International Swaps and Derivatives Association
International Securities Market Association
Association of Norwegian Stockbroking Companies
Bankers and Securities Dealers Association of Iceland
Danish Securities Dealers Association
Finnish Association of Securities Dealers
London Investment Banking Association
Swedish Securities Dealers Association

We provide this evidence jointly in order to assist CESR by providing one industry response letter rather than eight. For the purposes of its analysis of responses, CESR should however count this evidence eight times, and weight it accordingly.

Comments on CESR's call for evidence on the European Commission's second set of draft mandates for implementing legislation under the Markets in Financial Instruments Directive (MIFID)

These comments on the Commission's second set of draft mandates for implementing legislation under MIFID have been prepared by the International Swaps and Derivatives Association, International Securities Market Association, Association of Norwegian Stockbroking Companies, Bankers and Securities Dealers Association of Iceland, Danish Securities Dealers Association, Finnish Association of Securities Dealers, London Investment Banking Association, and Swedish Securities Dealers Association. We have prepared the comments jointly to ease CESR's task of assessing responses to its call for evidence.

General comments

The impact of the short timetable

1. Market participants share with CESR great misgivings about the short time which has been left to develop implementing measures as a result of the Council's decision to publish the Directive earlier than had been expected. In the case of the second mandate, which covers those Articles which gave rise to greatest controversy at Level 1, where the quality of legislation will be crucial to the EU's economic welfare, and over which the greatest care is therefore needed, it is particularly unfortunate and dangerous that CESR has been given less than a year in which to provide advice to the Commission.

Key principles that should underlie CESR's preparation of its advice

2. Many of our general comments set out how CESR and the Commission should approach this difficult task. CESR and the Commission should aim for the minimum amount of Level 2 measures necessary to implement the Directive in a way which protects investors and market integrity and promotes fair, competitive, transparent, efficient and integrated financial markets. CESR and the Commission should also adhere strictly to the principle that Level 2 measures should do no more than add technical detail to the Level 1 text. They should avoid re-opening

Level 1 controversies and aim at an early stage for draft Level 2 measures that command the maximum level of consensus. In particular they should:

(a) Avoid an excessive level of detail and prescription in Level 2 measures.

(b) Be prepared to rely on the Level 1 text where it provides sufficient detail, and recommend no, or minimal, Level 2 measures at this stage, especially in relation to 'the Commission may' provisions, and other Articles where there is less urgency for detailed Level 2 measures.

(c) Avoid Level 2 measures which would contradict the Level 1 text, go beyond what is provided for in the Level 1 text, or undermine the compromises on which the Level 1 text was based.

(d) Avoid trying to squeeze into the Level 2 timetable measures that would require many years of development before they could take effect.

(e) Provide a thorough, Article by Article, analysis of how best to use transitional measures or phased implementation to ensure that firms have enough time to make the necessary changes to systems and procedures.

Level of detail and regulatory prescription

3. CESR should take particular account of the Commission's request for CESR to pay 'particular attention to the level of detail required by market participants to be included in Level 2 legislation' (paragraph 2.1) and its statement that CESR should 'pay particular attention to striking the right balance between the objective of establishing a set of harmonised conditions for the licensing and operation of investment firms and regulated markets and the need to avoid excessive intervention in respect of the management and organisation of the investment firms. The amount of detail included in the advice should be very carefully calibrated case by case; the advice should ensure clarity and legal certainty but avoid formulations which would lead to over-prescriptive, excessively detailed legislation, adding undue burdens and unnecessary costs to the firms and hampering innovation in the field of financial services' (paragraph 2.3). However, some of the Commission's requests do not appear to be consistent with this aspiration (see comments on particular mandates below). Moreover, like many from across Europe who commented at CESR's open hearing in Paris on 8th and 9th July 2004, we are concerned at the level of detail and prescription that CESR has proposed in many areas in its consultation on the first set of mandates, in particular in those areas where the Level 1 Directive is already very detailed. We will comment further on those matters in our responses to that consultation. But it is important to stress at this stage that, especially in view of the short time available for CESR to prepare its advice, CESR should take particular pains to avoid unnecessary new detail, and undertake a rigorous assessment of priorities (see below). CESR should follow the guiding principle that Level 2 expands on the principles inherent in the Level 1 Directive, but should not prescribe the specific methods and procedures to put those principles into practice.

