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Wien, 20. September 2004

CESR´s Draft Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments

Dear Mr. Demarigny,

VÖIG[1] welcomes the opportunity to comment on CESR´s Consultation Paper on draft technical advice on the implementing measures concerning several aspects of the Markets in Financial Instruments Directive 2004/39/EC (MiFiD).

This Directive has always been considered a key element of the Commission's Financial Services Action Plan (FSAP) to complete the creation of a single market for financial services whilst providing for the necessary degree of harmonisation in order to offer investors a high level of protection and to allow investment firms to provide services throughout the Community. For a better understanding of the meaning of a "single market for financial services", we refer to the Commission's Communication on "Financial Services: Building a Framework for Action"[2] (which became the fore-runner to the Financial Services Action Plan of 1999), where we can read the following: "*To ensure a level playing field for financial operators is one of the key elements of an integrated single market for financial services*" and elsewhere in the same paper: "*The Commission will strive to achieve greater policy coherence whilst enhancing transparency for consumers and effective competition*".

Thus, achieving a level playing field for financial services, greater policy coherence, enhanced transparency for consumers and effective competition constitute the benchmarks against which to measure CESR's draft Level 2 Advice.

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[1] VÖIG Vereinigung österreichischer Investmentgesellschaften represents the interests of the Austrian investment fund industry.

[2] COM(1998) 625 of 28 October 1998.

The adoption of MiFiD undoubtedly represents a significant step forward towards a single market for financial services and the proposed Level 2 regulation can become a further important step in this direction if it is done correctly, in particular in setting European standards in the field of distribution with respect to transparency, marketing communication and advice.

For VÖIG the latter undertaking is of key importance as it is a potentially important building block for a single market for investment management with a double potential impact:

- Firstly, through the European passport for investment management firms that offer individual portfolio management services; and
- Secondly, by reason of the significant numbers of units/shares of investment funds that are distributed through intermediaries, who in the future will be subject to the MiFiD (as investment advice is no longer considered an "ancillary" activity).

GENERAL COMMENTS

on the conditions for a positive impact on the single market from Level 2 measures

To take the single market forward with respect to investment management, VÖIG believes that:

- Rules for investment management companies operating under both directives, UCITS and MIFiD, must be consistent;
- Level 2 measures on financial instruments/products must not distort competition between UCITS and other investment/savings products, but should create a level playing field;
- Level 2 measures should not be too detailed, but should leave room for national specificities and industry self-regulation.

Consistent rules for investment management companies

Already in the response to the Call for Evidence with respect to the Commission's preliminary mandate in January of this year[3], FEFSI[4] underlined that:

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3 CESR/04-021 of 20 January 2004.

4 FEFSI, the European Fund and Asset Management Association, represents the interests of the European investment management industry (collective and individual portfolio management). Through its member associations from 19 EU Member States, Liechtenstein, Norway, Switzerland and Turkey, FEFSI represents the European asset and fund management industry, which counts some 41,100 investment funds with EUR 4.7 trillion in net assets under management. For more information, please visit www.fefsi.org.

- The rules, which will be drafted for investment firms, should take into consideration the specificities of portfolio management as a particular investment service. Portfolio management as an investment service is a fiduciary activity representing the “buy side” of the market.

  In fact the difficulty of not having a single “Investment Management” Directive, but seeing asset management lumped together with other activities that frankly have little in common with each other and fund management subject to an entirely separate directive becomes very clear in this context. Certainly with respect to the draft Level 2 Advice the European investment management industry frequently feels ill at ease with some elements of the proposed provisions. Not because the industry is shy of regulation but because the provisions were not drafted with asset management activities foremost in mind and thus the consequences end up being questionable or meaningless. A certainty in most cases, however, is the incurrence of additional costs making the services incrementally less attractive and competitive to clients;

- That adequate attention should be paid to achieving a high level of consistency between the implementing measures of the ISD2/FIM/MiFiD – as far as they are relevant for individual portfolio management - and regulation under the UCITS Directive, given the strong similarity between collective and individual portfolio management and the fact that many asset managers are also fund managers.

