September 16th 2004

CESR - Secretariat
11 – 13 Avenue de Friedland
75008 Paris
France

Dear Sirs,

Reference: **Position of The Netherlands Bankers Association on CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments**

The Netherlands Bankers' Association (NVB) has taken notice of CESR's Advice on Possible Implementing Measures of Directive 2004/39/EC on Markets in Financial Instruments and we are most happy to enclose our comments on the consultation paper of CESR.

In this summarizing letter an overview is given of our initial observations and our general comments. In the annexes you will find our answers to CESR's questions and detailed comments with respect to the specific chapters of the consultation paper. We hope our comments will do their part in the further elaboration of level 2 rules and that our observations will be taken into consideration in the midst of the many reactions that may be expected.

I. Initial observations

We understand it is the intention of CESR to regulate the protection of the retail client rather than the professional client, although this is not made consistently explicit throughout the consultation paper. Therefore, we attach great value to stating clearly that the Advice only covers the treatment of retail clients by an investment firm and not the relationship between a professional client and an investment firm.

The NVB believes it is very important that the definitions to be used are in line with other relevant European legislation (for example but not limited to the Market Abuse, Prospectus and Transparency Directives) and due attention should be paid to mutual consistency. Further attention needs to be given to the scope of CESR's Advice with respect to the other Financial Services Directives, since CESR's Advice is overlapping the scope of the Market Abuse, Prospectus and Transparency Directive. For example, the Market Abuse Directive determines that

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Member States should be able to choose the most appropriate way to regulate persons producing or disseminating research or other information recommending and investment strategy, including appropriate mechanisms for self-regulation. This self-regulation should ensure that the research information is fairly presented, the interests are enclosed or conflicts of interests, concerning the financial instrument to which that information relates, are indicated.
CESR's Advice is contradictory to this provision of self-regulation in the Market Abuse Directive because CESR's Advice intends to regulate research activities and leaves no space for self-regulation, for example in the chapters concerning conflicts of interest ('investment research'), fair, clear and not misleading information ('marketing communication') and client order handling (paragraph 5 'dealing ahead').

It is not clear how the proposals of CESR relate to applicable national civil law. CESR seems to easily neglect applicable national civil law and is creating a new overarching civil law solely applicable to services in financial instruments. It is not clear how this new regulation relates to the generally valid civil law provisions. For example the criteria for the contents of the client agreement are overlapping with applicable national civil law. Therefore, we believe Member States should have the opportunity to implement solely the provisions of the CESR advice which are not already regulated in national civil law.

Our general impression is that CESR's approach is too prescriptive and that there is an imminent danger of legislative overkill. The proposals may be in line with existing best practice in Europe, turning all items into binding rules might result in insufficient flexibility to adapt to new market developments and unnecessary administrative burdens to the detriment of the global competitiveness of providers. Secondly, we think the introduction of even less prescriptive level 2 rules will prompt industry to organisational and technological adaptations. Therefore, we attach great value to adequate transitional measures. Furthermore we would like to point out that our observations should be considered as an addition to the comments made by the European Banking Federation, which we fully support.

II. General comments

The general comments as stated below correspond to the chapters and subjects of the consultation paper. Our specific comments are included in the annexes to this letter.

1. <u>Compliance and personal transactions; obligations related to internal systems, resources and procedures; obligation to avoid undue additional operational risk in case of outsourcing</u>

In order to avoid contradictory regulatory requirements regarding the compliance function, all requirements regarding this function as mentioned in the CESR document should be in line with the Basel Paper on the Compliance Function in banks. For example the further elaboration by CESR of the degree of 'independence' of the Compliance Function (as mentioned in question 1.1) might be contradictory to the position of the Basel Paper on this aspect.

We also refer to the comments from the Dutch Bankers Association Compliance Working Group on the Basel Paper (copy attached to this letter (annex 16).

2. Safeguarding of clients'assets

To understand the impact of the requirements to employ a 'depositary' it is absolutely vital that rules proposed by CESR specify precisely to what type of 'depositary' they refer to. The explanation of the definition to settlement systems as well as to CSD's or other organisations providing similar services is not appropriate and should be made undone.
Paragraph 7 and 8 of article 13 of the Directive do not seem to offer a basis for any rules on the investment firm's liability for the client's assets held with a 'depositary'. Both paragraphs of this article require investment firms to put into place *organisational* arrangements that secure the ownership rights of the client with regard to the client's assets.

Rules with regard to the liability investment firms are required to accept towards the client (article 12 sub (a)) have no relation whatsoever with these arrangements. The same remark can be made about the proposed rules by CESR with regard to the descriptions that are to be included in the agreement with the client, or with regard to information that is to be provided tot the client (article 12 sub (b) to (e).

3. Conflicts of interest

The paragraph regarding conflicts of interest describes, inter alia, some disclosure requirements to the clients. In general, we propose to differentiate between private clients and professional clients and to limit the disclosure requirements to private clients. This would be in line with (international) common practice and would avoid unnecessary administrative burdens to dealings with professional counterparties.

4. Fair, clear and not misleading information

A definition of marketing communication should be limited to communications not directed to specific persons and not containing personal recommendations. The definition should exclude advertisements only for the purpose of name recognition or consumer awareness (of brand name etc.) and low profile advertisements (as mentioned in paragraph 9).

The criteria for marketing communication are media neutral. We suggest taking into account the different means of communication and to tune the provisions to the different means of marketing communication, where necessary. For example, it is impossible to comply with the detailed information requirements as stated in paragraph 2, 3 and 5 in a television commercial.

Although the information may not be misleading, it will have a recruiting character. It is inherent to advertising that this is a recommendation of a product or a service. Too detailed information requirements will mean that one is compelled to only use low profile advertisements (as meant in paragraph 9). It is the function of marketing communication to have a recruiting character.

The intention is to persuade the (potential) client to contact the investment firm. Once the client contacts the investment firm more detailed information requirements will ensure that the client is adequately informed about all the relevant products or services.

5. Information to clients

We understand that apart from the requirements applicable to the client agreement other information needs to be given prior to the signing of the agreement. CESR divided the sources of information in three: 1) marketing communication; 2) information to the client; and 3) the client agreement in which the other information may be included.

It is important that the requirements do not result in too long and unreadable information documents. The information provided to the (potential) clients should contribute to an appropriate judgement by the client of the product or service. Therefore, it is in the interest of the clients to provide them with limited, uncomplicated, understandable and accessible information. In particular the amount of technical text should be limited as much as possible. Although we acknowledge the purpose of supplying adequate information to the client, we note that the proposed information requirements on top of the already existing information requirements (for instance the prospectus requirements) will result into lengthy and detailed documents. Lengthy and detailed documents may contravene with the purpose to supply clients with the most understandable and accessible information.

6. Client agreement

It is in the interest of both the client and the investment firm that the client agreement is clear and it is sufficient that the client understands the client agreement. The imposition that the client agreement needs to be easily understandable is hard to comply with as the client agreement is a legal document rather than a marketing document. In addition, this requirement is hard to be determined objectively as 'easily' understandable by one person might be 'difficult' understandable by another person. The qualification 'clearly' already assures that the information needs to be unmistakable and that no doubt about the text is allowed. Therefore, we suggest to delete the wording 'easily'.

It is important that the investment firm, in providing its services as portfolio manager, informs the client about the performances and enables the client to compare the portfolio management with the investment objectives. A client will be able to do this on the basis of the periodic reports and the transaction notices. Therefore, it will be of no use to supply the client with a benchmark consistent with the management objectives. And an appropriate benchmark will not be available for each individually compounded portfolio. A rigid use of this provision may result in the use of non-relevant benchmarks.

7. Reporting to clients

CESR's suggestion to oblige investment firms to report to clients on given advice will be of use to neither the client nor the firm. Clients are not served by receiving messages about given advice once they have already understood –and followed– the advice. Only in the case they seek possibilities to hold a firm liable for occurred losses, will these advice statements –being more compact than the held conversation– be 'useful' to them. For firms, mandatory advice statements will lead to considerable unnecessary administrative burdens.

8. Best execution

We are of the opinion that the mandate does not invite CESR to determine the relative importance of the factors.The relative importance of the criteria should be left to the firm's own policy judgement in compliance with the Level 1 text, and should not be specified in legislation. The listed criteria are all appropriate. However, they are interdependent. If one of them is below an acceptable level, the whole transaction is. Giving less importance to one of the criteria severely influences the success of the order execution. We do not think, therefore, that any ranking of these criteria will contribute to better 'best execution' rules.

For the retail market, clients are best served by clear standardised execution procedures, without having to choose which trading venue they wish. On behalf of their (retail) clients, firms in The Netherlands will generally choose the trading venue where the main part of the trade in the respective instrument takes place. The criteria mentioned are best observed in that way, without having to weigh them separately. Having to pick a trading venue per individual (retail) order would be very burdensome for both client and firm. We believe that if a certain trading venue becomes more attractive in terms of the mentioned criteria, trade will automatically (based upon economical principles) move to that trading venue. We believe that any rules prioritising some factors over some others, will disturb execution procedures rather than improve them.

9. Client order handling

We are of the opinion that the rules suggested here do not always find their basis in the level 1 legislation. The proposed rules can easily provoke practical problems due to its level of detail and will consequently overreach their goal, e.g. the proposed requirement 'to carry out orders sequentially'.

10. Pre-trade Transparency for Regulated Markets and MTF's; Post-trade Transparency for Regulated Markets, MTF's and Investment Firms

We are of the opinion that a number of the proposed regulations is too restrictive, inflexible and in some cases counterproductive and endangers the principle of one level playing field, e.g. the proposed obligation of a Regulated Market or Multilateral Trading Facility to disclose the number of shares the market participant is ready to buy or sell. This could prevent investors to submit ice-berg orders to the relevant RM or MTF.

11. Admission of financial instruments to trading
We believe CESR's advice at this point is overlapping with and additional to the requirements in accordance with the Prospectus Directive and the Transparency Directive. Therefore, we suggest that criteria for the admission to trading should not be specified at Level 2.

12. Transaction reporting
Article 25 of the Directive provides for the reporting of transactions to the home competent authority (section 3). In section 4, it is outlined specifically which features have to be reported with regard to a transaction. We agree to section 4. CESR overreaches the scope of the Directive, however, by considering the need for complementary information regarding the counterparty of the investment firm. Investment firms keep at the disposal of the home competent authority details of the identity of the client, as required in section 2 of article 25. However, this information is only provided to the competent authority in case of a specific investigation, and not on a structural daily basis.
We fail to see the necessity of expanding the scope of the directive as proposed by CESR.
Moreover we consider such an extension contradictory to the purpose of the Directive; explicitly to recital 43 which contains an obligation for the Member States to protect the right to privacy of natural persons. National legislation is compliant with recital 43 and is an impediment for investment firms to provide client information as proposed by CESR.

