



Brussels,
MARKT/G2 D(2003)

**PROVISIONAL MANDATE TO CESR FOR TECHNICAL ADVICE ON POSSIBLE
IMPLEMENTING MEASURES CONCERNING THE FUTURE DIRECTIVE ON FINANCIAL
INSTRUMENTS MARKETS**

The present provisional mandate follows the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points, including increasing transparency. For this reason, this request for technical advice will be made available on DG Internal Market's web site once it has been sent to CESR.

This provisional mandate defines some priority areas where implementing measures are needed at the time of the entry into force of the Directive in order to ensure its effective application in the Member States. This is an initial provisional mandate; it will possibly be completed by additional provisional mandates, depending on the development of the negotiation process of the Level 1 Directive before the Council and the European Parliament.

This provisional mandate for technical advice to CESR does not cover all the articles for which the Directive may establish the need for implementing measures. Nor does it prejudice in any way the ongoing negotiations on any article in the Council and the European Parliament in the context of the co-decision procedure nor the discussions on the final split between Level 1 "principles" and Level 2 "implementing measures". In this context, therefore, this mandate does not cover articles where important differences currently exist between the Council and the European Parliament texts. The formal mandate will be sent to CESR once the directive has been adopted in the codecision procedure by the European Parliament and Council.

The numbering of the Articles in the provisional mandate follows the text of the Council common position adopted on 8.12.03. This numbering might change following negotiations in the Council and the European Parliament

1. BACKGROUND

In its conclusions in March 2000, the Lisbon European Council emphasised that in order to accelerate completion of the internal market for financial services, steps should be taken to set a tight timetable so that the Financial Services Action Plan is

implemented by 2005, including among other legislative proposals modification of the current "Investment Services Directive" (ISD).

The proposal for a Directive on Investment Services and Regulated markets¹ - the title of which was adapted during negotiations in Council to proposal for a Directive on Financial Instruments Markets" - follows the four-level approach (essential principles, implementing measures, co-operation and enforcement) proposed by the Committee of Wise Men (chaired by A. Lamfalussy) in February 2001 and endorsed in a Resolution of the Stockholm European Council in March 2001. The European Parliament agreed to this new approach in a Resolution adopted on 5 February 2002. The Commission is assisted by CESR, in its capacity as an independent advisory group, in its preparation of draft implementing measures.

Bearing in mind the deadline set by the FSAP and, in the light of the forthcoming elections of the European Parliament and the new Commission to be appointed in summer 2004, adoption of the level 1 proposal should take place at the latest in April 2004. If the deadline of 2005 is to be met, this will mean not only Directives being adopted before this deadline, but the technical implementing measures as well. This concern is of particular importance for those implementing measures without which the Directive cannot function.

This provisional mandate takes into consideration that CESR needs enough time to prepare and deliver its technical advice. Furthermore, under the Lamfalussy arrangement, the European Parliament will benefit from 3 more months, as a minimum, to review the draft implementing measures. These time constraints clearly show that CESR needs to begin work well in advance of the final adoption of the Directive.

Timely adoption of the implementing measures is even more important given that some Member States may need up to 12 more months – in the cases where the implementing measures are adopted in the form of a Directive - to have them implemented into national legislation. This implies that if the implementation period of the level 1 directive is 24 months after its entry into force (starting at the time of the publication of the directive), the implementing measures will have to be adopted and enter into force no later than 12 months following the entry into force of the level 1 Directive. Implementation of Level 1 and Level 2 measures will need to occur at the same time. This means that respecting the deadlines set in this provisional mandate is imperative.

In order to facilitate and speed up the implementation process, the Commission may, whenever justified, consider proposing the adoption of regulations for the implementation of Level 2 measures for a number of provisions which are covered by the present provisional mandate (e.g. Articles 4, 13, 19, 21, 22, 28, 29, 30, 39, 43, 44 and 58 of the draft Directive). The Stockholm European Council, the European Parliament itself and the Lamfalussy report all urged the use of regulations whenever possible. In other cases, where the Commission has less experience in the field, the form of the implementing measure will be decided at a

¹ Proposal for a Directive of the European Parliament and of the Council on Investment Services and Regulated Markets, amending Council Directive 85/611/EEC and 93/6/EC, and European Parliament and Council Directive 2000/12/EC, of 12.11.02 - COM(2002) final, 2002/0269(COD).

later stage, depending on the content of the advice that CESR is going to provide the Commission services (e.g. Articles 18 - and eventually 13 (3) - and 22 ???).