Fair competition between the various investment instruments

Already the Directive itself falls short of achieving fully its goal of creating a level playing field of financial operators as one of the most important players - the life insurance sector - is not covered and that – in the field of distribution and advice - a specific Directive exists that covers the distribution of life insurance products, which remains far below MiFiD and in particular far below what CESR is proposing with respect to mediation of financial products under the MiFiD[5&6]. This has led some European regulators to seek to exclude the distribution of investment funds from the application field of the ISD because their inclusion would have exacerbated the un-level playing field.

This is why CESR’s rules on market communication, reporting and advice must be comparable, wherever possible, for all comparable financial instruments/products distributed by a firm subject to the MiFiD and thus provide for an equal treatment of all financial products at the point of sale. At a later stage, CESR should also encourage the Commission and the Committee of European Insurance and Occupational Pension Supervisors (CEIOPS) to consider aligning the Insurance Mediation Directive to the regime of the MiFiD.

No inappropriate “detailism”

Another concern, that FEFSI already underlined in their response to the Call for Evidence and that can only be repeated, is that CESR should contemplate the possibility that technical advice can also consist of recommending that no detailed rules be drafted, or that some issues are best left to the market place or participants to agree on – with or without the option of European regulators endorsing industry standards where feasible.

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5 Directive 2002/92/EC on insurance mediation.

6 Not to forget second pillar pension, where a level playing field between products covered by Directive .....

and other products serving for occupational pension does not exist neither

Finding ourselves now confronted with the draft technical advice in response to the Commission's mandate, VÖIG can only repeat what FEFSI said 6 months ago in emphasising that overly detailed and prescriptive Level 2 rules necessarily lead to "over-regulation". From our point of view, Level 2 rules should be principle-based measures that only when necessary and/or where absence of a more explicit nature to the measures may result in a distortion of competitive forces should details be elaborated.

We therefore recall the Commission's statement included in the formal request for technical advice of 29 June 2004[7] that "*particular attention should be paid of the level of detail required by market participants to be included in level 2 legislation"*. We urge CESR to take this qualification to heart, esp. as the Consultation Paper on which we are now commenting is, indeed, anything other than broad risk-oriented principles-based measures that can be absorbed into the diverse national contexts and regulatory environments with sufficient clarity and legal certainty.

From our point of view, it would be key to analyse better what degree of details is necessary to create a level playing field on the one hand and on the other what degree of "openness" can be left to national regulators and industry self regulation without cross-border providers being confronted with a range of national differences.

Lastly, we believe it extremely important that the CESR's technical advice takes into account the nature of the client who is to benefit from the investor protection envisaged. The levels of protection should vary quite considerably depending on the professional or private/retail nature of the (potential) clients, whereby it is imperative that the former benefit from a lighter regime than the latter. To date, we believe these distinctions have not been made very clearly or consistently.

We would like to underline that the structure of MiFiD covering a number of very different services and service providers should lead to the recognition that detailed regulation does not necessarily lead to greater clarity. In fact, the CESR draft is often unclear in respect to the applicability of certain rules. In particular it is often not clear whether certain rules are applicable for institutional or retail business or for both.

Before entering into more detail on some of these issues, a final more general comment must be made concerning VÖIG members´ responsibility for distribution. As producers of investment funds they do not fall under MiFiD. However, we are directly concerned as we have to deliver consistent product information to the distributor. Indirectly, we feel a certain responsibility as our products are distributed and errors or mistakes made at the level of distribution might have significant impact on the product or product provider image.

Last but not least the division of MiFiD Level 2 draft Advice in two "parts", this one and another concerning in particular Articles 19(1), 19(4), 22(2), 24 and 27[8], makes commenting rather difficult as certain issues in both parts are very closely linked (distribution – advice – suitability test).

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[7] CESR/04-323 of 29 June 2004.

[8] CESR/04-323 of 29 June 2004.