13. Cooperation and exchange of information
It should be questioned whether it is appropriate to include Level 3 recommendations in this CESR advice that should be limited to Level 2. Reporting by the remote member to several competent authorities should in any case be precluded. Otherwise reporting requirements will become far too complicated in the absence of an identical and automated reporting system.

Yours sincerely,

B.B. van der Burgh
secretary Legal Affairs

Enclosure: Answers to CESR's questions and detailed comments with respect to the specific chapters of the consultation paper

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Annex 1

Section II – Intermediaries

Compliance and personal transactions; obligations related to internal systems; conflicts of interest (pages 11-25 and 39-48)

General observation

The comments below relate to the proposed text that, directly or indirectly, deals with the compliance function. Some comments are made with regard to the paragraph on Conflicts of interest. Most of the compliance issues are described in art. 13 (2). In order to avoid contradictory regulatory requirements regarding the compliance function, all requirements regarding the compliance function as mentioned in the CESR document should be in line with the (final version of the) Basel paper on the Compliance Function in banks. In this respect, we also refer to the comments from the Dutch Bankers Association Compliance Working Group on the Basel paper (copy attached in annex 16).

Compliance and personal transactions (pages 11-25)

1. According to article 13 (2), an investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its manager, employees and *tied agents* with its obligations under the provisions of this Directive as well as appropriate rules governing personal transactions by such persons. The explanatory text includes, inter alia, persons who perform equivalent roles to employees and individuals involved in the provision of services to the investment firm or its tied agent under an outsourcing arrangement.

   The persons mentioned above may be under contract with a different legal entity than the investment firm itself. These ‘third persons’, not under contract with the investment firm, are first and foremost responsible for *establishing* their own adequate compliance policies and procedures. The investment firm can’t be held responsible for all actions by these ‘third persons’ in general and establishing compliance policies and procedures with these ‘third persons’ in particular.

   We propose to limit the applicability of art. 13 (2) to persons under contract of the investment firm itself and the persons working for the same group (as meant under section I (24)), which the investment firm is a part of, insofar the policies and procedures are also applicable to the business of these parts of the Group. If and when an investment firm concludes an outsourcing agreement, or another contract with ‘third persons’, the investment firm could include a requirement in the agreement with the ‘third person’, which states that the ‘third person’ will reasonably comply with the investment firm’s compliance policies and procedures, as far as the investment firms compliance policies and procedures relate to the scope of the activities under the agreement.

2. On page 11, the explanatory text also mentions that the obligations to be placed on investment firms in relation to relevant persons under the advice should not prevent Member States from also directly regulating relevant persons. If this would also mean regulating ‘third persons’, the member States should be restrained to applying the advice to these ‘third persons’ because the articles and advice should relate to the activities of investment firms only as these firms fall under the goal and scope of the Directive.

3. Page 12 mentions the possibility of outsourcing the compliance function. Principle 11 of the Basel paper ‘The Compliance Function in banks’ also mentions the possibility of outsourcing the compliance function, but sets certain requirements. It would be preferable to harmonize the conditions for outsourcing compliance activities, or refer to the (final version of) the Basel paper on ‘The Compliance Function in banks’.

   As compliance is considered a core risk management activity, the compliance *function* itself should, in general, not be outsourced. Only in exceptional circumstances should outsourcing of the compliance function be considered (e.g. if it is financially not realizable for bank (holdings) to maintain a separate compliance function). However, in practice certain compliance *activities*, like compliance training, advice on certain deals are outsourced from time to time to specialised compliance advisory firms. The outsourcing of certain compliance *activities* should be allowed, providing that the compliance *function* (including the investment firms compliance organisational structure, compliance programs, policies, guidelines and procedures) remains part of the investment firm’s organisation itself.

4. Question 1.1. for consultation deals with the subject of Independence of the compliance function. Again, the subject of independence of the compliance function should be in line with the (final version of the) Basel paper ‘The Compliance Function in banks’. Differences in rules regarding the independence of the compliance function between CESR’s approach and The Basel Committee’s approach could lead to problems when implementing these rules. This not only applies to financial conglomerates, but also smaller banks that must not only comply with banking rules, but also with rules from securities regulators.

   In practice, the compliance function within smaller firms is usually performed by someone performing other duties as well. The requirement for an independent compliance function in such cases would indeed be disproportionate. Therefore, independence of the compliance function should 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 the business.
   In said cases, other measures could be taken to ensure independence, given the special nature and/or scale of the firm. An employee with non-commercial re-

sponsibilities or one of the directors (the ‘financial director’; not the ‘commercial’ director) could perform the compliance duties.

The implementation of requirements for independence should not have to be deferred, based on the nature and scale of the business of the investment firm (Question 1.2), as long as the requirements take into account the complexity of its business and other relevant factors, including the nature and scale of the business (see above).

5. The paragraph regarding outsourcing of investment services on page 14 describes three options. In practice, more functions may be outsourced than the portfolio management function alone. The principles considered when outsourcing certain activities of an investment firm are basically the same for all material outsourcing arrangements. The investment firm remains responsible for all outsourced activities, certain control measures should be in place and the regulator should have access to all relevant information concerning the outsourced activities.
   Hence, in response to Question 1.3, option 3 would be preferred. Although the investment firm is ultimately responsible for all outsourced activities, it should also have the necessary regulatory flexibility to deal with these issues.

   There are several regulators that already published rules regarding outsourcing. In the Netherlands, the Regulation on Organisation and Control includes several rules regarding outsourcing. The Belgian regulator, the CBFA, recently published some sensible principles regarding outsourcing (see www.CBFA.be). The Committee of European Banking Supervisors (CEBS) also recently published a consultation paper on outsourcing. As said before, harmonisation on the regulatory requirements is a prerequisite for setting standards that touch investment firms across Europe and also financial conglomerates that house European investment firms. We propose to harmonise these rules with respect to outsourcing or simply refer to outsourcing rules that already exist.

6. Draft Level 2 advice, Box 1:
   In general, with respect to the compliance function, reference should be made to the Basel paper ‘The Compliance Function in banks’ to ensure consistency in regulatory requirements.

   Paragraph 2b under Policies and procedures to ensure compliance, requires an investment firm to ‘establish and maintain compliance policies and procedures…. that are designed to ensure compliance with the investment firm’s obligations under the Directive….’. One could conclude from this description that the scope of the compliance function includes all obligations under the Directive. It is the responsibility of the investment firm to comply with all obligations and not an individual function within the investment firm. Although a compliance officer may be involved in some parts of the Directive, other functions within the investment firm may also play an important role. Ín order to avoid any misunderstanding, we suggest to rephrase the wording of 2b as follows: …establish and maintain policies and procedures (leave out the word 'compliance')…..

7. Paragraph 3 of the 'policies and procedures to ensure compliance' discusses the involvement of senior management. We refer to the Basel paper 'The Compliance Function in banks' and the comments from the Dutch Bankers Association Compliance Working Group on the Basel paper.
   Paragraph 3b states that senior management is responsible for…approving the compliance policy….It is not clear what is meant by 'the compliance policy'. We propose to adopt the term used in the Basel paper: 'the Compliance Charter.' It is the responsibility of the Compliance Officer to ensure that all compliance policies are appropriate. The Compliance Officer reports to senior management on implementation and updates of the compliance policies, procedures and guidelines.

8. The activities described in paragraph 5 concerning complaints handling are not necessarily performed by a compliance officer. Again, these activities are the responsibility of the investment firm, but may be handled by a different function than the compliance function.

9. Paragraph 6 sets some minimum standards for an investment firms Code of Conduct. Although most investment firms have policies and procedures in place that are compliant with the minimum standards, the policies and procedures are not necessarily a part of the investment firm's Code of Conduct, but may be part the firm's other policies and procedures. We propose to rephrase this paragraph to this practice.

10. Paragraph 7 requires an investment firm to 'take reasonable steps to ensure that where a relevant person is prohibited from entering into a personal transaction, he doesn't counsel or procure any other person to enter into such a transaction or, communicate any information or opinion to any other person….'. It is not clear how an investment firm could be responsible for this, except by installing Chinese Walls. It is the responsibility of the employee involved to comply with said requirements. It is the investment firm's responsibility to have a policy in place that mentions this responsibility of all employees of the investment firm.

11. With respect to paragraph 9 on 'Outsourcing pertaining to investment services and activities' we refer to our comments mentioned above.

<u>Conflicts of interest </u>(pages 39-48)

<u>General observation:</u>

The paragraph regarding conflicts of interest describes, inter alia, some disclosure requirements to its clients. In general, we propose to differentiate between private clients and professional clients and to limit the disclosure requirements to private clients. This would be in line with (international) common practice and would avoid an unnecessary administrative burden to dealings with professional counterparties.

Specific remarks

12. Paragraph I-1.3 of the draft level 2 advice on the identification of conflicts requires an investment firm to maintain updated records of the categories of interested persons, areas of business, types of financial instruments and transactions that have been identified as potential sources of conflicts of interest according to the criteria mentioned in paragraphs 1 and 2 of the draft advice.

    A policy regarding conflicts of interest should be aimed at preventing conflicts of interest and handling existing conflicts of interest in an adequate manner. A detailed recording requirement as described in paragraph I-1.3 may increase the administrative burden of investment firms disproportional. An audit trail of possible conflicts of interest will already be achieved by the recording of the investment firm's day-to-day business. We propose to refer to the recording requirements that are already applicable to investment firms.

13. Paragraph II with respect to Conflicts Policy describes examples of methods of managing conflicts of interest. Depending on the nature of the business and the relationships with clients, other examples of conflicts of interest may be possible. It is probably impossible to present a complete list. Hence, it is not necessary to refer to other examples of conflicts of interest (Question 6.1). It is up to the investment firm to identify possible conflicts of interest and handle these in an adequate manner. Furthermore, the list of measures as mentioned under 8(a) to (f) should be stated as examples of arrangements that may be effective methods (question 6.2).
    A situational approach would be preferred, because the possible conflict of interest must often be evaluated in relation the type of business, type of client, type of information flows etc.

14. Paragraph III regarding Inducements under 11 mentions a requirement to inform the client in writing of the firm's inducements policy. Furthermore, a requirement is proposed to provide clients in writing with the relevant details of such inducements. The transparency with respect to inducements should be limited to the facts relating to the client, i.e. the costs that are involved in the relationship between the client and the firm. If inducements are not charged to clients and therefore don't lead to (higher) cost for the clients, there is no need to inform the clients of this on an individual basis, other than the fact that the firm has an inducement policy and some inducements may apply in the securities firm's business. Furthermore, we believe that Chinese Walls may hamper the complete communication on inducements.