It cannot be excluded, at this stage, that a number of changes will be introduced in the ongoing negotiations on the Directive currently before the European Parliament and the Council. For instance, the European Parliament, during its second reading, might wish to introduce further amendments modifying the substance of certain key articles. In this case, this initial CESR mandate will need to be adapted and supplemented in order to reflect the changes introduced into the text during the negotiations.

2. THE PRINCIPLES THAT CESR SHOULD TAKE ACCOUNT OF

2.1. The working approach agreed between DG Internal Market and the European Securities Committee

In the meeting of the European Securities Committee of 19 September 2003, the Commission announced its intention to grant provisional mandates to CESR, provided that political agreement would be achieved on 7 October. At that meeting, it was agreed that DG Internal Market would request technical advice on certain priority issues, and that CESR should immediately start the groundwork on these to meet the 2005 deadline set by the Lisbon European Council. The present initial provisional mandate was presented in its present form in the meeting of the European Securities Committee of 18/11/03. On the working approach to be followed by CESR, it was agreed that this request should be based on the following approach:

- CESR should take account of the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- The beginning of work on certain aspects of technical advice by CESR shall not, in any way, prejudice the outcome of the discussions between the European Parliament and Council. The request for technical advice does not touch or prejudice Level 1 issues at any stage, or any point.
- CESR should start work on the basis of the texts of the Directive of the European Parliament and of the Council on markets in financial instruments being discussed in the Council and the European Parliament. The Commission representative attending meetings of CESR or its expert groups will regularly inform CESR of any developments in respect of the text of the Directive.
- CESR should provide comprehensive advice on all subject matters covered by the delegated powers included in the relevant comitology provision of the level 1 Directive as well as in the relevant Commission request included in the mandate. Given the time constraints and the variety and complexity of issues covered by this proposal for a Directive, the Commission, in order to provide guidance to CESR to define the limits of the scope of the mandate, is putting forward in an annex to this provisional mandate a list of indicative elements in respect of each request for advice included in this mandate. On the basis of the experience gained in the context of the preparation of the technical advice for the level 2 measures for the Prospectus and the Market Abuse Directives, the Commission realises that the mandates to CESR must be very clear and precise for the items that have to be

covered by CESR's future advice. This indicative guidance is not exhaustive; it could be completed by further questions or replaced by completely different ones by CESR, and it is not binding.

- Acting independently CESR will determine its own working methods, i.e. by creating expert groups depending on the content of the provisions dealt with. Nevertheless, horizontal questions should be dealt with in a way ensuring coherence between the work carried out by the various expert groups.
- CESR should address to the Commission any questions they might have concerning the clarification on the text of the draft Directive or other parts of Community legislation, which they should consider of relevance to the preparation of its technical advice.
- The Commission itself will not issue a formal mandate to CESR until the final adoption of the Directive on Financial Instruments Markets in Council and Parliament.
- The technical advice given by CESR to the Commission will not take the form of a legal text. However, CESR should follow a structured approach, i.e. provide the Commission with an "articulated" text in a language which is easily understandable and respects current legal terminology used in the field of financial securities law.
- CESR should provide advice which takes account of the different opinions expressed by the market participants (practitioners, consumers and end-users) during the various consultations. CESR will provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation. CESR should also inform, if necessary, the Commission. Particular attention should be paid of the level of detail to be included in level 2 legislation (see point 2.3).

2.2. Consultation of the public

The Stockholm European Council endorsed the Lamfalussy recommendations on consultation and transparency. In particular, it invited the Commission to make use of early, broad and systematic consultation with the institutions and all interested parties in the securities area, especially by strengthening its dialogue with consumers and market practitioners. It also stated that CESR should “*consult extensively, in an open and transparent manner, as set out in the final report of the Committee of Wise Men and should have the confidence of market participants*”.