Specific Comments

on sections I and II of the draft Level 2 Advice

VÖIG has focused its attention on those areas that concern the Austrian investment fund managment industry directly or indirectly. Although VÖIG is appreciative of the constraints that CESR finds itself under, the period chosen for the first public consultation of CESR's draft Level 2 Advice on MiFiD has proved most unfortunate, and we wish to reserve the possibility to raise further comments in due course. Partly for the aforementioned reason and partly out of respect for the procedures that CESR feels bound by, VÖIG looks forward to the second round of public consultations on these provisions. At this stage, the Austrian investment fund management industry has the following specific comments on individual sections that have grasped our attention:

- **Compliance & personal transactions** (section II.1)

This is an area where some of the provisions have been written with other (or all) types of MiFiD services in mind and constitutes an awkward fit for the asset management business. We appreciate that the draft technical advice is not to be perceived as a legal text (as suggested in point 2 of your introduction) and the use of "where appropriate and/or relevant" allows for some flexibility in interpretation, but the subjective room of appraisal still leaves us concerned, as it is not clear on whose determination the appropriateness will fall. It would be welcomed if applicability to the asset management business would be reviewed carefully as frequently the implementation of the requirements will bring additional resources/costs with them without the benefits being relevant or meaningful to the industry's clients.

We agree that an investment manager must establish and maintain a compliance function, but we also believe that the qualification of that function being "*permanent and effective*" is somewhat invasive and excessive as it interferes with senior management's discretionary powers to decide over how best to implement the respective duty. Certainly among smaller investment firms the requirement in its current form will be disproportionately onerous, but even within a pan-European group structure this will become onerous as in every country a similar compliance structure would be required. It must remain possible to outsource the function or share the function within a group structure. We believe the independence of the compliance function is decisive and thus we welcome the inclusion of this qualification irrespective of the nature or scale of the business of an investment firm (*cf. CESR Question 1.1*).

We agree with the provision that the remuneration of the compliance function should safeguard its independence and should therefore not be linked to the financial performance (of the business lines) of the investment firm. The compliance function, however, can never be completely divorced from the performance of the firm as a whole and thus we would welcome the insertion of a qualification such as "…*not directly linked to the financial performance of*…".

It was also remarked that the draft technical advice speaks of a compliance policy (*e.g. in II.1 sub 3(a)*) as if it were a single policy, whereas in practice in the asset management business it usually consists of a collection of policies and the requirements described under (a) to (e) of section II.1 sub 3 do not give rise to concern, but should be given the status of guidance rather than that of legal requirements as points II.1 sub 1 and 2 contain the key requirements: responsibility of senior management and the installation of an independent compliance function. Once again broadly speaking the European investment management industry does not see any fundamental problems with the requirements (a) – (e) but wonders whether this degree of detail is necessary / desirable for technical advice that in all likelihood will end up in a legally binding text. We believe this degree of detail could be left for Level 3 or industry self-regulation.

In paragraph 2 (b) investment firms are held to establish and maintain compliance policies and procedures, including the code of conduct referred to in paragraph 6, that are designed to ensure compliance with the investment firm's obligations under the Directive. It remains unclear what CESR means by the term "compliance policy", especially when it comes to separation from the compliance procedures and the code of conduct. We propose to make clear that this "compliance policy" lays down the high level principles which need not be a separate set of rules in addition to the compliance procedures.

A further concern that was raised is that the detailed and prescriptive nature of the present draft Level 2 advice on compliance may end up overlapping or duplicating with duties traditionally within the audit function.

The on-going assessment and monitoring of the adequacy and effectiveness of the firm's policies and procedures are understood to refer to those of the compliance function and we seek to have such a qualification as "…*the investment firm's <u>compliance</u> policies and procedures…*" inserted. Moreover, we strongly object to the compliance function being given enforcement competence as is suggested by the final sentence of II.1 sub 4(a). Senior management must at all times retain the responsibility to act or take the necessary remedial steps. In order to do so it is essential that the compliance function reports to senior management and thereafter reviews what steps may been taken, but it should never itself have enforcement competences. We therefore suggest to have the final sentence of II.1 sub 4(a) read as follows: "…*and <u>reports whether</u> the appropriate measures <u>have been</u> taken in the event of non-compliance;*". Otherwise, this rule would lead to unnecessary administrative burden for investment firms which already have implemented effective compliance supervision (e.g. by risk management, legal, controlling, data protection, etc.).