    We therefore propose to limit the requirement to a general inducement policy. This could be part of the client agreement that will be concluded with the client prior to commencing securities transactions. Perhaps some general facts regarding inducements may be disclosed in the published financial statements of the securities firm.

15. Paragraph IV, section 12 requires an investment firm to disclose to its clients in general terms its conflicts policy in writing. Moreover, section 14b requires the client’s consent before undertaking business with the investment firm. We propose to let the (private) client give its consent via the client agreement that may include a general description of the firms conflicts policy. A separate client consent would increase the administrative burden for the investment firm too much.

16. Paragraph V deals with investment research. We assume that this refers to research regarding stocks and bonds and does not include economic research (industry, country reports).

17. It is indeed appropriate for investment firms that publish investment research to maintain information barriers between analysts and its other divisions (question 6.3.a.). Research should be independent from investment banking (question 6.3.b.).

18. Question 6.4 deals with the situation where research is issued without complying with all standards as described in paragraph 16f. The second option is not very realistic: an investment firm is not likely to issue a warning 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…’. Instead, the investment firm could disclose that the investment research was not prepared in accordance with *some* (not: all) of the conflicts of interest standards for the preparation of investment research laid down in the level 2 measures and that the firm has taken alternative measures, *with regard to the standards the firm is not compliant with*, in order to address conflicts of interest related to the preparation of research (first option with a slight adaptation).

Annex 2
Section II – Intermediaries

Record keeping obligation (Article 13(6) (pages 26-30)

As will be further elaborated below, it is recommended that CESR's Level 2 advice will be limited to the proposed paragraph 2 and 3 (with due regard to certain comments on these paragraphs).

In response to Question 4.1 it is noted that there are already sufficient safeguards incorporated in article 13(6) of the Directive. Consequently, there should not be a separate obligation for investment firms to be able to demonstrate that they have not acted in breach of their obligations under the Directive. Besides, a reversal of the burden of proof would be unnecessary burdensome, since it is impracticable to demonstrate a negative fact (ie. That the investment firm has *not* acted in breach of certain rules).

The first paragraph of the Draft Level 2 advice creates a potential unlevel playing field between different EU Member States by providing leeway to the competent authorities to impose additional record keeping obligations. This would be in contradiction with the objective of harmonisation which is an underlying cornerstone of the Directive.

With regard to paragraph 2(d) of the Draft Level 2 advice it is observed that it is impracticable to exclude the risk that records will be manipulated or altered. This risk can only be *mitigated* by taking adequate protective measures (e.g. separation of functions).

As to paragraph 3 of the Draft Level 2 advice it is noted that it is unclear after what period of time this survival clause will expire.

The Minimum list of records to be maintained as set forth in the Annex to the Draft Level 2 advice is far too much detailed. It is strongly insisted to delete this list in its entirety. Without prejudice to the foregoing, the following observations are made. The Annex seems to be focused exclusively on retail clients, whereas for professional clients in any case less stringent requirements would suffice. Another observation is that it is unclear what information should be recorded at client level and at a higher level of aggregation respectively. In any case it should be clarified that marketing communications and investment research should not be recorded at client level. The records compliance reports and internal audit reports should only contain the final versions of these reports (and therefore not draft versions). Finally, it should be allowed to combine certain records, such as the 'complaints records' and those in relation to the 'complaints handling'.

In view of the comments made in the preceding indent it will not be astonishing that, in response to Question 4.2, we are of the opinion that no additional record keeping requirements are deemed necessary in relation to capital markets and investment banking activities.

Annex 3
Section II – Intermediaries

Safeguarding of clients' assets (article 13(7) and (8)) (pages 31-38)

Key issues

To understand the impact of the requirements to employ a 'depositary' it is absolutely vital that rules proposed by CESR specify precisely to what type of 'depositary' they refer to. The explanation of the definition to settlement systems as well as to CSD's or other organisations providing similar services, should be made undone, as in the relationship between an investment firm and such a system or organisation these rules cannot be applied, due to the specific character of such a system or organisation (*inter alia* their monopoly position), and are, in any case, out of place.

Paragraph 7 and 8 of article 13 of the TRBD do not seem to offer a basis for any rules on the investment firm's liability for the client's assets held with a 'depositary'. Both paragraphs of this article require investment firms to put into place *organisational* arrangements that secure the ownership rights of the client with regard to the client's assets. Rules with regard to the liability investment firms are required to accept towards the client (article 12 sub (a)) have no relation whatsoever with these arrangements, just like the proposed rules by CESR with regard to the descriptions that is to be included in the agreement with the client or, with regard to information that is to be provided tot the client (article 12 sub (b) to (e).

General remarks

In the draft advice a question 5.2 appears, which was not mentioned in the previous explanation. Below, the order and therefore the article numbers of the draft advice are followed.

First, it should be mentioned that the rules proposed in the draft advice seem to focus on the weak, private client with little knowledge as opposed to powerful, professional investment firms and securities institutions. See for example the far-reaching protection and counselling of the client in the proposed article 12. These rules may be justified in a private-professional relationship, they are much less justified in a relationship of two more or less equal professional parties, let alone in a relationship in which the professional client of a securities institution is more powerful than the institution. It would therefore be correct to make a distinction between professional and non-professional clients for this type of rules or similar rules with the effect that the more stringent, protective rules only apply to private-professional relationship. A distinction through the use of a list with criteria should always give the client the possibility to opt out if the client wants to be treated as a professional client instead of a retail client. Think for example of small pension funds that are usually represented by knowledgeable and professional consultant firms.

In addition, one item of the explanation affects the entire draft-advice. In the second paragraph of the explanation (page 31) it is mentioned that the 'definition' of 'depositary' also includes 'a clearing or settlement system with which client assets are held'.

Section 1 of the draft advice defines sub 7 a depository as 'a third party with whom an investment firm holds client assets'. This expansion of the definition, which definition in itself does not even make clear whether it focuses only on so called sub-custodians or has a broader meaning (including, for example, special depository vehicles used by Dutch credit institutions for the protection of their client's rights), may lead to putting on a par with each other three totally different figures: depositories of investment firms, Central Securities Depositaries, as Necigef for the Netherlands, and (securities) settlement systems, like Clearnet in some countries. This, of course, is not correct, not only because these three types of organisations have very different functions, but also as they have completely different positions on the market, both with regard to the optional possibilities of the client and with regard to the possibility of choice of and influence by the securities institution.

It may be noticed that this misconception also appears in (other) European regulations: Article 9 of the Financial Collateral Directive (2002/47/EC) compared to Article 24 of the Directive on the Reorganisation and Winding-up of Credit Institutions (Directive 2001/24/EC) and article 8 of the Directive on Payment Finality (98/26/EC); and the third indent of article 31, of, once again, the Directive on the Reorganisation and Winding-up of Credit Institutions, and article 25 of the Directive on the Reorganisation and Winding-up of Insurance Undertakings (Directive 2001/17/EC), which is almost, but not fully, identical to the said article 31.

To come to an understanding of what the CESR means by the various rules proposed in its draft advice, it is absolutely vital that these rules specify precisely what type of 'depositary' they refer to. The expansion of the definition to settlement systems should be made undone, as in the relationship between a securities institution and such a system the rules proposed here due to the specific character of such a system (amongst others monopoly position) cannot be applied or are, in any case, out of place. Both arguments also apply to the CSD's, which should therefore also explicitly stay outside the range of the term 'depositary'.

The involved paragraphs 7 and 8 of the TRBD are (even in wording almost) identical to the preconditions that appear in the second and third indent of article 10 of the first Directive on Investment Services. One might wonder why over four pages (15 articles) of far-reaching implementing regulations are required, when the European legislator did not deem it necessary to state anything more about the subject in the TRBD than he did in the first Directive on Investment Services. The sometimes extensive and comprehensive obligations that are imposed on investment firms and securities institutions, sometimes without an evident necessity, can hardly be considered consistent with the acknowledged principle that there should be reserve in public and administrative obligations not only on a national level, but on a European level as well.

Specific remarks

1. Article 4 requires the investment firms to take measures that guarantee, in outline, that clients' securities are not affected by the selling off of securities of another client by this latter's creditor or by the bankruptcy of the institution. There is of course no objection to the precondition for a investment firm to show as much effort as possible to come to such a result. However *guaranteeing* this is too much to ask, as long as international exchanges and clearing organisations are not prepared (or are prohibited) to (also) accept depositories of investment firms as members.

   Where the international and, in particular, European regulations that indicate which law is applicable to the question of ownership of securities currently diverge – in short, they, alternately, indicate the law chosen by parties, or, always compulsory, the law of the country of the 'relevant intermediary', of the country of the CSD where the securities are kept, or of the country of the register where the securities are registered – it is impossible to be certain on the applicable law. In the absence of certainty, a guarantee as proposed cannot be asked from an investment firm.

2. For article 6 it is useful to state (also see the end of article 4), first, that the rule does not prevent assets placed with a custodian by the client to be given as a collateral, and, as a consequence thereof, to be sold subsequently; and, secondly, it should be stated explicitly that the rule does not prohibit that the client provides a power of attorney to the investment firm to debit his account with the costs and compensations owed by him for the services provided.

3. In article 7, it is unclear in the second sentence whether 'identified' only refers to administrative segregation between the client's cash and that of the investment firm, or also refers to a legal segregation. The sentence is probably to be read in the last sense, which meaning, however, should then be stated explicitly. In case of a legal segregation, attention should be paid to the fact that in any case according to Dutch law a so-called 'omnibus account (i.e. an account that is kept by the investment firm at a credit institution to hold cash on behalf of clients) explicitly does not realise the prescribed situation. Cash in such an account (actually: receivables related to that account) legally belongs to the investment firm.

   More generally it should be noted that, at least according to Dutch law (which roughly corresponds with other continental law), it is legally incorrect to require a non-credit institution to 'sub-deposit client funds'. Such term implies that a client deposits its cash with the securities institution, which is not permitted.

4a. A similar remark applies to article 8, introduction: the mentioned 'clients' funds' may belong to the client administratively and economically, but never legally. This should be made clear.