4. It is particularly important to take into account the environment in which the Directive will operate: 28 already existing regulatory systems; investors and markets with different relative maturities, different products, and different balances between professional and retail investors. It is also important to ensure that Level 2 measures are not so inflexible that they deter innovation in financial markets.

5. It is also important to avoid detail and prescriptiveness where a regulation is setting standards for an action which will vary depending purely on the facts of the case: e.g. suitability of product to client. In these cases there is little more that can be said over and above the Level 1 legislation, given the variety of products being marketed in 28 different jurisdictions, without running into wasteful and damaging prescriptive detail. Implementing measures must at all costs avoid restrictive micromanagement by regulators of customer relationships and market structures.

6. It is also vital to ensure that implementing measures will not require a comprehensive re-write of national regulators' and exchanges' existing detailed rules, unless there is good cause and the benefits of the change outweigh the costs. It is particularly important to bear in mind that changes to the detail of rules may require firms to make very extensive changes to their systems, and that completely new rules, such as those associated with Article 27, are likely to be even more demanding. The time needed to make these changes – and the costs – mean that extensive changes would be impossible to make within the timeframe available. We estimate that even straightforward system changes (for example, those involved in linking to the infrastructure of an existing exchange) take a minimum of six months from inception to completion, while more complex system changes, starting from scratch, are likely to take much longer, even where firms have in-house system development resources. CESR and the Commission should also take account of the fact that firms will need to budget for the necessary system changes well in advance, especially if (as is likely) there is heavy demand for the necessary technical expertise. In some cases these considerations should determine whether a Level 2 measure should be deferred at this stage or whether it should incorporate a practicable transitional provision.

7. A further feature of detailed and prescriptive Level 2 measures is that they would be more likely than higher-level principled measures to conflict with facets of the existing laws, whose nature will vary from Member State to Member State, that govern financial services provision. Such conflicts may well give rise to legal confusion and legal challenge, which clearly could be resolved in the context of the final Level 2 measures (see also paragraph 16 below). Problems of this nature have not arisen in the implementation of existing detailed CESR standards, which are in the nature of Level 3 measures.

8. Where appropriate, CESR should be prepared to advise the Commission that in particular areas, further detailed implementing legislation, except perhaps a statement of high-level principles, is not appropriate, even where the 'shall' formulation is used in the Directive, because the Level 1 text provides sufficient detail.

Determination of priorities

9 Given the potential size of the task of developing implementing measures, CESR should be prepared to advise the Commission to give priority to certain implementing measures, with the consequence that lower priority measures should be dealt with later. It is the essence of the Lamfalussy approach that there is more than one opportunity to develop and update implementing measures and that European legislation can be developed in an iterative way.

10. For example, there appears to be no pressing reason to devote scarce resources to the development of detailed implementing legislation where comitology provisions in the Directive are permissive ('…the Commission may…') rather than mandatory ('…the Commission shall…').

11. It is also inappropriate, as part of the Level 2 legislative process, to propose measures which go beyond, or contradict, the specific terms of the Level 1 Directive. A particular case in point is the Commission's proposal on systems for the dissemination of Article 27 price information: 'it is important to bear in mind that regulatory intervention should be focused in facilitating general access to information and the use of the most effective means for disseminating price information in a consolidated manner' (paragraph 3.7.2.4). Article 27 requires 'systematic internalisers' to publish quotes and give their clients access to those quotes. The Level 1 text does not appear to refer to 'consolidatability' and neither should Level 2 measures. Article 27 specifically permits firms to publish quotes through proprietary arrangements, an option which a 'consolidatability' requirement would prevent firms from using.