Likewise, the investment management industry feels that a statutory obligation to report to the internal and/or external auditors on the compliance monitoring and assessment is too much of a good thing. Internal and/or external auditors have full access of all documents in the fulfilment of their duties and the specific formal reporting duty to auditors is excessive. Moreover, any such formal reporting requirement could perversely dilute the responsibility of senior management.

Item II.1 sub 4(d), from the perspective of the asset management industry, adds little and hurts none, but forms an illustration of our industry's reservations over the utility of having such details enshrined in Level 2 Advice.

Item II.1 sub 5 is again, from the perspective of the asset management industry, very detailed and although perfectly sensible in itself the question has arisen whether this degree of prescriptive detail is truly necessary in Level 2 Advice. Moreover, the regular verification of complaints handling would normally constitute an element of the compliance function and thus a separate requirement forms a duplication of tasks. From the legal point of view CESR's recommendations on complaints handling go far beyond the legal basis given by the MiFID (Article 13 (2)). In particular, we see no legal basis for information requirements on out-of-court complaints and regress mechanisms or implementing compensation policies. CESR should confine itself to ask for record keeping of complaints and their handling.

VÖIG suggests that this provision could be reduced to a simpler formulation requiring investment firms to have complaints-handling procedures that operate effectively and in a timely manner irrespective of the nature of the client.

In the matter of a code of conduct (under II.1 sub 6) the definition of relevant persons (as set out in Section I – Definitions) is, from the asset management point of view, drawn too widely. It would be preferable to distinguish between two categories of personnel, whereby an investment firm's officers and senior staff members should fall under a code of conduct with particular emphasis on integrity standards and the management of conflict of interest situations whilst the remainder of staff and/or other agents would fall under work/staff regulations.

According to the establishment of a code of conduct There is no clear distinction between "compliance policy" on the one hand and "code of conduct" on the other hand. In order to avoid double regulation, clear definitions of these terms are recommended.

On the issue of personal transactions, the proposed regime exceeds considerably what is customary in the asset management industry in the sense that the draft Advice requires the notifications and ensuing verifications are made on a permanent or immediate basis. This approach, moreover, exceeds the monthly verification requirement that the SEC is newly imposing. Furthermore, the fact that an investment firm must "ensure" that the requirements are abided by appears unrealistic as the procedures operate with all the shortcomings of an "honesty" system. The investment firm can set out its policy to personal aspects and obliges its staff to abide by them, but ultimately it depends on the veracity of the notification or whether a notification is made by an individual. As such the compunction on investment firms to <u>ensure</u> various elements is far too prescriptive. It can never be more than a best effort obligation that rests on the firms and its senior management to install appropriate control mechanisms for those cases where a potentially relevant conflict of interest exists.

VÖIG urges CESR to emphasise II.1 sub 7(a) in its draft Advice and to leave points (b) to (e) as guidance without the qualification that a firms must "ensure" a concrete result, which is mission impossible for any investment firm, be they asset manager or other.

With regard to the possibility to outsource investment services and activities, the draft Advice under II.1 sub 9 is pretty impenetrable. The Austrian investment fund management industry emphasises that outsourcing should remain possible to the widest degree. In other words, every activity should in principle be susceptible to outsourcing, incl. core activities, so long and as far as the responsibility over such activities remains firmly overseen by the outsourcing entity. We consider the possibility to outsource activities essential for the creation of a single market for investment services in the sense that it must be permissible to outsource without limitations across borders within the EU (between independent entities as well as intra-group). From the asset management point of view, we are equally concerned that potentially a different regime may apply to fund management and asset management and we urge the draft Advice to maintain consistency across individual and collective investment management disciplines. In particular, the reference to §§4 and 6 to 9 of the advice on Article 13(5) MiFiD causes uncertainty whereby it appears that portfolio management would be excluded from outsourcing arrangements to avoid undue operational risk. From the point of view of the investment management industry it is essential that outsourcing of investment management must be possible.