4b. The proposal of part a), i of article 8 that in the choice of a (sub) 'depository' an investment firm should be bound by the answer to the question whether the (sub) 'depository' is ‘regulated’, is insufficiently clear. The sole circumstance that there is regulation or supervision is meaningless. As is generally know, there are many intensities and types of regulation or supervision worldwide and endless discussions can be held about the level of a certain supervision (whereby it should not only be taken into consideration what supervision has been provided for by law, but also how supervision is actually applied). Already for that reason alone *question 5.1* cannot be answered. As both the institution and the client benefit only from rules which are clear and consistent, this part of this article should at most refer to the *intensity* of the regulation or supervision of the (sub)'depository' (ergo not: *whether* it is regulated or supervised), provided that a prescription like this is useful anyway.

5. It is unclear what is meant by ‘pooled’ in article 9 (and elsewhere). It is assumed that it will not be allowed to put together securities of various kinds, as in that case the institution would no longer qualify as an investment firm but as an undertaking for collective investment in transferable securities. Moreover, to the letter, even the 'pooling' of securities of the same type would already result in a collective investment and, therefore, a re-qualification of the investment firm.

   In case "pooled" only means that clients are not entitled to certain physical securities, but only to a certain amount of securities of the same type (i.e. the difference between a specific, concrete, assignable good, for instance a car, and a good to which is generally referred only as a species, for example money), then the rule in both variants (both a and b) will be essentially unacceptable for the Netherlands, as the Netherlands Giro Securities Administration and Transfer Act 1977 (*Wet giraal effectenverkeer*) alone already makes all securities included in that system ‘pooled’. It goes without saying that an investment firm only lends securities that belong to clients that have given their authorisation and that (the scope of) that approval is administered appropriately. This, however, is not stated in the article.

   Finally, *question 5.2* is not only more a matter of fact than of a legal character. Moreover, the question is posed so generally that an exhaustive answer is, out of necessity, very extensive and requires too much investigation for this moment and for the intended objective.

6. In response to *question 5.3* (article 11): since, at least according to Dutch law, there is no legal use for the client for specifically having recorded with which (sub)depository his securities are kept, such a rule is an unnecessary and - substantial! - administrative burden.

7a. It should first be mentioned that paragraphs 7 and 8 of article 13 of the TRBD do not seem to offer a basis for any of the prescriptions in this article. Both paragraphs require investment firms to put into place *organisational* arrangements that secure the ownership rights of the client with regard to his securities and cash. Rules with regard to the liability investment firms have to accept towards their clients have no relation whatsoever with these arrangements, just as rules with regard to descriptions that have to be included in the agreement with the client, or with regard to information to be provided to the client.

7b. Still in a general sense on this article, it needs attention, in the second place, that a far-reaching liability of an investment firm for (sub)depositories serves the interests of its clients less than it seems. Such a liability means a considerable risk, which will not be surveyable and therefore neither controllable nor insurable. The risk that as a result of such a liability an investment firm is dragged along by problems at its (sub)depository is increased considerably. As a result, many more clients will bear the adverse consequences of the problems at the (sub)depository than would be the case if the liability was limited to situations where the investment firm would have been able to control the risk.

7c. It is therefore extremely undesirable, both from the viewpoint of the investment firm and that of the client, that an investment firm is prohibited to limit its liability when it employs a (sub)depository that is no subsidiary (if necessary: group company) of the firm.

The investment firm has no influence on such (sub)depositories and can therefore, other than by selecting the (sub)depository, not actually limit the risk of the securities placed in custody there. Moreover, the choice of (sub)depositories is often limited, certainly when CSD's and settlement systems should also be regarded as (sub)depositories. *Question 5.4 (a)*, part (i), should therefore be answered by a firm 'no'. Part (ii) can be accepted, if such a rule is deemed really necessary, now that an investment firm has sufficient grip on such a (sub)depository.

Question 5.4 (b) should be answered with a firm 'no' in both part (i) and part (ii) as well. In both cases, because consequential losses may not be excluded, according to the proposal. This again is undesirable, as it concerns an unsurveyable loss as well. Part (i) should also be rejected, as the used criterion 'directly or indirectly' is a term, which is not well defined (it apparently does not refer to the link that exists between two group companies, like in question 5.4 (a)). More general, it is rather difficult to determine what exactly is meant by the difference in wording between question 5.4 (a) and question 5.4 (b).

7d. With regard to the term 'pooled' in part b) of article 12: please see remark 11.

7e. Again, 'identifiable' in part c) of article 12 raises the question whether that word solely has an administrative meaning, or also a legal meaning (please see also remark 9). In all cases, but especially when a legal meaning is intended, the rule cannot or can hardly be complied with, as it (a) requires certainty with regards to the applicable law, which is impossible under the European regulations contradicting each other in this matter (see remark 7); (b) requires a thorough knowledge of all relevant local legal systems where securities are kept, which cannot be required from a securities institution in all fairness; and (c) will result in an extensive documentation (much worse than the already extensive and not always helpful prospectus in case of a securities issue), both per country and for all qualifying countries combined; it goes without saying that that documentation will be provided with all legal cautiousness and reservations, so that the client will quickly be off the track.

7f. First, the rule of part (d) of article 12 raises the question in which it differs with regards to the 'own' Investor Compensation and Collective Guarantee Scheme from the disclosure requirement, which is already included in the relevant European directives. Secondly, it is impossible to find out how in all countries where securities are held for clients the relevant Investor Compensation and Collective Guarantee schemes read and how these schemes actually function in (sub)depository relationships, in which securities abroad are kept *on behalf of* clients, but in most cases not (legally) *by* them. A problem which is further complicated because as a result of the several European directives it is unclear which law applies to the ownership-relation of securities kept in an account with an investment firm. Here as well out of necessity the client will be forced to deal with such a quantity of documentation, that will be drawn up in a legally sound manner, that transparency, clarity and simplicity will be far away.

8. The obligation proposed in article 15 to have 'external auditors' annually investigate whether the investment firm still complies (and still is able to comply) with the proposed obligations, is rather demanding. Such a report requires a thorough investigation (both legally and factually), not only at the organisation, but also in numerous jurisdictions, for it to be given with any certainty (NB even supervisory authorities state that they, with all their powers, cannot give a comprehensive declaration on the extent to which a supervised institution complies with the law). Moreover, the obligation is rather arbitrary. Why should 'external auditors' report on compliance with these obligations, and not on numerous other obligations that investment firms are subjected to?

Annex 4
Section II – Intermediaries

Fair, clear and not misleading information (Article 19(2)) (pages 49-53)

General remarks

A definition of marketing communication should be limited to communications not directed to specific persons and not containing personal recommendations. The definition should exclude advertisements only for the purpose of name recognition or consumer awareness (of brand name etc.) and advertisements as mentioned in paragraph 9.

The criteria for marketing communication are media neutral. We suggest taking into account the different means of communication and to tune the provisions to the different means of marketing communication, where necessary. For example it is impossible to comply with paragraph 2, 3 and 5 in a television commercial.

Although the information may not be misleading, it will have a recruiting character. It is inherent to advertising that this is a recommendation of a product or a service. Too detailed information requirements will mean that one is compelled to only use advertisements as meant in paragraph 9. It is the function of marketing communication to have a recruiting character. The intention is to persuade the (potential) client to contact the investment firm. Once the client contacts the investment firm more detailed information requirements will ensure that the client is adequately informed about all the relevant products or services.

Specific remarks

1) We assume that the clause stating reference in the advice to an investment firm includes an investment firm causing a third party to do so, only applies to outsourcing and not to distribution by a third person, unless this third person is a tied-agent.

2) It is inherent to advertising this is a recommendation of a product or a service with a recruiting character rather than a full legal description of the product or the service. Not every (type of) advertisement lends itself to give a fair indication of the risks. [Therefore this advice is stated too broad and should be limited to a general warning]. By other requirements it is ensured that the client receives all information about the risks.

3b) If by ‘key items’ is meant ‘the most important characteristics of a product or service’ than it is necessary to realize that not all (type of) communications lend itself to mention all characteristics. This provision should be deleted, because other provisions already ensure that the client is given adequate information.

4) We understand the wording ‘consistent’ as in the meaning that the provided information in marketing communication is not in contradiction with the information the investment firm provides to its retail clients in the course of the provision of the investment services.

7a) On the basis of the current wording of this provision it is not possible for an investment firm to state that it is ‘the best investment adviser’ or anything comparable. Therefore the meaning of factual claims in this provision should be limited to the performance of a portfolio.

7b) An investment firm needs to make plausible that a factual claim is accurate, unless the opposite is proved. Therefore the wording ‘or is deemed sufficient by the competent authority’ should be deleted.

8) How does this paragraph 8 relate to the information an investment firm needs to supply to a client on the basis of article 19(3)? It is the function of marketing communication to have a recruiting character. The intention is to persuade the (potential) client to contact the investment firm and subsequently all the appropriate information (as required by article 19(3)) needs to be given. We understand the wording “illiquid” as in not traded on a regulated market/ MTF or the absence of a buy-in possibility by the Issuing Company.

9) We understand advertisements as in the meaning of marketing communication. Paragraph 9 seems to be in contradiction with paragraph 5. To be precise paragraph 9 assumes that it is possible that an advertisement only contains one or more of the following: a) the name of the investment firm; b) the name of a financial product; c) a contact point; d) a logo; e) a brief factual description of the investment firm’s activities; f) a brief factual description of the investment firm’s fees; g) a short generic description or statement about the financial instruments; and h) the prices and yield of financial instruments and the charges. On the basis of the current drafting of paragraph 5 it is not possible to make an advertisement which only contains one or more of the items mentioned in paragraph 9 because in order to comply with paragraph 5 the investment firms needs to mention contact details as well as the fact that the investment firm is authorised and/or registered and the name of the competent authority that has authorised and/or registered it. A possible solution is to say that both paragraph 8 and 5 do not apply to advertisements as mentioned in paragraph 9 (so far as the definition of marketing communication does not exclude advertisements as meant in paragraph 9).

10) How does this paragraph 10 relate to the information an investment firm needs to supply to a client on the basis of article 19(3)? The advice under article 19(3) already arranges the timing of that information. It is not appropriate to overload the (potential) client in the stadium of advertising with all the required information on the basis of article 19 (3) because at this moment the investment firm is only trying to enthusiast the (potential)

client for a particular product or service. Marketing communication may not be misleading, however this should not mean that all the information required on the basis of article 19(3) should be included. There are enough safeguards to ensure that the client will receive the information as meant in article 19(3) adequately and timely.

13) In the Netherlands it is standard market practise to work with simulated historic returns, on some conditions (the information identifies the simulated historic returns and the simulated historic returns are certified by an accountant stating that the simulation is mathematically correct, objective measurable and representative).

After the implementation of CESR's advice the use of simulated historic returns should still be possible because they attribute to a better understanding by the client of the product and its risks. Moreover the use of simulated historic returns should be allowed because the use of forecasts is also permitted.