12. Furthermore, a 'consolidatability' requirement would be likely to have significant system development consequences. It would also need to be considered in the context of how the information derived would be used and deployed by consolidators – an issue in relation to which the Directive confers no powers. Before any specific proposals could be adopted, there would need to be extensive debate about whether consolidated information is actually needed, and if so, how to provide it sensibly and cost-effectively. Market participants are ready to enter into discussions with CESR and the Commission on these matters. But there is not time to do so in the time available to implement the Directive. Since a 'consolidatability' provision is not necessary to complete the technical detail of the Level 1 text and enable it to come into effect, it should not be pursued as a Level 2 measure. It would be especially inappropriate to deprive firms of rights conferred by the Directive before there is agreement on these issues. Even if it were appropriate, such a project would have to be considered in a more measured way at Level 3, not against the clock as a Level 2 measure.

13. Careful attention to avoiding inappropriately detailed and prescriptive measures (see paragraphs 3 to 7 above) is also relevant to the process of determining priorities.

Transitional measures and grandfathering

14. The importance of allocating priorities has been exacerbated by the early publication of the Directive in the Official Journal, and the resultant truncation of the time available for the Level 2 process and for CESR to provide its advice. It will be vital for CESR to recommend the appropriate use of transitional provisions or phased implementation. There is also a need to provide adequate transitional and grandfathering arrangements under Article 19 measures to prevent unnecessary and costly repapering of client classification, client agreements and other documentation.

15. In its consultation paper CESR should propose, in relation to each Article, specific methods that are best adapted to ensure a practical transition to any new requirements. Possible methods include:

    a) Measures which explicitly give regulated entities more time beyond the implementation date to come into compliance with the new requirements.

    b) Measures which require regulated entities to comply with a set of high-level principles by the implementation date, but which allow more time beyond the implementation date to make any necessary changes to the detail of their compliance arrangements.

    c) Measures which permit firms to continue for a period to use existing systems, procedures, documentation, and agreements that are consistent with the general principles of the Level 1 text.

Fact-finding about existing level of detail in CESR members' requirements

16. In a number of key areas, CESR should, as a first step, ensure that it has information about how each CESR Member regulates at present, and differences between key Member States' existing regulatory regimes. This information about the detail of national requirements should not be used as the basis for proposing a detailed Europe-wide rulebook, but rather to provide a basis of evidence to enable CESR to ensure that the implementing measures it advises are proportionate, appropriate, relevant to markets and their users, and grounded in specific knowledge about variations between existing requirements, and the impact that change at various levels of detail would have. Without such fact-finding (which we welcomed in CESR's work on transaction reporting and information exchange), there is a strong risk in areas such as those listed in paragraph 16 below of implementation measures which are not appropriate, proportionate, or grounded in an understanding of current market and regulatory practices.

17. Areas that would benefit from such fact-finding include:

    - Differentiation, or lack of it, of regulatory obligations depending on whether a firm is dealing with a counterparty, a professional or a retail client (and definition of those categories).

- Requirements for firms to obtain best execution for their clients (building on the work of CESR's Review Panel on implementation of the CESR standards).

- Requirements for firms providing non-advice services to clients, where they exist.

- What would be the impact of detailed Level 2 measures on the existing particular legal structure governing financial services provision in each Member State? What conflicts could arise with existing requirements? Would specific Level 2 measures override them? Would specific Level 2 measures be open to challenge? Would any conflicts be capable of resolution?

Format of advice

18. CESR should provide its advice, as recommended by the Commission, in an 'articulated text' which can, if appropriate, be easily adopted by the Commission in its drafting. This approach will ease the process of identifying where and why the Commission departs from CESR's advice, if it decides to do so. It will also enable the Commission to save time by drafting the Level 2 measures more quickly.

Regulations or Directives?