Another key point where consistency between individual and collective investment management rules is essential, is the alignment of requirements between the MiFiD and the UCITS Directive over the existence of arrangements among supervisors as a precondition to permit outsourcing of portfolio management. The Level 2 Advice for MiFiD speaks of "…*an appropriate formal arrangement between supervisors to exchange material information…*" whilst the Level 1 UCITS Directive (Art. 5g) speaks of "…*cooperation among the supervisors being ensured…*". It strikes us that at least as far as asset management is concerned the Level 2 Advice should concur with the UCITS regime, which in our eyes constitutes an important "benchmark" as it was discussed extensively in the run-up to the recent modernisation of the UCITS Directive and is widely accepted as best practice.

In response to Question 1.3, VÖIG strongly urges CESR to retain the first alternative – the current text of CESR/FESCO Standard 127[9], which accommodates our desires most closely without undermining the effectiveness of supervision over an asset manager's core activity.

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[9] "*An investment firm may delegate the portfolio management function to another investment firm only if such delegatee firm is authorised in its home country to provide portfolio management services on an individual basis and is qualified and capable of undertaking the function in question. The mandate shall not prevent the effectiveness of supervision over the delegator, and in particular, it must not prevent the delegator from acting in the best interests of its customers. In no case the investment firm may delegate its functions to the extent that it becomes a letter box entity. Furthermore, it may so delegate to a non-EEA investment firm so*

- **Obligations related to internal systems, resources & procedures** (section II.2)

Whilst endorsing §1 of the General Principles of Section II.2 the Austrian investment fund management industry has serious misgivings about the more detailed provisions, which in the eyes of the asset management industry belong firmly within the remit of the investment firm, as it constitutes the prerogative of business to determine how to comply with the main principle that is laid out under §1. How far does item II.2.2 actually go? How much documentation will this engender? All administrative, accounting, systems and controls functions within an investment firm will need to be described in clear, transparent, formal and documented operational procedures, which constitutes a phenomenal task which undoubtedly will be difficult to adhere to for smaller and mid-size asset managers. Moreover, the pervasive extent of the provision also seriously compromises the innovative capacity of the asset management industry as for new concepts and techniques the operational procedure lags the actually development quite a bit. The draft Advice seems to leave little room for innovative trail-blazing and encourages to stick to the beaten track.

From the asset management point of view it is sufficient to have the up-dated written operational procedures communicated to those people within the firm who are affected by it and not to all throughout the investment firm as it is suggested in II.2.2(d).

We wonder why examples of certain compliance checks are given in II.2.2(e), such as hierarchical controls, cross-checking, and dual control, and not others? Is it not more sensible to speak only of "*…suitable mechanisms…*", and leave the determination of such suitability to senior management who bears the ultimate responsibility?

In conclusion VÖIG would wish to see section II.2.2 (a)-(f) receives the status of guidelines as opposed to binding rules that are overly prescriptive and cumbersome, and disproportionately so for the (numerous) smaller asset management firms.

On the risk management policy section the most important amendment that needs to be made is to qualify the risks that are aimed at. The present text refers to all risks. This cannot be, and we urge CESR to qualify this draft Advice to read "*…of all the material risks inherent…*". Surely, only those key risks that matter to the business need to be subject to the risk management policy?

Section II.2 sub 5(b) on risk tolerance levels may be useful for the other categories of investment firms, but for asset managers, who do not take any risk on their own trading book, this requirement is meaningless. For the bulk of our business it is the client who specifies his own risk tolerance level with the asset manager acting on his behalf. Consequently, we believe it necessary to qualify this provision to apply only to firms taking principal risks (e.g. by the insertion of "*for firms taking principal risks, the level of risk tolerance*…").

In section II.2 sub 6 (a) CESR states that investment firms will have to implement information technology resources to retain, store and access data. We do not think, however, that the firm should also have to make sure that this technology permits adequate search applications, since this could tempt the supervisor to demand the implementation of a certain search system. It is crucial that the competent authority is able to access and search the data, which should be reflected by the wording of the advice.

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authorised in its home country only if an appropriate formal arrangement between regulators enables them to exchange material information concerning both cross-border delegations and the delegatee."

Regarding the internal control function and additional requirements of section II.2 sub 7 and 8 VÖIG notes their interrelatedness and is unclear over the discretionary appraisal element to its application; who will determine where these provisions are "*appropriate*"? Will a threshold exist and if so who will set it? And if it does, having triggered it is the application total and immediate, or progressive? The provisions appear to have been written with a larger international brokerage firm in mind, but can it find comparable application to smaller or mid-sized asset managers?

