COMMENTS BY THE ASOCIACIÓN ESPAÑOLA DE BANCA (AEB) TO THE CESR DOCUMENT CONCERNING POSSIBLE IMPLEMENTATION MEASURES OF THE DIRECTIVE 2004/39/EC ON MARKETS IN FINANCIAL INSTRUMENTS
(First set of mandates, CESR/04-603b)

The general impression taken from the reference document is favourable, because all different issues to which it refers to are dealt with in a complete and precise manner.

However, it has drawn our attention, the great detail in which some issues are dealt with. Such great detail may be appropriate in analytical terms but it may not be so for Level 2 measures. If in general, excessive detailed regulation is not advisable, some of the issues covered in the document seem to demand, due to its nature, to also preserve a general approach in Level 2, even though the degree of precision of Level 2 is somewhat greater than in level 1 (we think, in particular, of the function of regulatory compliance, outsourcing, conflict of interests and separation of areas …).

Equally, and as a general observation, one must emphasize the importance of the fact that the harmonisation level should be high in those areas that are particularly sensitive from the perspective of the desirable equality in the competition conditions amongst markets and investment services' providers (level playing field); for example, in everything relating to the treatment of conflicts of interest and separation of areas, and in the scope of the operations reporting obligations.

In relation to the various sections of the document, the following concerns are raised:

1. Independence of compliance.

The functional and flexible approach of the document on this point deserves positive valuation. Each firm should be allowed to organise its compliance function as it considers most appropriate according to its characteristics and culture (not only according to its dimension), even with the possibility of resorting, to a greater or lesser extent, to outsourcing.

2. Burden of proof and record keeping.

It is considered to be inadequate that in level 2 the principle is established that the burden of proof (against the customers or the supervisor) corresponds to the investment services company. The European and national rules relating to the provision of investment services must be limited to regulate this matter, without worsening the condition in the area of legal guarantees of the companies that provide them with respect to those that provide other types of services.

In this respect, one has to take into consideration that the Member States' regime on the issue of proof usually incorporates rules that have a tendency to facilitate the evidence for those that are objectively in a worse situation to easily prove.

In relation to the possibility of establishing the duty to record telephone orders, this is a system that is already established in certain countries, including Spain (Circular 3/1993 of the CNMV). But such obligation implies disproportionate costs and complications, particularly when it is applied to order reception points like ordinary bank branches. In any event, the important issue is that the regime on this point be totally harmonised for the purpose of the desirable level playing field.

And in relation to the period during which the recording must be kept, the important issue is whether there is or is not the obligation to record and not, therefore, if the tapes must be kept for six or twelve months.

3. Outsourcing of investment services.

On this issue the content of the document is positively assessed. The approach must be as flexible as possible, so that each firm can organize itself appropriately.

4. Conflicts of interest and segregations of areas of business.

Also deserving a favourable opinion is the flexible approach of the document on this matter, particularly the reference to there being recognition of a certain degree of discretion in the way that each company deals with the management of conflicts of interest and the indication that the setting up of barriers and separations is not the only acceptable method.

In any case, a high degree of harmonisation is very important on this issue. What is not acceptable is that in some Member states the level of detail and organization requirements is greater than in others.

5. Investment research.

Doubts arise on the need to differentiate between two types of research. Probably, the concept of research should be a single one and maybe more restricted, leaving more scope to the "marketing communications".

6. Reporting of financial transactions.

Deserving a positive evaluation is also that the document limits the scope of reporting to securities and financial instruments negotiable on regulated markets (obviously, as the Directive indicates both if the transactions are performed within the regulated market itself or if they take place through an MTF or otherwise outside the regulated market).

In all other respects, one must insist the level of harmonisation on this matter be particularly demanding. It can not be acceptable that the differences on the level and scope of such important reporting remain the same as nowadays. For example, it is not acceptable that outside Spain transactions on securities listed on the Spanish stock market are taking place without any type of reporting, while those that are performed in Spain through Spanish institutions are subject to reporting simultaneously to their performance (when they pass by Stock Exchange mechanisms) or within the same day (when performed outside the Stock Exchange).

7. Most relevant market in terms of liquidity.

In the interest of the desirable simplicity, the "proxy-based approach" proposed in the document seems appropriate in order to decide the relevant market in terms of liquidity (taking into account circumstances like the market in which the admission to trade was first produced or the domicile of the issuer). In any event, it is essentially a problem of coordination between supervisory bodies.

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