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By email to CESR at www.cesr-eu.org

Dear Sirs

Response to CESR on Draft Technical Advice on Possible Implementing Measures of the Directive on Markets in Financial Instruments (MiFID) – 2nd set of mandates 2nd consultation paper

The Association of Private Client Investment Managers and Stockbrokers (APCIMS) is the organisation that represents those firms who act for the private investor and who offer them services that range from no advice or 'execution only' trading through to portfolio management for the high net worth individual. Our 207 member firms operate on more than 500 sites in the UK, Ireland, Isle of Man and Channel Islands and in other European countries as well. APCIMS members advise upon and manage securities of c.€400 billion for the private investor and undertake some 13 million trades for them annually.

We are grateful for the opportunity to respond to consultation paper **ref CESR/05~164.**

Chapter 1

Q.1 **The drafting needs to be greatly clarified if this is to be the subject of an EU-wide regulation (as to which we are unclear what the case is for it).**

These provisions reflect existing rules in the UK for investment firms. However in the context of MiFID, we consider the language needs to be clarified. The use of the term "suitable", which is taken from the FSA Handbook COB 7.9, is confusing as suitability is a different technical term in MiFID. Is CESR suggesting that even where a firm has a duty to carry out an appropriateness test under Art 19.5 (and gather information for it) then different information must be gathered and a different test carried out for assessing the loan provision? The text does appear to suggest that suitability is different in Box 1 compared to Art 19.5, since it is said that professionals are deemed to have sufficient knowledge and experience, though no positive assistance is given.

It is important not to trespass on the proper concerns of prudential regulation. Firms should be free to manage these risks appropriately, ensuring that they calculate their capital requirements accordingly.

Q.2 CESR must resist being over-prescriptive concerning the information to be sought and the present formulation fails in that regard. It is preferable to ensure the test to be applied is clearly stated than to list what information is always going to be relevant.

Chapter 2

Q.1 and 2 **For the reasons set out in your paper and by us and others previously, we remain of the firm view that investment advice should be restricted to specific recommendations.**

Chapter 3

Best execution

We welcome the broad thrust of your advice. The application of principles through Article 19 to those firms, who carry out portfolio management for private clients, so as to prevent sterile legal arguments over vires is appropriate.

We do feel that CESR is still over-prescriptive, despite its best efforts, when it advises upon information provision to clients. Most retail clients will not be assisted by receiving more information than Level 1 explicitly demands and more substantively those clients who have chosen to pay for a full discretionary portfolio management service will often do so because they do not want to be concerned with such issues. To inform a client that an execution venue has been changed when the firm has full discretion seems to misunderstand quite fundamentally what the client wants and does not want.

Q.30. b) – the introduction of a discussion about unbundling and softing at this late stage with little analysis in the text risks less than optimal advice being given. CESR will note the FSA's work in this field which identifies how complex this subject can become and how difficult it is to avoid unintended effects. If CESR is to give an opinion on these areas, we would urge it to reflect over a longer period than the deadline for the Commission permits.

Q.56 – naturally there are times when there is effectively only one execution venue; specialist products such as CFDs or other OTC contracts are obvious examples. Additionally it is important that CESR does not prevent firms who are market makers from executing all orders which it receives from its clients – i.e. operating as the sole execution venue for its clients.

Qs 82 and 87 – execution venues are in business – they spend a lot of time and money ensuring our member firms know what services they offer. CESR does not need to intervene in such issues.

Para 101 – Our member firms remain concerned from the latest paper that CESR's proposal would result in their having to inform clients every time they add or delete an execution venue from their list. As you are aware, this would involve some of our firms sending out over a million letters.

Q.110 – Whether or not information is only provided upon request, CESR's proposal will require the implementation of new systems for many of the small firms. **This provision appears to have no regard to the size of firm or the amount of business it transacts.** In any event as many customers will not want this information, then at the very least providing it only on request should be the default position for portfolio managers.

Q.115 – this will become over-prescriptive and could give rise to confusing data. Some errors are in favour of the client; others are not. All our firms have complaints handling and the UK has a compensation scheme. The UK also has a financial ombudsman service. Firms are obliged to inform clients about all of these. Where the firms make an error on an execution they correct it – what is the point of telling a client more than this?