On the whole we find the provisions have little justification for the asset management sector, as in principle the risk management policy falls under the responsibility of senior management and all references to a risk control mechanism can be found in the prospectus.

Once more, as was already raised earlier (see comments to section II.1 sub 4), a specific reporting duty to external auditors over the internal control mechanism is an unnecessary duplication, which could dilute the responsibility of senior management. Internal and/or external auditors have full access to all documents in the fulfilment of their duties and the specific formal reporting duty to auditors is excessive.

We are extremely surprised to see draft Level 2 advice formulate – under the heading additional requirements – the necessity to have the accounting records and reporting audited by external auditors. In the asset management business this is a statutory obligation that has no place in a Level 2 rule – draft or otherwise. Is this to be seen as an(other) example of over-zealousness by CESR?

The permanent training requirement of section II.2.sub 8 (c) sub (4) is to our knowledge an unprecedented example of interference in the economic discretion of the business. Surely, it belongs to senior management to determine how best to fulfil the internal control function in the most professional and efficient manner. Surely, such requirements should not find their way into Level 2 rules; supervisory authorities can recommend and coax investment firms to follow such guidelines but obliging them is excessive and inadmissible.

- **Obligation to avoid undue additional operational risk in case of outsourcing** (section II.3)

The scope of the provisions under this heading has been drawn too widely. . This scope is not covered by Article 13(5) of the MiFID. We recommend to make clear that basically the level 2 advice concerning outsourcing refers only to activities referred to in Article 13(5). The aim should focus on capturing the core competences and the ancillary services thereto, and not all operational functions as presently suggested.

As already indicated above under II.1 sub 9, the European investment management industry already has a long experience with outsourcing not only operational functions, including the investment management function, under the UCITS Directive (Art. 5g). Once more, we call for consistency between individual and collective investment management rules by aligning the requirements between the MiFiD and the UCITS Directive. From the asset management point of view, we are concerned that potentially a different regime may apply to fund management and asset management and we urge the draft Advice to maintain consistency across individual and collective investment management disciplines, whereby the UCITS regime in our eyes constitutes an important "benchmark" as it was discussed extensively in the run-up to the recent modernisation of the UCITS Directive and is widely accepted as best practice.

Moreover, we believe the list of operational functions that can be subject to outsourcing arrangements is incomplete. From the asset management perspective at least functions such as investment research, investment decisions, and investor services should be mentioned specifically. as operational functions in the asset management business should be specifically mentioned in the list of permissible Section

We request CESR to clarify the meaning of section II.3 sub 5 (c) which seems to exclude portfolio management from the scope of application of the draft Advice, whereas section II.1 sub 9 (b) poses questions over applicability of CESR's advice when the outsourcing the portfolio management function to a third country.

Lastly in this section it appears inadequate to extend the rules of this advice also to intra-group outsourcing. In particular, the reference to Paragraph 9 is too far reaching (e.g. concerning the requirement for a "comprehensive exit strategy"). The proposed level of regulation on intra-group outsourcing would lead to factitious and inefficient business structures. We urge CESR to substantially reduce the requirements for intra-group outsourcing.

- **Record keeping obligation** (section II.4)

VÖIG draws CESR's attention to the circumstance that the specific record keeping obligation under section 11.4 sub 2 (b) with regard to telephone orders should not constitute an obligation for the "buy-side" of the industry, even not those that have central trading desks. In the asset management industry such an obligation is far from commonplace today and the corresponding steps that would need to be taken to comply would be considerable and include set-up costs.

Obviously records are kept by asset managers and are available but they do not extend to cover telephone orders from clients and usually do not consist of voice recordings. The length of the holding period for such recordings also gives rise to concern as they contribute to the cost factor as the manpower and man-hours involved in retrieving and verifying recorded orders is not to be underestimated.