19. The mandates show a clear preference for Regulations over Directives, especially for Articles 4 and 27 (paragraph 1). On the choice of the legal instrument for implementing measures, the draft mandates focus on the rapidity of implementation which it is asserted that the Regulation route would offer. The rapidity of implementation should not be the driving consideration for CESR's advice on this matter. As explained above, transitional measures or phased implementation is likely to be necessary in any event and can be accommodated by either Directives or Regulations.

20. It is essential to consider the legal form of implementing measures in a principled way, so that the legal form is well adapted to the measures' content. We do not propose to discuss here, at length, whether the implementing measures should take the form of Regulations or Directives. In the end, this is a matter for the Commission not CESR. We are currently preparing for the Commission, and will share with CESR, a detailed analysis of the objective principles that should underlie the choice.

21. However, we note that it is questionable whether using Regulations as implementing measures in relation to definitions of commodity derivatives or investment advice in Article 4 or 27 would really expedite implementation. For example, even if a regulation is adopted further clarifying the Article 4 definitions of derivatives and investment advice, the other, interrelated provisions of Annex I, and their related definitions, would still be in the form of a Level 1 Directive and have to be implemented by Member States as such.

Consultative Working Group

22. CESR should continue to use the Consultative Working Group as a source of advice on priorities and the level of detail which is appropriate and feasible.

Planning for CESR consultation

23. We welcomed the consultative concept paper which the CESR Expert Group on Cooperation and Enforcement Issues published in March, in advance of the formal consultation on the first set of mandates. We also welcome the similar approach in CESR's consultation paper on matters such as best execution. This iterative approach will be all the more important in the complex areas covered by the second set of mandates.

Comments on particular draft mandates

Article 4.1.2; Annex I, Section C – List of financial instruments

24. With respect to the issues on which the Commission has requested technical advice:

(a) The definition of commodities should include electricity, as well as fungible goods, such as base or precious metals and agricultural products. However, the definition need not extend to other intangible rights and assets (such as emissions certificates, bandwidth, etc.) derivatives which are more appropriately addressed by Annex 1, Section C10.

(b) We consider that it is unlikely that it will be possible to specify definitively when a contract is to be regarded as being for commercial purposes. However, it should be possible to identify factors that can be taken into account in making the determination. On the other hand, it may be difficult to identify additional 'badges' which definitively label contracts made for a non-commercial purpose as having the characteristics of other derivative financial instruments, beyond those identified in the Directive.

(c) It should be possible to define the various elements required for these purposes. However, we would point out that, in the text of the Directive, 'inflation rates and other official economic statistics' are one, combined category, rather than separate items. The definition of emission allowances should refer to the relevant EU Emissions Directive and the Kyoto Protocol.

(d) The consultation process will show whether there is a strong demand to include other categories of underlying asset.

(e) In the case of a cash-settled contract (in the terms of the Directive), we consider that it is not necessary to demonstrate the existence of additional features to show that the contract has the characteristics of other derivative financial instruments (compare Annex 1, Section C5).

Please note that ISDA, shortly, will separately submit a supplementary paper focusing on Article 4.1.2. Annex I, Section C – List of financial instruments.

Article 4.1.4 Definition of investment advice

25. It is important that the definition of investment advice adequately distinguishes regulated investment advice from other consultancy and advisory activities which may also relate to a transaction in financial instruments, e.g. technical advice on computer connectivity, accountancy questions or other issues which may be necessary to resolve in order to consummate the transaction. The definition should be limited to personal recommendations to one or more persons with respect to the merits of whether or not they should enter into one or more transactions in financial instruments.

26. It is also important to distinguish personal recommendations from general recommendations, financial analysis, research, etc., as well as journalism and other media activities. Regulated investment advice should be limited to advice given to one or more specific person or persons where the person giving the advice holds the advice out as having been determined by reference to the particular circumstances of the person to whom the advice is given.

27. In addition, the definition of investment advice refers to advice given to a 'client'. CESR's advice should recognise that a firm may give advice to an eligible counterparty related to a particular transaction covered by Article 24 without invoking the COB rules.