Article 5 of the Commission Decision establishing the CESR provides that “*before transmitting its opinion to the Commission, the Committee [CESR] shall consult extensively and at the early stage with market participants, consumers and end-users in an open and transparent manner*”.

In this context, DG Internal Market draws CESR's attention to the European Parliament's Resolution on the implementation of financial services legislation of 5 February 2002 and the Commission's formal Declaration in response.

DG Internal Market will ensure that the Stockholm European Council recommendations on consultation have been fully met. In particular, it will satisfy

itself that CESR has consulted all interested parties on its technical advice in accordance with the CESR Public Statement on Consultation Practices. This provisional mandate will also be posted on DG MARKT website.

Once the Commission has received the CESR's advice, it will draw up draft legal texts to put forward to the ESC and the European Parliament. It simultaneously publishes those texts on its Internet site. If the Commission amends its draft to reflect discussions in the ESC, those amended drafts will also be made public on the website.

Interested parties will have the opportunity to comment on published draft legal texts. The Commission has set up a dedicated e-mail address (Markt-ESC@cec.eu.int), allowing all interested parties to send their contributions to the Chairman of the ESC. All such comments will in turn be made public on the same Commission website.

Interested parties will have sufficient time to participate in this exercise because the ESC will not be asked for a vote until at least three months have elapsed from the publication of initial draft implementing rules. This will also allow the European Parliament to follow the process and, if it so wishes, to make its views known.

2.3. Access to finance and investor protection

In giving its advice on possible implementing measures, CESR should take full account of two key objectives:

1. The protection of investors and market integrity by establishing harmonised requirements governing the activities of authorised intermediaries;
2. The promotion of fair, competitive, transparent, efficient and integrated financial markets as well as the promotion of competition: this goal should be furthered by implementing the ground-rules governing the negotiation and execution of transactions in financial instruments on organised trading systems and marketplaces, and by investment firms.

CESR should also pay particular attention to striking the right balance between the objective of establishing a set of harmonised conditions for the licensing and operation of investment firms and regulated markets and the need to avoid excessive intervention in respect of the management and organisation of the investment firms. The amount of detail included in the advice should be very carefully calibrated case by case; the advice should ensure clarity and legal certainty but avoid formulations which would lead to overperscriptive, excessively detailed legislation, adding undue burdens and unnecessary costs to the firms and hampering innovation in the field of financial services.

3. CESR IS INVITED TO PROVIDE ADVICE ON THE FOLLOWING PRIORITY ISSUES:

3.1. Organisational requirements (Article 13)

Article 13 establishes the organisational requirements which a person has to comply with in order to be authorised to provide investment services or to perform investment activities. These include compliance obligations, internal systems, resources and procedures obligations, outsourcing and record keeping obligations and obligations referred to the protection of client's funds.

The obligations under article 13 shall apply, in an appropriate and proportionate manner, taking into account the various risks inherent to the different services or activities, to all types of investment firms. CESR advice should be proportionate.

CESR is expected to provide a comprehensive overview of the necessary, minimal conditions that should be fulfilled by investment firms in order to ensure uniform and consistent application of the obligations provided for in this Article throughout the EU. The advice should avoid excessive detail.

3.1.1. Compliance obligations and treatment of personal transactions (article 13§2)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

- (1) the minimum basic elements that the compliance policies and procedures that an investment firm has to set up should contain as well as the principles governing the content of the policies and procedures;
- (2) the criteria for identifying the persons that are to be considered as managers and employees;
- (3) the conditions with which the content of the rules established by the investment firm governing personal transactions by managers, employees and tied agents should comply;
- (4) what is to be considered as a personal transaction for the purposes of the rule.

3.1.2. Obligations related to internal systems, resources and procedures (article 13(4) and (5) second subparagraph)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

- Establish the minimum basic criteria that competent authorities should take into account for determining when the investment firm has taken reasonable steps to ensure that:

- (1) their administrative procedures are to be considered as sound;

(2) their accounting procedures are to be considered as sound; in respect of this request CESR should take account of or refer to any relevant provision of Community Law;

(3) their internal control mechanisms are to be considered as sound;

(4) their risk assessment procedures are to be considered as effective. For the definition of the various risks, their categorizations, as well as the means for their assessment, CESR should take account of any relevant provision of Community Law as well as relevant or similar work carried out in the field of financial services in other European and International fora.

