement that the contract be drafted in clear and easily comprehensible fashion for the client, a positive valuation be accorded to the intermediary's decision to annex to the contract a glossary explaining the technical terms therein;*

- *eliminate from the minimum content of the contract the various types of order, in that these may be numerous and changeable depending on the markets in which they are executed;*

- *take account of the fact that a clause in the regulations specifying applicable law and competent court would overlap with Italian law on abusive contract clauses. In particular, under Article 1469-bis of the Civil Code, the competent court must be that of the place of residence or elected domicile of the client, it he is a "consumer".[3] As a consequence, the proposal to include such a clause should be dropped;*

- *coordinate the content of point 4(f), which requires that the contract specify the right of withdrawal and the period for reconsideration, with the provisions of Community law. The latter has so far allowed* jus poenitendi *(understood as an assertion of the non-definitive nature of the consumer's consent, which is thus susceptible to revocation and withdrawal) solely in cases in which the consumer has been solicited to sign the contract outside the premises of the offeror[4]or where the contract is signed at a distance,[5] in view of the need to balance the differing abilities to grasp and assess the contractual commitments being undertaken, in that in these circumstances before he signs the consumer may not have the opportunity to thoroughly weight its features and terms, including economic terms. The CESR should thus specify that the "rethinking" period applies only where the contract is signed following an offer made off-premises or using distance communication techniques by the intermediary. This does not prejudice to the right to withdrawal with notice[6] in the cases where the contract is*

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[3] The sentence of the Civil Court of Cassation, Sez. Un., no. 14669 of 1 October 2003 specifies that Article 1469-bis of the Civil Code – which presumes abusive, unless proven otherwise, clauses in contracts between a professional and a consumer that have the effect of naming as competent court for contractual disputes any court other than that of the consumer's place of residence – introduces a further assumption of exclusive competence, albeit with the possibility of derogation (through individual negotiations). It should be noted that Article 1469-bis transposes Directive 93/13/EEC on unfair clauses in contracts with consumers. Still the Annex (letter q) to the Directive (which specifies the types of clause that must be considered unfair) merely defines as unfair those clauses whose purpose or effect is to suppress or limit the consumer's right to take legal action for redress. Italian legislation, under Article 8 of the Directive (which gave Member States the power to adopt or maintain stricter provisions), in fact introduced stricter rules, including a special legal protection specifying the place where the consumer lives or workers. Effectively, a Community provision for a specific clause on applicable law and competent court in investment service contracts with retail clients would mainly affect the laws of the Member States which, like Italy, have stricter provisions as regards unfair clauses on this matter.

[4] See Article 5 of Directive 85/577/EEC prote4cting consumers in the case of contracts signed outside commercial premises (transposed into Italian law by Legislative Decree 50/1992), which gives the consumer seven days to reconsider the agreement.

[5] See Article 6 of Directive 2002/65/EC (which the Member States must transpose by 9 October 2004), which allows a *jus poenitendi* of fourteen days.

[6] The banks' standard contract with consumers for securities trading, reception and transmission of orders provides (Article 15, "Duration of contract") that: "The present contract is open-ended and each party may withdraw with

signed in the ordinary way at the intermediary's premises or where the consumer has not been "solicited" to sign it but has himself actively sought out the intermediary;

- *make it clear that the provision of point 4(k) – namely that the forms of communication between intermediary and client to sent and receive orders must be specified, including alternatives in the event that the ordinary means are unavailable – is meaningful only as regards orders given and received via distance communications techniques;*

- *eliminate from the provision of point 4(g) – requiring the specification of the actions that the intermediary can undertake to dispose or appropriate the client's goods in the event that the client fails to perform his obligations (e.g., a payment obligation) – the specification of the period of time within which the intermediary may act and the related information to be transmitted to the client in such circumstances; this specification is excessively burdensome for the intermediary;*

- *delete the provision of Box 9, point 6, which bears not on investment service contracts but on depository contracts, whose content does not fall within the scope of the regulations under discussion here.*

- *in point 9 (a), to simplify the obligations of intermediaries, it must be specified that the types of transactions to be indicated in the contract are the following: a) cash sales, b) forward sales, c) short sales, d) options, e) securities lending and riporto contracts, f) repurchase agreements;*

- *point 9) (c), which would introduce major specifications concerning margins, is excessively restrictive. Rather, it should be required that if the provision of the service envisages the possibility that transactions may involve derivative instruments or warrants then the contract with the client must supply information on the rules governing margins and collateral, specifying that any change in the margin rules must be communicated promptly to the client.*

Reporting to clients (Art. 19(8))

Question 10.1.