Article 19

28. Our comments below focus in particular on the implications of the Article 19.4-6 mandates for professional clients. We have also seen, and support, the comments of the British Bankers Association on the retail client aspects of these mandates.

29. CESR should take particular note of the Commission's request for CESR, when delivering its advice in respect of Article 19, to take account of the retail or professional nature of the relevant clients or potential clients (as the Level 1 text itself requires). A professional client is defined in Annex II as possessing 'the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs'. As such, Level 2 measures under Article 19 should focus on the relationship between investment firms and retail clients. The presumption should be that, as regards professional clients:

    a) Article 19.1: There should be no need for Level 2 measures over and above the Level 1 obligation to act fairly, honestly, and professionally.

    b) Article 19.4: The firm should be deemed to have gathered sufficient information regarding the client as part of the process of classifying the client as a professional. Professional clients should be deemed to possess the knowledge and expertise to assess the suitability of the investment service or financial instrument in question.

    c) Article 19.5: Professional clients should be deemed to possess the knowledge and expertise to assess the appropriateness to them of the investment service or product envisaged. A firm should not be under a regulatory obligation to carry out these procedures in the case of a professional client. Professional clients should be free to negotiate at arm's length the required degree of responsibility assumed by the investment firm. The same considerations apply to Article 19.4.

    d) Article 19.6: As a consequence, investment firms should not be subject to constraints on their ability to provide execution only services requested by professional clients. Moreover, in determining what is a complex product,

CESR should focus on the complexity of the nature of the returns offered to investors rather than the complexity of the mechanisms used to deliver those returns. For example, a principal protected note should not be considered to be a complex product.

Article 22.2

30. CESR should remind the Commission that Article 22.2 applies only to shares admitted to trading on a regulated market. Recital 46 is not a reason to extend the scope of Level 2 measures.

31. CESR's advice should ensure that investment firms are not unduly constrained in the means by which they can make the relevant orders public and accessible.

Article 24

32. The Commission's mandate relies on Article 24.5, which permits, but does not require, the Commission to adopt implementing measures. Given the shortness of the time available, and the differences within FESCO when it discussed the definition of 'counterparty' in 2002, we consider that CESR should advise the Commission not to propose Level 2 measures on Article 24 unless CESR is able to agree advice which preserves the current freedom for counterparties to choose their own status without substantial administrative burdens.

Article 24.2

33. The procedures for requesting a more protective treatment need not be too complex. An eligible counterparty should be able to request more protective treatment by notice in writing to the investment firm concerned. The investment firm also should be able to grant more protective treatment at its own option, regardless of whether the client has specifically requested this.

Article 24.3

34. CESR's approach towards its advice on criteria for corporate eligible counterparties should be guided by the principle that sophisticated corporates should not be unduly constrained from choosing to reap the benefits of lower dealing costs that are available by dealing as counterparties. The extent of those cost savings will depend partly on how intrusive and therefore costly are the conduct of business requirements for professional clients. Many special purpose corporate vehicles that currently routinely deal as counterparties operate without substantial capitalisation or assets. In order to avoid major disruption to this market, and significant cost to the relevant corporate entities, the quantitative thresholds for eligible counterparty status should be set at an appropriate level which are reflective of a differing level of responsibility on the part of the client for its own actions, based on its own market expertise, for example as a (small) multiple of the levels in Annex II of the Directive. They should not be set at the level once mooted by CESR (EUR 2bn turnover). Any

quantitative thresholds should also be capable of being calculated on a group basis.

35. Any procedures for obtaining corporates' express confirmation to be treated as eligible counterparties must enable willing counterparties to confirm their status without burdensome administrative procedures, and without delay. The firm should inform the client that it would forego the protections available for clients, and obtain the client's written consent to eligible counterparty status. A straightforward procedure is necessary to enable such counterparties to take quick advantage of short-lived commercial opportunities.