14a) The own administration of an investment firm should qualify as a source within the meaning of this paragraph, for instance with respect to non-listed products.

14b, i) We assume it is possible to comply with this provision by stating that '…guarantees can not be given based upon historic revenues'.

14b, ii) We assume that if the product or the portfolio only exists for 10 months reference can be given to the period for which the product or portfolio exists (as this will be in the client's interest).

14c, i) We assume it is possible to comply with this provision by stating that '…guarantees can not be given to future performance'

15b) It is not possible to include all assumptions on which any estimate, forecast or promise is made, in an advertisement. This information should be supplied to the client prior to the signing of the agreement but not necessarily in the marketing communication.

15d) This is already covered by the requirement that the information shall be fair, clear and not misleading.

16) We assume this paragraph refers to comparisons of estimates, forecasts or promises. This information should be supplied to the client prior to the signing of the agreement but not necessarily in the marketing communication.

Annex 5
Section II – Intermediaries

Information to clients (Article 19(3)) (pages 54-59)

General remarks

We understand that apart from the requirements applicable to the client agreement other information needs to be given prior to the signing of the agreement. CESR divided the sources of information in three: 1) marketing communication; 2) information to the client; and 3) the client agreement in which the other information may be included.

It is important that the requirements don't result in too long and unreadable information documents. The information provided tot the (potential) clients should contribute to an appropriate judgement by the client of the product or service. Therefore it is in the interest of the clients to provide them with limited, uncomplicated, clearly understandable and accessible information. In particular the amount of technical text should be limited as much as possible. Although we acknowledge the purpose of supplying adequate information to the client, we note that the proposed information requirements on top of the already existing information requirements (for instance the prospectus requirements) may result into lengthy and detailed documents. Lengthy and detailed documents may contravene with the purpose to supply the clients with the most understandable and accessible information.

Specific remarks

1) We assume that paragraph 1 is only applicable to a retail client. The general explanation says an investment firm may be deemed to comply with the obligation to provide information under article 19(3) where the client has received the information on a previous occasion and that information is still up to date. Therefore it is desirable to make a distinction in the information requirements which information should be provided to potential clients (information on the firm, services and instruments) and the information that should be given to existing clients (information on the possible newly provided services and instruments).

   We understand that the requirement saying that the information must be provided in writing does include electronically means of communication. In particular in the event that the client uses the internet services of an investment firm.

2) The wording 'in good time' should be judged against the principles reasonable and practicable and could be in contradiction with provision 2b. 'In good time' should be explained as in the meaning of sufficient opportunity to absorb and react to the information provided. We understand the purpose of this provision is to prevent the client being squeezed between

the moment it receives the appropriate information and the moment of the investment decision. On the other hand this provision may not lead to an obligation for an investment to refuse a client if the client hasn't read the information (how can an investment firm know), as it is the client who is responsible to take his decision on the basis of the received information.

4) This provision should not be applicable if the telephone conversation is part of the normal (already existing) relationship between the investment firm and the client. We assume this provision only applies to cold calling.

4b) We understand that the required consent may be given by telephone. It is practically not possible, in the event the client has not given its consent, to give all the required information on the basis of article 19(3) by telephone. The idea of this provision is probably that if the client wants to, it has the right to receive all information. Therefore it should to state that the information mentioned in paragraph 4b) is the minimum level of information that needs to be provided by telephone. The client should be informed about the fact that there is additional information available. It is up to the client whether he wants to receive this information in advance or immediately after starting the service.

4b, iii) Information on applicable taxes will be too technical and detailed for a telephone conversation. We rather prefer a requirement that states that an investment firm needs to mention that taxes could be applicable and that more information can be obtained in the product or service information.

4b, iv) It is not the responsibility of the investment firm to inform the client about the costs or taxes that are not imposed by or via the investment firm.

4b,v) It would be more logical only to mention the fact that a right of withdrawal does exist. Moreover it is the nature of some products or services that they can not be withdrawn.

5) What do you mean with 'means of distance communication'? We understand that also for other means of distance communication it is possible to supply the information required under article 19(3) immediately after the start of providing the service.

6j,k) It makes no sense to mention the language if the used language is the native language. It would be more logical only to mention the fact that information is given in another language than the native language.

7) We understand that (part of) this information may be included in the Client Agreement.

7a) This provision should only be applicable in the event that the investment firm is advising about securities issued by the investment firm itself. The provision should not be applicable to execution-only because in that event the client is protected by the applicable rules for offering securities.

7f) It would be more logical only to mention the fact that a right of withdrawal does exist. Moreover it is the nature of some products or services that they can not be withdrawn. It would be irrelevant and useless to state that the products or services can not be withdrawn.

7g) The meaning of this provision is not clear. It is obvious that the information is valid until it is renewed or stated that it is no longer valid.

8b) We understand that this provision doesn't mean that in the event of an all-in fee a break-down needs to be given. The client is informed about the total (amount of) fees.

10) We assume it is sufficient to disclose the identity of the guarantor if that guarantor is obliged to publish annual financial accounts.

12) Appropriate guidance should mean that it is sufficient if an investment firm gives general guidance on the mentioned investment services.

13) We understand it is not required to explain the complete clearing structure. It is sufficient to mention that insolvency may lead to financial damages. This provision can also be complied with by once-only mentioning this.

14) This is already covered by paragraph 7b.

15) We assume this provision is being complied with if the investment firm once stated in general that (and where) a prospectus is available. It will be too burdensome to mention on every occasion that a prospectus is available. Moreover this provision doesn't take into account that not every public offer needs to be accompanied by a Prospectus due to applicable exemptions or secondary offers etc.

Annex 6
Section II – Intermediaries

Client agreement (Article 19(7)) (pages 60-64)

General remarks

It is in the interest of both the client and the investment firm that the client agreement is clear and it is sufficient if a client agreement is understandable by the client. To impose the client agreement needs to be easily understandable is hard to comply with as the client agreement is more a legal document rather than a marketing document. In addition this is hard to determine objectively as 'easily' understandable by one person might be 'difficult' understandable by another person. Therefore we suggest to delete the wording 'easily'. The qualification 'clearly' already assures that the information needs to be unmistakable and no doubt about the text is allowed.

It is important that the investment firm in providing its services as portfolio manager informs the client about the performances and enables the client to compare the portfolio management with the investment objectives. A client will be able to do this on the basis of the periodic reports and the transaction notices. Therefore it will be of no use to supply the client with a benchmark consistent with the management objectives. And an appropriate benchmark will not be available for each individually compounded portfolio. A rigid use of this provision might mean that the client is given non-relevant benchmarks.

Specific remarks

1a) The wording 'in good time' should be judged against the principles reasonable and practicable. 'In good time' should be explained as in the meaning of sufficient opportunity for the client to react. This provision may not lead to an obligation for an investment firm to refuse a client if the client hasn't read the agreement (how can an investment firm know) as it is the client who signs the agreement. We assume that if the internet is used as mean of communication it is possible to comply with this provision by ensuring the relevant documents can be downloaded.

1b) We understand that in the event the internet is being used a 'confirmation click' will be sufficient.

2) We understand that by means of communication in this paragraph is meant among others telephone communication and internet. We suggest CESR mentions which means of communication are meant.

3) It is not clear what is meant with 'easily' understandable. It is hard to judge this objectively. The qualification 'clearly' already assures that the information needs to be unmistakable and no doubt about the text is al-

lowed. ‘Easily’ understandable by one person might be hard understandable by another person. Therefore the word ‘easily’ should be deleted.

4a) We assume that an investment firm may rely on the information given by the client.

4e) This information is obliged if applicable, we assume.

4f) A description of a withdrawal right or cooling-off period should only be given in the event the client agreement is made for a specific product (and such a right or period is applicable). This provision should not be applicable to a client agreement for general investment services.

4g) We don’t understand why the client agreement must contain the general term of business. It is up to the contractual freedom of the investment firm and the client to determine whether the general terms of business are applicable.

4i) The wording ‘type of orders’ is confusing because these terms are normally used to address e.g. limit order, market order, stop order etc. This provision is also overlapping with paragraph 4k “forms of communication to be used for sending and receiving orders”.

4l) It should be sufficient to disclose the method of calculating.

4q) We assume that by timeframe is meant the time it will last before the investment firm shall take action. It should be sufficient to mention that an investment firm will undertake such action and the wording ‘and the information to be given to the client in such circumstances’ should be deleted because at the time the client is not honouring his obligations the investment firm will supply him with the relevant information.

4r) It is logically that communication is possible in the language of the agreement. It is not necessary to mention this explicitly. And especially it would make no sense to state that communication is possible in the native language if the agreement is also written in the native language.

8) We understand that a copy of the client agreement may be kept electronically. The period should be limited to one year after the end of the relationship. This will be sufficient as the nature of the service providing is not requiring a longer period.

9) We understand it is possible to combine this agreement with the client agreement into one document, which can be agreed upon by means of one signature as meant in paragraph 1b.

9c) It should be sufficient to refer to the applicable margin requirements of the relevant regulated market or MTF. Therefore this provision should only rely to the situation the investment firm operates with its own margin requirements.

9d) We assume that the common practise in the Netherlands with respect to the 'know-your-customer' principle assures an investment firm complies with this provision.

10) Exception also needs to be made for paragraph 4(k) as this paragraph is about the forms of communication to be used for sending and receiving orders.

10c) It is important that the investment firm in providing its services as portfolio manager informs the client about the performances and enables the client to compare the portfolio management with the investment objectives. A client will be able to do this on the basis of the periodic reports and the transaction notices.

Therefore it will be of no use to supply the client with a benchmark consistent with the management objectives. And an appropriate benchmark will not be available for each individually compounded portfolio. A rigid use of this provision might mean that the client is given non-relevant benchmarks.

11) We assume no specific reporting is required in the event the client is informed periodically by portfolio reports and transaction notices. This enables the client to be informed about the performance, which may include losses. Furthermore the intention of CESR to introduce a 'warning-system' is of no use with respect to portfolio clients, since there is no possibility for a client to intervene other than terminating the portfolio agreement. Therefore this provision is of no use to the client and will lead to an additional administrative and IT burden for the Intermediary.

13) This provision and the two weeks notice should not apply to the situation of insolvency or a legal judgement. In that case it should be possible to terminate the agreement immediately.