The provision that has taken the Austrian investment fund industry aback most consists of the surreptitious reversal of the burden of proof as proposed by the draft Level 2 Advice in II.4 sub 4. We wonder not just on a metaphysical level how to prove that one has not done something. We fail to see the necessity to introduce a provision that essentially considers an investment firm guilty until proven innocent, and therefore reject it in the strongest terms. Surely, it befalls the individual competent authorities to scrutinise the authorised entities for wrongdoings and in doing so it may have the most suspicious mindset, but to enshrine in Level 2 rules a guilty verdict as the default position seems highly questionable.

Lastly in this section, we strongly urge CESR to drop the annex entirely. The list of records that have to be maintained is far too prescriptive and inflexible to constitute part of Level 2 regulation. Moreover, the list has been compiled from a singular perspective, i.e. to collect trading records, but makes no mention of other important record keeping duties such as accounting, book-keeping, know your customer requirements, distribution records, etc… We believe that the list is arbitrary also because it is ill-suited to the asset management business, which finds a perfect illustration in the requirements referring to investment research. This provision was drafted with the "sell-side' in mind, it does not apply to the "buy-side" (asset managers). A further remark was that the list makes no references to record keeping in the context of institutional relations. On the whole VÖIG considers the list as highly inappropriate; it contains too much in certain areas and too little in others. We strongly urge CESR to drop the annex entirely, or to use it solely for guidance purposes.

- **Safeguarding of clients' assets** (section II.5)

In the interest of a maximum of consistency between investment management under the MiFiD and the UCITS Directive, we believe that assets held for retail clients should in principle be safeguarded by a third party, who should in principle fulfil the requirements laid down in the UCITS Directive (be regulated and supervised).

When a firm holds assets belonging to clients which it does not entrust to an external depositary, it must have strict rules with respect to the separation of such assets from the firm's own assets. Clients should be informed of the identity of the custodian.

Institutional clients do not need this level of protection, they often will decide themselves about the custodian. However, where this is not the case, they too should be informed of the identity of the custodian.

- **Conflicts of interest** (section II.6)

VÖIG members are affected by this issue for two reasons: directly, as conflicts of interest can arise within a management company and, indirectly, at the level of distribution.

Conflicts of interest within the management company

To dispose of sufficient organisational and administrative arrangements for identifying, preventing and managing conflicts of interest is one of the key issues for an investment manager who manages other people's money on a fiduciary basis. Insofar we agree with CESR that such a firm's policy must include detailed and specific rules and procedures in this respect.

However, we would urge CESR not to be too prescriptive on the (example of) methods to manage conflicts as these will vary widely among different business models and will evolve as business models develop over time. This is one of the cases where CESR should leave sufficient room for industry self-regulation. In this context, we would like to underline that FEFSI is currently working on a set of Recommendations in this respect based on the principle that "*The Investment Management Company shall identify areas where the interests of investors may conflict with those of other parties such as the management company, its staff, the service providers, in particular related parties, or other investors. It shall define rules and procedures for such cases to avoid, manage or disclose such conflicts of interest and to assure that the interests of investors are protected and all investors are treated equally*".

Moreover, the question has arisen as to whether the draft Level 2 Advice is consistent with the MiFiD itself [Artt. 13(3), 18(1)&(2)] when it requires a written policy in all situations. From our point of view, a written policy should only be required for those cases of serious conflicts that are insufficiently dealt with, combined with an obligation to disclose the conflicts concerned and the curative policy to the clients.

Conflicts of interest at the level of distribution

If we read section I (definitions), sub 11 (inducements) correctly, Section II.6, sub III on inducements raises an issue which is of highest importance in the field of distribution of financial products, in particular investment funds, as the term "inducements" would also include so-called "retrocessions", which are usually paid by the fund producer to the distributor. While opposing in principle any further regulation regarding product transparency (as compared to the information that fund managers must already today provide under the UCITS Directive), we very much agree with CESR's approach to leave the transparency of fees to the distributor. Indeed, these fees and costs can only be expressed with respect to a particular sales offer and to an individual client taking into account fee-defining elements such as size and type of investment, advice given etc… Finally, the distributor must have a policy with respect to retrocessions, he must explain this policy to his clients and retrocessions must not have any impact on the advice given by the distributor. However, this must be applicable in a comparable way for all financial products distributed by an intermediary under this Directive.