What type of reporting requirements relating to the provision of investment advice should be included in the advice to the Commission? When should such requirements apply and what concrete requirements should be imposed?

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advance notice of at least 15 days, to be given by registered letter. The orders given prior to reception of notice of withdrawal remain unaffected."

Answer: No special reporting requirements should be included save those on the timing (date and time) of the advice and the retention of a copy of any documentation delivered to the client.

In addition, though no specific question bears on the matter, we think the following is relevant:

We oppose the requirement that when a retail client's order is not executed by the end of the next business day after its reception, the investment firm must send written confirmation of the order to the client.

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?

Answer: The definition is adequate and exhaustive..

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?

Answer: No, it should not be extended to professional clients..

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

Answer: Investment firms must keep a chronological, sequential list of orders.

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?

Answer: Leaving it up to the intermediary to identify the conditions preventing prompt or sequential execution of orders will predictably give rise to a hyper-detailed, heterogeneous set of cases. We advise at least including standards or parameters to refer to qualify the market conditions that prevent normal order handling.

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?

Answer: In some cases, aggregation could work to clients' disadvantage.

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?

Answer: We oppose giving individual investment firms the freedom to determine these conditions on their own, without CESR definition of criteria or minimum safeguard parameters, for the reasons given in the answer to question 4.

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?

Answer: Such aggregation should not be allowed, because in case of default by the investment firm or a client it would be very hard to reconstruction individual positions, especially in the case of partial order execution, differing execution prices for the same aggregate order, etc.

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

Answer: Yes. They should not be extended to professional investors.

Section III. Markets

Market Transparency

Pre-trade Transparency requirements for Regulated Markets (Article 44) and MTFs (Article 29)

Q12.1. Do consultees agree with the specific proposals as presented or would they prefer to see more general proposals?

Answer: Yes, we agree with the proposals, includi8ng the specification of market models.

Q12.2. Is the content of the pre-trade transparency information appropriate?

Answer: Yes, it seems appropriate, such as to meet the information needs of all market participants.

Q12.3. Do consultees agree on the proposal regarding the depth of trading interest and access to pre-trade information?

Answer: The paper calls for publication of the entire depth of the trading book of the RM or MTF. As generally only orders/quotes (trading interest) on the first best price levels are significant (for quantity considerations as well), we might consider setting a minimum level to publish (e.g., orders/quotes for the first 5 or 10 price levels), with the option for the RM or MTF to post lower levels as well.

We agree with the intention of providing the same level of pre-trade information to all.

Q12.4. Do consultees agree on the proposed exemptions to pre-trade transparency? Are there other market models which should be exempted?

Answer: The exemption for large trades and iceberg-type orders is OK. For those concerning the crossing system, see Answer 12.5.

Q12.5. Do consultees support the waiver for "crossing systems" as defined in paragraph 13? Could pre-trade transparency for crossing systems have a negative impact on liquidity or create the potential for abusive behaviour?

Answer: We do not think it is advisable to exempt such systems from pre-trade transparency requirements. If the purpose is to permit the best choice of venue for execution, then such a system, even at the same price, may have some overall advantage compared with the venue where the price is formed (e.g., lower trading fees or settlement costs).

Q12.6. Do consultees support the same minimum size of trade for the waiver to transparency pretrade and delayed publication post-trade? Are there circumstances in which the two should be different?

Answer: We have no special problem with the setting of the same minimum size for the waiver and for delayed publication, considering the benefits of the simplification that it would produce.