(5) their control and safeguard arrangements for information processing systems are to be considered as effective.

3. 1. 3. Obligation to avoid undue additional operational risk in case of outsourcing (Article 13§5 first subparagraph)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

(1) Determine what is meant by operational functions; establish the criteria for determining which functions are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis.

(2) Establish the conditions to which the firm is subject and the arrangements to put in place, when outsourcing its operational functions.

(3) Specify what is to be considered as outsourcing for the purposes of this rule

3. 1. 4. Record keeping obligation (article 13§6)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

(1) Establish the conditions with which the arrangements that an investment firm has to put in place in respect of its records have to comply in order to be considered as sufficient to enable the authorities to verify the investment firm's compliance with the applicable rules

(2) Specify which records are covered by this obligation

(3) Specify the period of time for keeping the records

In respect of this request CESR should take account of any relevant provision of Community Law and in particular those referring to data protection.

3. 1. 5. Protection of client's financial instruments and funds when a firm holds financial instruments and funds belonging to clients (Article 13 (7) and (8))

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

- (1) Determine the conditions with which the arrangements that an investment firm has to put in place in respect of its client's financial instruments have to comply in order to be considered as sufficient to safeguard their ownership rights and to prevent their use on own account by the firm except with the client's express consent.
- (2) Determine the conditions with which the arrangements that an investment firm has to put in place in respect of its client's funds have to comply in order to be considered as sufficient to safeguard their ownership rights and, except in the case of credit institutions, to prevent their use on own account by the firm.
- (3) Establish the conditions with which the procedures for obtaining the client's express consent to allow the investment firm to use the client's financial instruments on own account have to comply.

3. 2. Conflicts of interest (Art. 18 and 13(3))

Investment firms shall take all reasonable steps to identify conflicts of interest and shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients.

As for article 13 these obligations should be proportionate and take into account the risks inherent to the different services or activities with respect to the interests of the clients.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

- (1) the appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the clients or potential clients of the investment firm
- (2) the steps that investment firms might reasonably be expected to take to identify, prevent, manage and/or disclose conflicts of interest when providing various investment and ancillary services and combinations thereof.

This request should be combined with other requests formulated with respect of other parts of article 13 and in particular the internal control procedures. The technical advice should take into account the implementing measures of the Market Abuse Directive regarding the fair presentation of investment recommendations and the disclosure of conflicts of interest and other works carried out in other forums, such as IOSCO or the Forum Group on Financial Analysts.

3. 3. Conduct of Business Obligations when providing investment services to clients (Article 19, §§ 2, 3, 7 and 8)

Article 19 lays down the general Conduct of Business Obligations which investment firms have to comply with when providing investment services to clients. Like Article 13, this is a general article covering a variety of different situations. In order to guarantee investor protection in a proportionate and appropriate manner, application of this Article

has to be nuanced on the basis of various parameters to be taken into consideration when laying down conduct of business obligations.

CESR should define, where relevant, the exact content of each of the obligations laid down in article 19 on the basis of the following criteria:

- The nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions.
- The nature of the financial instruments being offered or considered.
- The retail or professional nature of the client or potential clients.

CESR should consider the possibility of establishing a general typology by their nature of investment services and financial instruments, or certain criteria for categorising by their nature those services and instruments. The same criteria should be applicable in the context of all the obligations laid down in this article.

In particular article 19 establishes the following conduct of business obligations:

3. 3. 1. Publicity and marketing communications (article 19§2)

The directive establishes that all information addressed to clients have to be fair, clear and not misleading. In particular, marketing communications shall be clearly identifiable as such.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

- (1) Specify the criteria for assessing the fairness, clearness and not misleading character of marketing communications and of any other promotional/publicity communication addressed to clients or potential clients"
- (2) Specify what is to be considered as a marketing communication in the context of this provision.