Annex 7
Section II – intermediaries

Reporting to clients (pages 65-69)

Question 10.1
An advice often is not just: buy A or sell B. An advice often constitutes the expression of the opinion of the investment adviser, and in the course of a conversation the adviser and the client will jointly reach conclusions such as buying A or selling B. If the adviser strongly disagrees with the client, especially because of a decision contrary to the agreed investment profile, it is correct to point this out to the client, preferably in writing.
Apart from such cases, we strongly advise <u>against</u> an obligation to report to a client after any investment advice is given. For the investment firm, this would have the following negative consequences:

- The adviser should make notes of everything he says during a conversation with a client about a portfolio, work these notes out into a statement and send it to the client. Short phone calls with clients will not be possible anymore. One adviser, now serving 100 clients, will serve only 50 after such requirement is in place. This means that firms will seek ways to serve less clients in a personal way.
- If the solution of the firm is to draft rather compact advisory statements (if hiring twice the number of personell is not feasible), it can be used against the firm if the client is not satisfied about his investment results. Only if the statement contains all considerations and alternative, will a firm be safe.
- Newly welcomed initiatives such as advisory desks where a client can get quick and inexpensive advice by phone without having a personal relationship with the adviser, will not survive.
- Apart from the cost of drafting these messages, reorganising front offices and hiring more personell, only the cost of sending thousands of messages a week will not compensate the possible improvement of client protection.
- We do not feel that clients are served by receiving messages about given advice once they have already understoon –and followed- the advice. Only in the case they seek possibilities to hold a firm liable for occurred losses, will these advice statements –if they are more compact than the held conversation- be ‘useful’ to them.

2,i) What is meant by counterparty, or what financial instruments are envisaged here? If a financial instrument is traded on the stock exchange, this obligation is not practicable.

3) Usually GTC (good till cancel) limit orders do not immediately lead to a transaction. We do not perceive much added value when the client receives a confirmation that the GTC order is not processed.

6) It is not clear whether a client who periodically deposits money into an investment fund using a direct debit (e.g. a “effectengiro” in the Netherlands) falls under the definition of ‘arrangement’.

8a) According to many general conditions (such as the General Banking Condi tions in The Netherlands) the assets of the client are pledged to the relative firm in all cases. Identifying the assets that have been pledged in the yearly statement, could cause great confusion with clients and will result in unneces sary unrest and many worried questions. This is not in the benefit of the cli ents and the firms.

8c) What does it mean to *show movements*? This should be better explained.

12b) It is not clear what the unrealised profit or loss would be.

13) *for* should be *from*.

13) and 14) refer to the same situations: the order will not be executed and therefore the client is notified. A difference is created here: some refusals must be notified immediately and others as soon as possible. Whatever reason the firm has to not-execute, it will practically always be because the order is unlawful, inconsistent with the agreement or not feasible.

Annex 8
Section II - intermediaries

Best execution (pages 70-79)

General remarks

We are of the opinion that the mandate does not invite CESR to determine the relative importance of the factors.The relative importance of the criteria should be left to the firm's own policy judgement in compliance with the Level 1 text, and should not be specified in legislation. The listed criteria are all appropriate. However, they are interdependent. If one of them is below an acceptable level, the whole transaction is. Giving less importance to one of the criteria severely influences the success of the order execution. We do not think, therefore, that any ranking of these criteria will contribute to better 'best execution' rules.
For the retail market, clients are best served by clear standardised execution procedures,
without having to choose which trading venue they wish. On behalf of their (retail) clients, firms in The Netherlands will generally choose the trading venue where the main part of the trade in the respective instrument takes place. The criteria mentioned are best observed in that way, without having to weigh them separately. Having to pick a trading venue per individual (retail) order would be very burdensome for both client and firm. We believe
that if a certain trading venue becomes more attractive in terms of the mentioned criteria, trade will automatically (based upon economical principles) move to that trading venue.
We believe that any rules prioritising some factors over some others, will disturb execution procedures rather than improve them.

Specific remarks

On 'monitoring requirements' (page 76) we have the following remarks:

Question 1:
Firms are able to monitor the prices they obtain against time and price information which is available from the venues they use. Given the fact that in equity markets in 95% of cases the vast bulk of executions take place on-exchange, the information provided by exchanges is all that is needed. In fixed income markets, execution quality can be monitored by reference to benchmark yields and published credit ratings (or, when credit ratings are not published, the firm's own estimate of what the credit rating would be). Some dimensions of execution quality, such as market impact, are possible to assess only after the trade has occurred, and are not possible to predict on the basis of past experience.

Question 3:
Firms can obtain data directly only from the venues which they use.

On 'Timing of venue assessements' (page 77 – questions 1-5):

Venues are only reviewed whenever there is material change. In relation to question 3 one of the difficulties in reviewing venues would be that infrastructure has to be built to support trade and post trade processing on new venues. As to question 4, venues would indeed make firms aware of material changes in their business. One example of change of venue has been the shift to Eurex for derivatives formerly traded for example on Euronext.

On ‘Information to the clients on the execution policy of the firm’ (page 78 – questions 1-10):

Our main comments relate to questions 2 and 3 since we believe that the information to give to clients proposed in those questions is totally irrelevant for the client. Clients want to know the type of service to be expected, but not statistical post-information about the percentage of firms’ orders directed to a particular venue.

Annex 9
Section II – intermediaries

Client order handling (pages 80-84)

General observation

We are of the opinion that the rules suggested here do not always find their basis in the level 1 legislation. The proposed rules can easily provoke practical problems due to its level of detail and will consequently overreach their goal, e.g. the proposed requirement 'to carry out orders sequentially'.

Specific remarks

On paragraph 3 (dealing as principal; page 81):
The draft advice states that 'if an investment firm may act as principal in relation to a client order, it must inform the client in advance that this may be the case'. In some markets, most notably for bonds and OTC derivatives, principal dealing is the norm and not the exception. Investors who deal in these markets, particularly, but not exclusively professional investors, can be expected to understand that. We do not believe that disclosure of capacity by the investment firm is necessary. In any market such an obligation, were it to be imposed, should be limited to disclosure in the client agreement.

Question 1:
We observe that the advice does not exactly provide a definition of prompt fair and expeditious execution. Rather it seeks to impose a set of conditions with which investment firms will have to comply, in order to meet the Level 1 obligation.
The Level 1 text requires Member States to 'require that investment firms authorised to execute orders on behalf of clients implement procedures and arrangements which provide for the prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm'. In so doing it recognises that order handling is a process in which firms are required to maintain high standards and adhere to the principle of fairness to their customers but in which there can be no guarantees that the desired result will be obtained on every occasion.
In our view, CESR's advice broadly follows the Level 1 approach. While requiring firms to provide for prompt, fair and expeditious execution, CESR recognises that what matters is good business practice in order handling

Question 2:
It is good business practice for both retail and professional clients and the investment firms through which they deal to establish the terms of an order prior to its execution or transmission to a trading venue such as the order book of a regulated market. This is common sense and essential to avoid post execution disputes. As to the elements listed in 2(a-f) we would however note that (f) 'the account for which the order has to be carried out' may not always be available before the or-

der is carried out, such as in the case of an order which is an aggregate of several client orders. We also note that this provision overlaps significantly with the draft advice set out in para 18. Although the two requirements are similar (and cover approximately the same period of time in the order handling process) they are not identical.

Question 3:
The proposal in paragraph 6 that ‘an investment firm must carry out orders for clients sequentially’carries within it many problems, for which the exceptions in paragraph 7 do not provide an adequate solution. The sequential requirement is not compatible with the Level 1 text, which requires prompt, fair, and expeditious, not ‘sequential’ execution.
A sequential obligation might be workable in a small stockbroker which handles exclusively low value retail orders which it routes to the order book of one regulated market for execution. In all other circumstances, (and under the new best execution provisions, reliance on only one execution venue may be difficult to justify) the absolute nature of the obligation (must carry out….. sequentially’ sets an impossibly high standard.
A strict sequential obligation with very limited exceptions is not, we believe, a practical solution. Instead, we suggest that CESR should propose a solution based on a higher level of principle, requiring firms to have a policy and/or procedures designed to ensure that clients’ orders are executed fairly while working with the industry to develop any further detail at Level 3.

Question 4:
We agree, but it needs to be combined with the amendments we recommend under Question 3 above to remedy problems with the limited nature of this exception and concerns about the sequential obligation generally.

Question 5:
We do not see a conflict here. Firms have an obligation to act in their clients’ best interests and will exercise their judgement as to the relative importance of the various factors relevant to how an order is handled. But there can be no guarantees in the execution of client orders. The advantage to clients of having their orders aggregated is the reduced commission they pay (primarily from each client paying only his pro rata share of one transaction fee levied by
a regulated market).But the process of aggregation is likely to result in some clients’ orders not being executed promptly. The net price the client receives will sometimes be better than or the same as if his order had been executed promptly but that will not always be the case. Paragraph 8 of the draft advice would, with minor amendment and clarification, set out the appropriate obligations on a firm. Indent 8(a) should be amended to ‘the firm reasonably believes that aggregation will not…….’, since the ‘it is likely that…’ test requires a firm to predict the future with an unreasonably high degree of certainly; disclosure in the client agreement as set out by CESR should be sufficient.

Question 6:
We believe that a Level 2 implementing measure should require a firm to have an allocation policy and oblige the firm to adhere to it. Although the draft advice set out in paragraphs 12,13 and 14 does, we believe, reflect current good practice, its inclusion at Level 2 would be an excessive level of detail and would be better dealt with at Level 3.

Question 7:
We can see no reason to prevent the aggregation of client and own account orders subject to firms having and adhering to an allocation policy which treats customers fairly in these circumstances.

Question 8:
We think so. Professional clients are sufficiently competent to demand the level of service they require. Furthermore, it is not apparent to us that the information set out in paragraph 15 requires explicit reference in a Level 2 implementing measure for any clients. Sound commercial practice dictates that risk, delays or other problems with executing orders be provided promptly to all clients regardless of status.

Annex 10
Section III – Markets

Pre-Trade Transparency requirements for Regulated Markets (pages 85-90)

General remarks

We agree with many of the proposals as set forth in Section III of the consultation paper. However, we are of the opinion that a number of the proposed regulations is too restrictive, inflexible and in some cases counterproductive and endangers the priciple of one level playing field, e.g. the proposed obligation of a Regulated Market or Multilateral Trading Facility to disclose the number of shares the market participant is ready to buy or sell. This could prevent investors to submit ice-berg orders to the relevant RM or MTF.

Ad Box 12

2) Should a RM or MTF be obliged to disclose the number of shares the market participant is ready to buy/sell this could prevent investors to submit ice-berg orders to the relevant RM or MTF. This could affect adversely their competitive position.

4) This paragraph seems in contradiction with paragraph 18 (p.89) that stipulates that indicative prices are not covered by the proposal.