From the asset management point of view the requirement to disclose to the client in writing prior to the commencement of the provision of services any relevant and permitted inducements is regarded as quite unrealistic. Also, the annual disclosure of the details of any relevant inducements is viewed with scepticism from the point of view of feasibility for asset managers.

In this context, we would also like to raise another issue which does not provide for clarity with respect to CESR's Level 2 Advice: often a terminology is used which is, at least, unusual. What does e.g. "*provide advice that is not impartial*" [Section II.6 sub I §1(c)ii] mean? Does it mean "unbiased" or "neutral"? Another example from a different section is the "*substantially empty box*" [Section II.3 sub 6 in the context of outsourcing].

- **Fair, clear & not misleading information** (section II.7)

We fully agree that fair, clear and not misleading information of investors about the product/service is crucial when speaking about quality distribution and we fully support CESR's approach in this respect.

However, we would like to underline that in the field of UCITS there is already a high level of regulation, in particular concerning the so-called "Simplified Prospectus". Both, FEFSI and the Commission (together with the UCITS Contact Committee) have worked extensively on this issue and developed a number of rules (see: Commission Recommendation on some contents of the simplified prospectus[10] as well as the FEFSI Models[11]), which should be considered as the benchmark for good information of retail investors. In this context, we would like to remind CESR that for investment funds the publication of TER is now a generally accepted industry standard going far beyond what is delivered for other investment instruments/savings products.

This means that – as far as applicable – the same information which must be given to retail investors under the rules of the UCITS Directive must be provided for also with respect to any other financial product/service distributed under MiFiD. On the other hand this information should be considered as sufficient – at least with respect to UCITS - and no further information should be necessary.

- **Information to clients** (section II.8)

Also concerning the information to be given to investors with respect to the contract and the distributor/service provider, VÖIG agrees with CESR. We would, however, like to underline that the differentiation between information to be given to retail clients and to institutional clients is not always clear. Do we understand correctly that the information included in section II.8 only concerns retail clients and that information to institutional clients falls directly under Article 19(3)?

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10 Recommendation C (2002) 1541/2 of 27 April 2004 [OJ L 199 of 7 June 2004].

11 See www.fefsi.org under « FEFSI Standards » (both Model Prospectus and Users' Manual are currently being brought in line with the Commission Recommendation and transformed into best practice recommendations).

Section II.8. sub.6 lays down a multitude of information elements which have to be provided to the (potential) customer, some of which raise doubts about their usefulness or simply lack a legal basis in the MiFID (e.g. information on whether the firm is registered or on out-of-court redress mechanisms). We therefore urge CESR to thoroughly revise these requirement, keeping in mind the competing provisions of Directive 2002/65/EC on the distance marketing of consumer financial services.

Sub 8 Lit. b) asks for an estimate on the amount of fees charged by third parties. Following this provision might prove to be difficult, since the investment firm itself often has no influence on these third party charges. We therefore propose to replace this estimate by disclosure of the fact that third party charges may incur.

- **Client agreement** (section II.9)

We would like to draw CESR's attention to the fact that national regulation concerning agreements involving trading in warrants and derivatives are currently very different from country to country.

We also think that it might be appropriate to differentiate between the distribution of regulated and supervised financial products, such as UCITS, on one hand and the distribution of non-regulated products or provision other services on the other hand.

- **Reporting to clients** (section II.10)

Also with regard to section II.10 it is not always clear what must be reported to retail clients and what to institutional clients.

However, as already said above, we agree with the proposal that in the case of distribution of financial products, e.g. investment funds, the information concerning the cost of distribution must be given by the distributor.

FINAL REMARKS

Since the consultation deadline on the draft advice concerning best execution (Box 11) and market transparency (Boxes 13 and 14) has been extended to October 4, we are planning to comment on these issues at a later date.

We hope that our comments are helpful for CESR´s future work on implementing measures of the MiFiD and remain at you disposal for any indepth discussions of the issues raised.

With kind regards

VEREINIGUNG ÖSTERREICHISCHER

INVESTMENTGESELLSCHAFTEN

Wolfgang Dorten Dr. Wolfgang Sindelar