Transparency (Paragraph 3.7)

36. The Commission asserts that 'the Directive considers that the information should be provided and handled in a manner that could allow markets to consolidate it'. As explained in paragraph 11 above, Article 27 does no more than require 'systematic internalisers' to publish quotes and to give certain investors access to those quotes. Nowhere in the Directive is there any reference to the 'consolidatability' of the quote information. Furthermore, any requirement to make Article 27 information 'consolidatable' would effectively rule out the publication option in Article 27.7(b)(iii). Thus the Commission's proposal to introduce a 'consolidatability' criterion would not only go beyond what is provided for in the text of the Level 1 Directive, but also undermine a right conferred by the Directive itself. We therefore urge CESR most strongly to advise the Commission not to propose a 'consolidatability' criterion.

Article 4 – definition of 'systematic internaliser'

37. The Commission's mandate relies on Article 4.2, which permits, but does not require, the Commission to clarify definitions. Given the shortness of the time available, the contentious nature of the debate on the Level 1 measure, and the risk of reopening and unravelling the political compromise on which the Level 1 text was based (a risk which some of the interpretations that the Commission puts forward in the draft mandate are likely to exacerbate – see paragraph 38 below), we consider that CESR should advise the Commission not to propose Level 2 measures on Article 4.1.7.

38. If, however, CESR does consider it necessary to provide some advice to the Commission on this point, it should take particular note of the following points:

    a) The Commission's instruction to CESR to take into account Recital 53. In particular, CESR should reject the Commission's assertion that 'an investment firm should not be deemed to trade on own account on a given security on a systematic and a non-systematic basis at the same time as this could include an element of legal uncertainty and jeopardise the effectiveness of the pre-trade transparency rule', since this interpretation would directly nullify Recital 53.

b) CESR should examine critically the Commission's assertion that the definition 'does also apply to all dealing on own account activities of the investment firm whether with eligible counterparties…or not'. This assertion also runs counter to Recital 53, which explicitly excludes ad hoc dealing with 'wholesale counterparties' (a term which should at least include all eligible counterparties).

c) The Commission requests advice on 'the criteria for determining when an investment firm deals on own account on an organised, frequent and systematic basis by executing client orders'. Since the definition of 'systematic internaliser' was based on a political compromise that encompassed all elements of the definition, CESR should not provide advice on selected elements without also taking into account other elements of the definition.

d) The Commission asserts that the Directive 'refrains from linking the provision of the service on a systematic manner to the use of any specific technical or automated mean'. When giving its advice CESR should however bear in mind that the word 'systematic' was specifically included in Article 4.1.7 as part of a political compromise with a Parliamentary vote for a definition which applied to activity conducted 'through a system'.

Article 27.1- liquid market

39. CESR should take full account of the Commission's injunction to consider the risk incurred by liquidity providers when it provides advice on what is a 'liquid market'. CESR should advise the Commission that 'liquid market' should be interpreted as applying only to shares in the exchanges' senior indices. This approach would meet the simplicity criterion and is parallelled in CESR's 'proxy' approach to Article 25.

Article 27.1 – prices reflecting prevailing market conditions

40. This provision should not be interpreted narrowly. Any firm that intends to participate competitively in the market will quote competitively.

Article 27.1/2 – standard market size

41. The Commission asks for advice on what orders are to be considered as 'large in scale compared to normal market size'. The Commission loosely interprets this size as 'block size'. CESR and the Commission should bear in mind that the terms 'block size' and 'normal market size' have different meanings in different markets. The risk attached to the quoting obligation is such that 'large in scale compared to normal market size' should be interpreted, in a predictable way, as a small multiple of the average size.

42. Data are not available at present in many European markets about the size of off-exchange executions. Such data are not likely to be available on a consistent basis until after the Directive's transaction reporting provisions have been implemented in all Member States. CESR should therefore advise

the Commission that for the time being, until consistent further data are available, 'standard market size' should be calculated on the basis of reported on-exchange executions.

43. A 'representative' standard market size should be interpreted as an indicative amount which takes account of the need for standard market size to be an easily manageable round number of shares.