5) Taking into consideration the various circumstances in which RM's should be able to tailor their requirements to serve liquidity providers, this proposal is too restrictive.

6) It should be crystal clear that market makers should be able to change their quotes, which are often based on client orders, irrespective of the frequency the changes appear.

7) RM's and MTF's offer this service taking into consideration both the needs of their clients and the costs involved. This could result in a tailor-made optimum amount of information at a fair price for the various categories of clients. Hence, this could result in the availability of a limited number of quotes.

8) We would like to repeat our point of view that the availability of quotes should be given
taking into consideration the needs of the relevant market participant and the costs the market participants are willing to pay.

9) We refer to our comments given under 7 and 8.

10) This proposal does not take into consideration the various categories of market participants. A wholesal client investor that trades in real time has different needs than a retail client investor that does not and has to contact a broker in order to be able to trade. When the same degree of pre-trade transparancy should be available to all categories of 'interested parties' this should result in system changes at huge costs (passed on to clients).

11) We refer to our comments under 10.

13) We agree on this proposal.

14) The size of an order that should not be displayed cannot be defined in advance. The criteria are dependent on the market conditions and will vary from day to day.
Furthermore, an undesirable effect of this regulation should be that clients' behaviour should be affected.

Questions

Q12.1
We refer to our comments above. Some of the CESR-proposals would have an adverse effect on the market and the interests of the various categories of market participants. We support a more general level of principles.

Q12.2
No. We refer to our specific comments on paragraphs 1-3

Q12.3
No. See our specific comments on paragraph 7-10 above.

Q12.4
No. See our specific comments on paragraph 13-15 above.

Q12.5
We support the waiver for 'crossing systems'. With respect to the second question, we are not aware of any negative impact on liquidity or potential for abusive behaviour from those systems.

Q12.6
No. See our specific comments on paragraph 15 above.

Q12.7
We are of the opinion that CESR has to adopt a reticent attitude with respect to the requirements with respect to the establishment of a treshold because due consideration has to be given on specific market conditions.
When CESR adheres to the basic principle of a treshold, we prefer the average daily volume method (limited to the trades).

Annex 11
Section III – Markets

Post-Trade Transparency requirements for Regulated Markets (pages 91-96)

<u>Ad Box 13</u>

21) We are of the opinion that the proposed requirements are too prescriptive. Similar to our comments related to pre-trade transparency also here we deem it important that is taken into account the position and interests of the various categories of market-participants and local market-practice. Therefore, we support that these regulations should be dealt with under local exchange/MTF-rules.

22) We agree with the method of post-trade transparency of trade by trade information, however, we do not support the inclusion of 'aggregated information'; we believe that this should be left to market forces.

23) We support the principle that every trade is published only once. Again, we want to stipulate the importance of taking into consideration the different rules of the relevant exchanges.

24) Taking into consideration the daily market-practice of orderrouting the obligation to make public post-trade information within the time frame of one minute is unrealistic. Not all trading systems are automated. Furthermore, sales-traders are not always able to report immediately their trades to the Trading platform, particularly when they are receiving many orders at the same time. Therefore, this requirement bears a high violation-risk. We support a more general requirement i.e. an obligation of publication as close to real-time as physically possible taking into consideration the characteristics of the trading and reporting mechanism and the linkage between them. If a time limit is inevitable, we opt for a time limit of 10 minutes.
    With respect to this requirements we opt for the possibility to report *directly* to the regulator instead of the relevant exchange. We think this is more in conformity with the current rule as both the exchanges and the regulator.

25) We deem these requirements impractical and unnecessary. It should be sufficient that the system is available during normal trading hours (of the relevant instrument). The 'out-of-hours-trades' could be reported at the opening.

26) We have no specific objections with respect to the obligation to have in place arrangements that could make post-trade information available. However, the obligation that such information should be easily consolidatable is too far-reaching and not in accordance with the Level 1 text.

29) We are of the opinion that is not appropriate to include this category of transactions in the trade report regime.

Questions

Q13.1
We refer to our comments under 21 above.

Q13.2
No. We refer to our comments under 22 above.

Q13.3
No. We refer to our comments under 24 above.

Q13.4
We support CESR's point of view in this respect. We think the most important consideration while establishing which trades should be excluded should be that such trades do not contain important pricing information.

Q13.5
No. We refer to our comments under 24 above.

Q13.6
Yes.

Q13.7
Such harmonisation should be addressed at a global level rather than at a European level.

Q13.8
We refer to our comments under 24 above.

Q13.9
We support this suggestion. However, we think that this process should not necessarily be simultaneous with the development of Level 2-measures. An extensive consultation of the market participants is necessary. We think this process could better be started after implementation of the Directive itself.

Annex 12
Section III – Markets

Admission to trading (pages 96-100)

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?

Reply to Q14.1: Overlap with and/or additional requirements to the requirements for issues in accordance with Prospectus Directive (2003/71/EC) and/or Transparency Obligations Directive (formal adoption of which is scheduled for late autumn 2004) the requirements for the admission to trading should avoided. We therefore are of the opinion that criteria should not be specified at Level 2.

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

Reply to Q14.2: Why impose an obligation on an RM if it is an issuers responsibility to publish a prospectus? Also, the proposed role for RMs could result in having two supervisory bodies in a Member State for obligations that arise from the Prospectus Directive.
The proposal (in 4) does not seem to take into account the possibility for an issuer to have its prospectus approved by the competent authority of the Host Member State.

Annex 13
Section IV – Cooperation and Enforcement

Transaction Reporting

General remarks

Directive 2004/39/EC on Markets in Financial Instruments provides in article 25 for the reporting of transactions to the home competent authority (section 3). In section 4 is outlined specifically which features have to be reported with regard to a transaction. We agree to section 4. CESR however overreaches the scope of the Directive by considering the need for complementary information regarding the counterparty of the investment firm.
Investment firms keep at the disposal of the home competent authority details of the identity of the client, as required in section 2 of article 25. This information however is only provided to the competent authority in case of a specific investigation, and not on a structural daily basis.
We fail to see the necessity of expanding the scope of the directive as proposed by CESR. Moreover we consider such extension contradictory to the purpose of the Directive; explicitly to recital 43 which contains an obligation for the Member States to protect the right to privacy of natural persons. National legislation is compliant with recital 43 and is an impediment for investment firms to provide client information as proposed by CESR.

In the Directive (article 25, section 3), the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. This excludes transaction reporting for so called ‘Over the Counter’ transactions. We expect CESR to operate within its mandate and adhere to the rule of the Directive. In this regard it is better to avoid paragraphs that could lead to more than one interpretation (first line of page 102 of CESR’s advice). We ask CESR to confirm that the proposed Level 2 advice should be read within the scope of the Directive as mentioned in article 25, section 3.

Specific remarks

Question 15.1
If the information that has to be reported will be as broad as yet envisaged by CESR, it would be better to give every investment firm the possibility to fulfil it’s reporting obligations by means of hard copy as well, and not only by means of exception. It would be very expensive to develop electronic reporting systems for every financial instrument that is traded by an investment firm; note that many of such instruments are ‘one offs’. If such over the counter transactions would become subject to reporting, this would imply that each OTC transaction has to obtain an ISIN code. Furthermore client information does not form part of the transaction reporting system. It would be very expensive to adapt the systems for the reporting of client information (besides the fact that we are principally against a reporting obligation of client information, as explained under ‘general’). Last, hard copies would have to be maintained as back up solution.

Question 15.2
To adapt the reporting systems for bond- and commodity derivatives markets to the implementing measures, would require a transitional regime of 3 years. The legitimate for such transitional period is the investigation that has to be done and investment that has to made in the infrastructure of the investment firms.

Question 15.3
Larger investment firms are often based in more than one country, which implies that they may have more than one home country in the sence of the Directive. Bearing this in mind it is highly recommended that a European standard for transaction reporting will apply.
Perhaps harmonising standards at a national level may be less time consuming, but this does not establish a level playing field. The advantages for a standardised/harmonised approach are huge: One launch moment; less development- and implementation costs; investments firms that are present in more than one Member State have the same transaction reporting method; standardised transaction reporting obligations are in line with other standardised/harmonised EU developments, like clearing & settlement.

Question 15.4
The home country authority itself should invest in a system for transport of information to a host authority in a standardised manner. An SLA between an investment firm and a reporting channel should be a standardised framework and not differ from market to market. We recommend that each measure of standardisation is done at Level 2, and not at Level 3.
The responsibility for reporting remains with the investment firm, also in case of outsourcing.

Question 15.5
We have serious concerns about the way in which the competent authority will handle all the information that it receives out of transaction reporting obligations. Which measures has the authority implemented for storage, maintenance and protection of the information received?
We have serious concerns that the competent authorities will receive a load of information out of which they are unable to distinguish which information serves which goal.

Question 16.1 – 16.5
Investment firms will deliver the transaction reports to only one authority; in general this will be the home competent authority. The determination of the most relevant market in terms of liquidity is the responsibility of the competent authorities and not a responsibility of the market. However, a proposed change in the system of most relevant market, should not be taken overnight; in such case consultation – or at least early information - of the market is advisable.

Question 17.1
We are strongly in favor of a standardised/harmonised approach on a European Level.

Question 17.2
For the advantages of a standardised/harmonised EU approach, we refer to question 15.3.

Question 17.3
We do not agree to the fields in Annex A for the following reasons:
Time Identifier: is related to the Trading Venue, thus forms part of the (common) authority system/database, instead of a separate field in the report;
Buy/Sell Indicator: what is meant by ‘from the perspective of the reporting firm’? It is unclear whether transaction reporting obligations apply to both principals and agents, or not. Clearness about the obligation is necessary to be able to designate the fields;
Instrument Security Code and Underlying Instrument Security Code: It is not relevant whether a security is underlying or not, so this field should be deleted. Relevant is that a financial instrument is unique, with a unique instrument security code. If no Instrument Security Code is available for a financial instrument, there is no reporting requirement for this instrument;
Instrument Type: is related to the Instrument Security Code, thus no separate field in the report, but part of the (common) authority system/database;
Price Multiplier: is related to the Instrument Security Code, thus no separate field in the report, but part of the (common) authority system/database;
Value Notation: is related to the Instrument Security Code, thus no separate field in the report, but part of the (common) authority system/database;
Counterparty: in many regulated markets the Counterparty is always the Central Counter Party. In all cases the counterparty will be indicated by a code and not by name.
Customer/Client Identification: as explained under ‘General’ we are against the introduction of a Client Identification field in the Transaction Report. The client will be identified in the internal administration of the investment firm.

Annex B is the responsibility of the competent authorities.