Q12.7: Do consultees have a preference for one of the options proposed for defining the block size, are there other methods which should be evaluated?

Answer: We have no special preference. What is crucial is that the option chosen be as simple as possible and above all allow immediate determination whether the order must be published or not.

<u>Post-Trade Transparency requirements for Regulated Markets (Article 45) and MTFs (Article 30) and for Investment Firms (Article 28)</u>

Q13.1: Do consultees support the method of post-trade transparency (trade by trade information), should some other method be chosen (which)?

Answer: We agree with trade by trade information; this system provides the maximum information to the market.

Q13.2: Do consultees support the inclusion of "aggregated information" in paragraph 22 or should it be left for market forces to provide on the basis of the information disclosed under paragraph 21. If it is included what should the content be?

Answer: Yes, we think the CESR recommendations should include publication of aggregated information at the end of the session on prices and trading volumes during the day, to produce uniform information for all financial instruments wherever traded (especially in the case of dual listing of a share). As to the content of the information, as now provided it is adequate.

Q13.3: Do consultees support the two week period for which the post-trade information should be available?

Answer: Yes.

Q13.4: Should some minor trades be excluded from publication (and if so, what should be the determining factor)?

Answer: No.

Q13.5: Do consultees agree on the method of defining the time limit in paragraph 24 and is the one minute limit capable of meeting the needs of occasional off-market trades?

Answer: Yes.

Q13.6: Do consultees support the view that only intermediaries who have created a risk position to facilitate the trade of a third party should benefit from deferred publication or should all trades which are above the block size be eligible for deferred publication?

Answer: Yes.

Q13.7: Should the identifier of a security be harmonised and if so to what extent? What should be the applicable standard (ISIN code, other)?

Answer: The harmonisation of the security identification code at European level is essential. The ISIN code, already in widespread use in Europe, seems like the best choice.

Q13.8: Should more information be available on stock lending? If so, which should be the content? Are there other similar types of activities which should be covered?

Answer: No. The reporting costs would be greater than the benefits for the market from knowledge of this information.

Q13.9: Should CESR initiate work, in collaboration with the industry and data publishers, to determine how best to ensure that post-trade transparency data be disseminated on a pan-European basis?

Answer: Yes. Consolidation of information at European level is a priority. The CESR should begin work as soon as possible, and in close cooperation with the industry.

Admission of financial instruments to trading (Art. 40)

Q14.1: Do consultees agree on the requirements for admission to trading? Should more (qualitative and/or quantitative) criteria for admission to regulated markets be specified in the level 2 measures? If yes, which?

Answer: We agree with the requirements proposed, both as regards securities and as regards derivatives, especially with a view to "fair and orderly trading" and the prevention of speculative maneuvers.

Q14.2: Do consultees agree on the role proposed for RMs in order to ensure that the issuers fulfill their disclosure requirements?

Answer: Yes.

Section IV - Cooperation and application

As regards the evaluation of liquidity to identify the "most relevant market", to whose authority reports must be submitted, the CESR suggest using, separately for each type of instrument, a "liquidity proxy" rather than calculating the effective liquidity of each market. The latter criteria would be difficult and costly. For example: for shares, the first listing market; for share derivatives, the listing market of the underlying asset; for bonds, the market where the issue is domiciled; and so on. In alternative to the proxy, it is envisaged that one may use the standard of "turnover" or "volume". A concrete analysis by the CESR would have shown that for shares this criterion would be effective in correctly identifying the most relevant market.

However, it is not clear when the proxy is to be applied and when actual liquidity is to be calculated. This is important, since the proxy method, though easier, more immediate and stable over time in identifying the most relevant market, can sometimes lead to incorrect conclusions.

As for the content of the transaction report, the CESR thinks that intermediaries must include the "Client/customer identification code" only where this is required by national law.

The CESR has prepared the list of information for intermediaries' reporting to authorities (Annex A) and that for exchange of information between authorities (Annex B). To take account of present standards in each country, the CESR found it advisable not to harmonize the information transmitted by intermediaries at European level, allowing national authorities to determine how the requirements can be complied with.