Q.126 – Paras 124 and 127 proceed on a legal basis we do not agree with. **We consider CESR has read part of article 21.3 incorrectly.**
"Member States shall require that, where the order execution policy provides for the possibility that client orders may be executed outside a regulated market or an MTF, the investment firm shall, in particular, inform its clients about this possibility. Member States shall require that investment firms obtain the prior express consent of their clients before proceeding to execute their orders outside a regulated market or an MTF. Investment firms may obtain this consent either in the form of a general agreement or in respect of individual transactions."
The reference to executing outside a RM is predicated by that being a **possibility;** in our view, a purposive reading supports the view that this provision only applies to instruments that could be executed on a RM or MTF. We consider that the application of this rule to, for example, AIM shares serves no policy purpose and is not required by the Level 1 text.

Q.129 – the best execution policy will state what the firm does and when and if it gives weighting to a variety of factors. It is over-prescriptive to start making rules to "highlight" particular factors. The communication must be fair and not misleading and comply with the requirements of Art 21(3) as fleshed out in Box 4 (though we disagree with part of that Box).

Box 4 – We agree the broad content of this Box save for:

i. We disagree with CESR giving legal views of Level 1 effects by recital in the introduction to the sub-clauses
ii. We disagree with the need to inform clients about the matters listed under (b). Firms have obligations under Article 13 to have processes; informing clients about the processes listed in (b) serves no purpose. FSA may have the skills to adjudge the adequacy of processes of that kind; a client will not and likely would have no interest in doing so.

Chapter 4
Pre-trade Transparency requirements for Regulated Markets (Article 44), MTFs (Article 29) and Systematic Internalisers (Article 27)

Question 2.1 and Box 2 Does the proposed approach to identifying liquid shares establish a sound methodological approach in the context of Article 27?

We believe that the key here is CESR's own statement at paragraph 21, that "Market structures seem to be so different that allowing some flexibility would meet the goal of Article 27". We have to say that we are not convinced that sufficient analysis has yet been carried out to validate the approach taken to identifying liquid shares. Obviously in asking this question, CESR itself is not clear whether or why the approach taken would represent liquidity, and CESR acknowledged at its open hearing in Paris on 23 March 2005 that there had been a real lack of quality data. We therefore must urge that further work in this area is completed before CESR finalises its proposals. There does appear to be a genuine risk that this proposal in trying to define liquidity for the purposes of Article 27 is not yet correct, and if implemented in its current structure it could lead to unintended and possibly damaging effects on what are currently healthy equity markets.

Questions 3.1 – 3.12 and Box 3
On a general point, we have found there to be too great a level of detail in this draft advice. We were nevertheless pleased to see CESR's recognition of the key difference between internalisers and regulated markets (**paragraph 69**), although the actual advice does not reflect this.

We would welcome a clarification in **paragraph 84 a.** that recognises that it applies to negotiated trades that are at or within the relevant spread. The point is that merely taking the best bid/offer may not reflect at all the volume available and relative size of the negotiated trade. If an index arbitrageur, or black box, is putting up a bid in only 400 shares, the true spread available for a negotiated trade in 5,000 shares may be very different.

We found the **last paragraph of 84** (under points a. – c.) to be illogical i.e. proposing that the waiver of pre-trade transparency requirements should not be available to internalisers for transactions smaller than SMS, except where the transaction involves the crossing of two client orders. We believe that this goes beyond CESR's mandate, is at variance with the level 1 text and it represents discrimination against the clients of internalisers – particularly as your own text in para 42 at page 49 makes the point that negotiated trades are sometimes necessary to achieve best execution. We recommend that this should be deleted. The needs of the client for best execution should drive the choice of venue.

On the question of size customarily undertaken by a retail investor (**para 105**) we note that CESR has proposed a figure of €7,500, but has provided no information on how this has been reached. Our view is that this figure is too high, and based on information provided by our firms; we recommend that a figure of €5,000 is more realistic and sensible.

Yours faithfully

Guy Sears, Head of Implementation and Policy