Question 17.4
The field ‘agent/proprietary’ is not defined in the annexes. We assume CESR refers to Trading Capacity. We do not understand why the definition in Annex A differs from the one in Annex B. As far as we should understand CESR question as ‘which definition is best’, we agree to the second paragraph of the definition of Trading Capacity in Annex B.

Question 17.5
As explained under ‘General’ we do not understand why client information should be reported under this Directive. Even if we would be willing to be report client information, this would only be possible with extreme high investments.

Besides legal impediments on a national level, we are not willing to do such investments bearing in mind that the Directive does not require us to report the client information.

Question 17.6
In line with the standards for Clearing & Settlement, we prefer one technical communication tool between the investment firm and the home competent authority, based on ISO 150222 standards. If investments firms have standardised reporting obligations, this may also be profitable for the exchange of information between competent authorities.

Annex 14
Section IV - Cooperation and Enforcement

Obligation to cooperate (article 56 lid 2) (pages 119-124)

Q 18.1:
The first question is why the factors listed are limited to regulated markets and why aren't they applicable for MTF's? The outlined situations cover the most probable situations of remote access/membership arrangements by the regulated market in a host Member State. However we believe that also situations in which securities of issuers are traded but not listed should be covered. Furthermore regarding situation c. "The use and operation in the host Member State of a platform/system and/or procedures that are integrated in or shared with the ones the regulated market uses and operates in the home Member State"; we are curious whether the possibility to use trading-screens (eg. Nasdaq-Europe) in a host-country is covered.

Q 18.2:
In factor d of paragraph 22 it might be more appropriate to make use of a certain percentage of investors and the value of their holdings. This in the light of the recent sequels of (re)issues of securities which probably have resulted in a substantial increase of securities and investors. Also we think that the factors listed in paragraph 22 and 23 should be assessed in relation with other arrangements of the regulated market in other (Member) States. In case a large regulated market has more arrangements in several (Member) States, it's behaviour and decisions will have a more significant impact on the European financial markets.

Q 18.3:
We believe that the factor of the status of the economy is automatically a part of every business decision and consequently (but on a different level) also of the supervisors and regulators. However: regulators and supervisors should not try to take the place of the Board of Directors.

Annex 15
Section IV – Cooperation and Enforcement

Cooperation and Exchange of Information (article 58) (pages 125-139)

General observation
It could be questioned whether it is appropriate to include Level 3 recommendations in this CESR's advice that should be limited Level 2. Double reporting by the remote member should in any case be precluded.

Specific remarks

1. At the end of paragraph 29 of the Draft Level 2 advice it could be questioned whether 'immediately' has the same meaning as 'without delay'' .

2. In paragraph 30 of the Draft Level 2 advice it should be clarified by whom (ie. the competent authority that erroneously received the transaction report) the transactions reports should be supplied to the competent authority of the most relevant market in terms of liquidity.

3. On the questions 19.1, 19.2 and 19.3 we have no comments. With regard to question 19.4 one could wonder whether it is appropriate to include Level 3 recommendations in this CESR's advice that should be limited Level 2.

4. With regard to the procedures for the routing of transaction reports by remote members as described in paragraph 51 of the Level 3 recommendations, it is important to stress that double reporting by the remote member should be precluded in any case.

5. In response to question 1 to Level 3 recommendations it is noted this issue can be solved automatically by granting adequate transitional provisions to intermediaries/investment firms.

6. The advantages of a common data base could be inter alia timeliness and harmonisation of the format of the information. The disadvantages of a common data base will be amongst others that it will be difficult to safeguard sufficient data safety, especially the confidentiality of the data. With due regard to the disadvantages set forth above it is recommended to make use of a common data base only in very restricted circumstances, in which the nature of the information may be deemed routine. No (strong) opinion is expressed whether a common data base should be created at Level 2 or Level 3.
   (Question 2 to Level 3 recommendations).

7. Finally, with regard to your questions raised under 3 to Level 3 recommendations as to the possibility of a mediation mechanism we refer to the responses of the Dutch Bankers Association and the European Banking Federation to the earlier CESR's consultation on CESR's role at level 3 of the Lamfalussy process (CESR/04-104b).

CESR could mediate in case interpretations of legislation differ in case of cross border activities, as long as the aim of this mediation is a consistent interpretation by local regulators to maintain the level playing field. Mediation should not involve conflicts between a regulated party and a regulator and should not interfere with the right of the regulated party to seek recourse to legal remedies.

Annex 16

Comments of the Netherlands Bankers Association on the Basel Consultative Document The Compliance function in banks

The issuance of this paper by the Basel Committee on Banking Supervision (The Committee) with general principles regarding the compliance function is a good initiative to harmonize differences that exist across the banking community. The paper is intended to serve as basic guidance for banks on compliance in banking organisations. This high level guidance is appreciated, because it provides banks the flexibility that's needed to effectively and efficiently organise their compliance functions.

Other banking associations and individual banks across the globe will probably comment on this paper. We would like to invite the Committee to publish these comments on the BIS website. This would provide the banking community with an opportunity to learn from the other comments.

After this paper is finalised, it is up to the individual countries to implement it. We would be interested to learn what the Committee's view is on this implementation: what will the Basel Committee expect from the individual countries on the way this paper must be implemented, what timelines are anticipated, what would the legal status of this paper be?

The following comments on the consultative document may be offered:

1. Paragraph 4 mentions two key principles. Paragraph 5 states, inter alia, that the board of directors and senior management should promote an organisational culture which establishes through both actions and words the expectation of compliance by all employees with laws, rules and standards when conducting business with the bank. With respect to the last mentioned statement, we suggest to add a third key principle: management commitment with regards to compliance.

2. Paragraph 9 states that the principles in the paper apply to banks, banking groups and to holding companies whose subsidiaries are predominantly banks. Other financial institutions, like brokers, investment firms, mutual funds, insurance companies and pension funds usually also have a compliance function as per legislation applicable to them. The scope of compliance and the responsibilities of the compliance officer in the last mentioned financial institutions sometimes differ from those in banks. The paper does not touch this subject. These differences may lead to problems for large financial conglomerates that may house all of the above-mentioned flavours of financial institutions. Coordination with securities and insurance regulators is requested.

Holding companies sometimes don't have a separate compliance function, but use the compliance function in the bank. We assume that the Committee does not intend to require a compliance function in a holding company where a compliance function in the bank is already present, or vice versa.

3. In paragraph 10 (and paragraph 1), Compliance risk is defined as ' the risk of legal or regulatory sanctions, financial loss, or loss to reputation a bank may suffer as a result of its failure to comply with all applicable laws, regulations, codes of conduct and standards of good practice'. Although labour laws, tax laws and safety regulations are applicable and relevant to the business activities of the bank, these laws and regulations are usually not considered part of the scope of compliance. In other words, the scope of the definition of the compliance function and compliance risk is too broadly defined.

   We suggest to limit the scope of the definition of compliance risk and compliance function. As an alternative, we suggest the following definition of the Compliance function that mentions an explicit relation to the integrity of the institution:
   'An independent function within the organisation, aimed at the furthering and supervision of the observation of such laws, rules and standards that are relevant to the integrity, and in connection with this, the reputation of the institution'. It is then up to each individual bank to further defining the scope of compliance.

4. Paragraph 11 mentions some applicable laws, rules and standards. Most of the mentioned topics are usually considered part of the scope of compliance. However, consumer credit is not. Privacy and Data protection would be disputable to some.

   We suggest leaving these topics out of the definition of the compliance function or merely mention them as examples. As a minimum, the following topics could be mentioned: Conduct of Business rules, Anti-Money Laundering, Market Abuse and Sanctions policies. As said, next to the approach each individual regulator has adopted, it is up to the individual banks to further define the scope of compliance.

5. Principle 1 states that the board (of directors) should, at least once a year, review the bank's compliance policy and its ongoing implementation to assess the extent to which the bank is managing its compliance risk effectively. A similar wording is used for senior management in paragraph 16. This proposed task of the board of directors and senior management is rather broadly defined and would, if taken literally, entail a lot of work. Reviewing/auditing proper implementation of laws, rules and standards is a task of the internal audit function, which also reports to the board of directors. See also principle 10.

   We propose a high level assessment of the bank's compliance policies by the board of directors and senior management and an independent review/audit of bank's compliance procedures and report to the board of directors by the bank's internal audit function.

6. Paragraph 18, first bullet point, mentions measures to ensure the independence of the compliance function from the business activities of the bank. We propose to change the word 'business' into 'commercial' for a number of reasons. In practice, compliance frequently operates close to the business, in order to know what is going on and to have an open communication with the business. In the Anglo-Saxon world, the term 'Line of business compliance (officer)' is frequently used. Furthermore, compliance to applicable laws, rules and regulations is also a responsibility of the business itself. In addition, compliance officers usually have a hierarchical line to management and a functional line to the compliance officer at the next level. It would be helpful if this paper allowed for this. We suggest rephrasing the meaning of the word 'independent' as follows: compliance officers must be sufficiently independent to be able to perform their duties objectively.

7. Paragraph 22 proposes that compensation schemes for compliance function staff to be independent on the financial performance of the various business lines. In practice, the compensation of compliance officers could also consist of a bonus that is dependent of the financial performance of the bank as a whole. As no problems are experienced with regard to this nor anticipated, we suggest to add the word 'materially' to the last sentence of that paragraph: '…should not be materially dependent on the financial performance of the various business lines'.

8. One of the responsibilities of the compliance function, according to paragraph 26 is assessing the appropriateness of internal procedures and guidelines etc. We propose to limit this to <u>compliance</u> procedures and guidelines.

9. Paragraph 30 states that the supervisor of the bank to be informed when the head of compliance leaves that position. We assume that the appointment of a (new) head of compliance also needs to be reported to the regulator. Furthermore, there may be more than one Head of Compliance in banks. It should be made more specific what has to be reported (e.g. Group Compliance Officer for larger banks).

10. The professional qualities of compliance staff would include a sound understanding of the applicable laws, rules and standards and their practical impact on the bank's operations (paragraph 31). Again, this should be limited to applicable laws, rules and standards with respect to the compliance function.

11. Paragraph 36 states that the compliance function and the audit function should be separate, to ensure that the activities of the compliance function are subject to independent review. Audit is also within the scope of compliance; there is a reciprocity between compliance and audit.

12. Principle 11 allows for outsourcing of specific tasks of the compliance function. As compliance is rightly considered as a core risk management activity, it should be made more explicit that the compliance function may not be outsourced. Only certain tasks of the compliance function may be outsourced in exceptional circumstances (e.g. if it is financially not realizable for bank (holdings) to maintain a separate compliance function).