In respect of this request CESR should take account of any relevant provision of Community Law and in particular those referring to publicity and marketing communications.

3. 3. 2. Appropriate information to be provided to the clients or potential clients (article 19 (3))

This includes following obligations:

- the obligation to give appropriate information to the client or potential client about the investment firm and its services
- the obligation to give appropriate information to the client on the execution venues
- the obligation to give appropriate information to the client or potential client about costs and associated charges

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on following issues:

- (1) Specify the content of the appropriate minimum information that the investment firm should supply to its clients and potential clients in respect of its services and of the firm itself. The content of the minimum information should depend on each type of service.
- (2) Specify the content of the appropriate minimum information, including the different warnings, that the investment firm should supply its clients in respect of financial instruments and/or investment strategies
- (3) Specify the content of the appropriate minimum information that the investment firm should supply to its clients concerning the different execution venues. This request should be combined with the requests formulated in the context of Article 19.
- (4) Specify the content of the appropriate minimum information that the investment firm should supply to its clients in respect of the costs and associated charges that the client's or potential will have to pay for the provision of the different investment services.
- (5) Specify which information should be provided at the outset of the relationship and which should be updated on a continuous basis; determine the form in which the information is to be made available as well as the arrangements for making it available.

3.3.3. Client Records (article 19(7))

This paragraph obliges investment firms to maintain records concerning their clients containing a series of documents, for instance those agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on the minimum content of the client records, in particular the customer agreement and the time at which such records must be established by the investment firm. This request should be combined with the request formulate with respect to Article 13 (.7)

3.3.4. Reports from the firm to its clients (article 19(8))

This provision obliges investment firms to provide to their clients adequate reports on the services provided. The reports should include the costs associated with the transactions to which they refer.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on the criteria for determining when and in which manner the investment firm should report to its clients

3.4. Best execution obligation (Art. 21)

Article 21 obliges investment firms to obtain, when executing orders, the best possible result for their clients, following always the specific clients' instructions. To this end, they will establish an order execution policy; they will inform about it to the clients and

obtain their prior consent. Investment firms are also obliged to monitor the effectiveness of their order execution policy and correct any deficiencies.

CESR should bear in mind that there is a need for a comprehensible set of criteria to be put in place to allow firms to determine whether they are complying with their obligations as well as to allow clients to understand execution policies.

3.4.1 Criteria for determining the relative importance of the different factors to be taken into account for best execution (21.1)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on the criteria that the investment firm should take into account when executing clients' orders for determining the relative importance of the factors such as price, costs, speed, likelihood of execution and settlement, size and nature of the order and any other relevant consideration. Those criteria should take into account the retail or professional nature of the client.

3.4.2. Trading venues to be included in the order execution policy (21.2).

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on the criteria for determining the venues that enable investment firms to obtain on a consistent basis the best possible result for executing the client orders.

3.4.3 Information to the clients on the execution policy of the firm (21.2)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 30 December on the information to be provided to the client or potential client.

3.4.4. Obligation to monitor and update the order execution policy (21.3)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on factors that may be taken into account by an investment firm when reviewing its execution arrangements and the circumstances under which changes to such arrangements may be appropriate.

3. 5. Client order handling rules (Art. 22)

Investment firms authorised to execute orders on behalf of clients are obliged to implement adequate procedures and arrangements to handle clients' orders which result in the prompt, fair and expeditious execution of them, taking into account the time of the reception of the order.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on:

(1) the conditions with which the order handling procedures and arrangements that investment firms have to set up shall comply in order to obtain prompt, fair and expeditious execution of client orders.

(2) the situations in which or types of transaction for which investment firms may reasonably deviate from prompt execution so as obtain more favourable terms for clients.

To respond to these requests CESR should take into account the retail or professional nature of the client.

3. 6. Reporting of transactions (Art. 25 (3), (4), (5) and (5.a))

Article 25 (3) establishes the obligation for the investment firms which execute transactions in any financial instruments admitted to trading on a regulated market to report details of such transactions to the competent authority. Article 25(5) provides the different ways that investment firms have to comply with the reporting obligations and for a waiver for this obligation.