Article 27.1/3 – multiple quotes

44. The Level 1 text is quite clear: "In cases where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices". Firms will also be subject to the relevant provisions on order handling and best execution. Given these facts, CESR should advise the Commission that 'general criteria for the handling of client orders in case that the systematic internalisers publish multiple quotes' are unnecessary and inappropriate.

Article 27.3 – publication of quotes

45. As explained in paragraphs 11 and 12 of our general comments above, the Commission's proposal to introduce a 'consolidatable' criterion to the publication and accessibility of quotes is inappropriate for Level 2 legislation, for two reasons:

    a) The proposed 'consolidatability' criterion would extend the obligations set out in the Level 1 text, and also prevent firms from availing themselves of specific means of complying which are set out in the Level 1 text. The Level 1 text does not refer to consolidation, and neither should Level 2 measures. Level 1 specifically permits firms to publish quotes through proprietary arrangements. Furthermore, Level 1 also permits firms to charge for access to the quotes which they publish, and to limit trading access to the firm's own clients. A 'consolidatability' requirement would make it practically and commercially impossible for firms to manage their Article 27 business through proprietary arrangements, forcing them to quote through an exchange or third party. Even with such a constraint, we know of no exchange or third party provider that currently has arrangements whereby firms can derive income from publication through their systems. There is no power in the Directive to oblige such exchanges or third party providers to enter into such commercial arrangements.

    b) The proposed 'consolidatability' criterion would have extensive system development implications. It would require debate about objectives and means that would require far more time and effort than is available before the Directive comes into effect. Even if it were in principle appropriate and consistent with the Level 1 legislation, such a project would have to be considered in a more measured way outside the legislative process, not as a rushed Level 2 measure.

46. CESR should therefore advise the Commission that a 'consolidatability' requirement should not be pursued, since it would be impractical and undermine and contradict the Level 1 text.

47. In order to avoid the imposition on firms of contradictory requirements, and to avoid undermining the efficiency of regulated markets, CESR should advise the Commission to make clear that if a systematic internaliser makes its quotes public through the facilities of a regulated market, it has no further obligations other than the rules of that regulated market, and that its obligation to comply with those rules overrides the provisions of Article 27.

Article 27.3/5 – multiple hits

48. CESR should advise the Commission that 'exceptional market conditions' needs to be broadly interpreted to mean any exceptional circumstance which affects the firm's ability to operate in a fair market, including *force majeure*.

49. To enable firms to protect their risk position, the provision that firms 'shall be entitled to update their quotes at any time' needs to be interpreted in such a way that a firm can change its quote between executing orders, even if it receives the later order before the earlier order has been executed.

50. 'Considerably exceeds the norm' should be interpreted in a way which does not discourage relevant firms from providing liquidity to the market. In this context it will be important to interpret 'at the same time' so that it does not cover the situation where, for example, the firm receives an order while it is executing another order in circumstances where it has not yet had the opportunity to update its quote.

Article 27.3 – exemptions from price control

51. 'Transactions where execution in several securities is part of one transaction' should be interpreted broadly to include all circumstances where applying the quoted price would be inappropriate in view of the status of the particular execution in the context of the overall transaction. Types of transaction which should be covered include programme trades and portfolio transactions.

52. 'Orders that are subject to conditions other than current market price' should be interpreted broadly to include a wide range of conditions, including volume weighted average price (since VWAP cannot be a 'current market price'), contingency orders, stop loss orders, protected orders, 'fill or kill' orders, hedging transactions, and out of currency orders. Any interference with firms' ability to negotiate prices for these and similar types of order would cause major disruption and cost to firms that would put them at an arbitrary competitive disadvantage in highly competitive international wholesale markets.

Article 27.3 – retail size orders

53. ‘Size customarily undertaken by a retail investor’ needs to be interpreted, in a predictable way, by reference to the typical size of retail transaction, and not to include any size, however large, in which a retail investor might transact.

29th July 2004