Article 25 (3) second subparagraph obliges competent authorities to establish, in accordance with article 58, the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives the information on transactions.

Article 25 (4) establishes which should be the minimum content of the reports that should be sent to the competent authorities.

In delivering its advice CESR should ensure that the arrangements are proportionate, that they facilitate exchanges of information between regulators and the comparability of reports and that they provide regulators with the adequate data to fulfil their responsibilities.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on:

(1) the methods and arrangements for reporting financial transactions.

(2) the criteria for assessing liquidity in order to define a relevant market in terms of liquidity for financial instruments.

(3) the minimum content and the common standard or format of the reports to facilitate its exchange between competent authorities

3. 7. Transparency obligations (Articles 28, 29, 30, 43 and 44)

The Directive establishes a comprehensive transparency regime that covers all types of trading venues and methodologies. These transparency obligations are necessary in order to avoid the possible negative effects that fragmentation of trading could cause to the efficient functioning of the market.

CESR should take into account of the necessity to facilitate the consolidation of trading information so that all market participants could have an easy access to comprehensible and comparable information and, consequently, be able to make efficient investment

decisions and allow for a smooth functioning of the best execution obligation. CESR should also, when determining the content of the information to be disclosed, take account of the need to ensure an efficient price formation process and to protect investors.

The Directive applies comparable transparency regimes to similar trading systems. This is the case of Regulated Markets and MTF's where differentiation should be based, in principle on the type of trading methodologies or market models and not on the Institutional choice for the organisation of the market. Nevertheless, CESR is invited to analyse, in respect of all the mandates related to regulated markets whether there are substantial reasons in terms of market efficiency and investor protection that could require some degree of differentiation between MTFs and Regulated Markets.

3. 7. 1. Pre-trade Transparency requirements for Regulated Markets (Article 43) and MTFs (Article 29)

Following issues are covered by this Article:

- the obligation to make public prices and volumes advertised through the market systems (Article 43.1)
- The waiver of the pre-trade transparency obligation in respect of the type and size of orders – block orders (Article 43.2)
- the waiver of the pre-trade transparency obligation in respect of the market model (Article 43.2)

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on:

- Specify the range of bid and offers or designated market-maker quotes, and the depth of trading interest at those prices that are to be made public
- Establish the criteria for determining the type and size of orders for which pre-trade transparency obligations may be waived and define orders that are "large in scale compared with normal market size".

In respect of size, and in particular when defining the orders that are "large in scale compared with normal market size" (block orders), CESR advice should take account of the fact that the objective of the waiver is to exempt from the pre-trade transparency obligation those transactions which size could have a market impact that could affect the investors and/or that could affect the provision of liquidity by market makers and/or could affect the quality of the price formation process on the market. In this respect, CESR should also take particular account of the differences between order and quote driven markets. The definition of block orders should be analysed with a view to establish harmonised criteria for each type of shares in the EU, to promote legal certainty and to develop as simple a model as possible. At this respect, CESR, in delivering its advice, might wish to analyse the possibility to establish a single measure in terms of number of shares and/or of quantity that could be applicable to most of the trading in shares in the EU.

- Establish the criteria for determining the market models for which pre-trade transparency obligations may be waived

3. 7. 2. Post-trade Transparency requirements for Regulated Markets (Article 44) and MTFs (Article 30)

Following issues are considered in this Article:

- the obligation to make public details of the transactions executed on regulated markets
- the possibility to defer publication of some types of transactions

CESR should consider that part of these measures do also apply (though article 26) to off-exchange trading. CESR should analyse the conditions under which those obligations should apply to off-exchange trading as well as the relevance of the obligations for off-exchange trading.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on:

- (1) Specify the scope and content of the information to be made public
- (2) Establish the conditions under which deferred publication of trades may be allowed as well as the criteria to be applied when deciding the transactions for which, due to their size or the type of share involved, deferred publication is allowed".

In respect of large orders, CESR should, where relevant, combine this request with the requests formulate in the context of Article 43

3. 7. 3. Post-trade Transparency requirements for Investment Firms (Article 28)

This provision establishes an obligation on investment firms that deal or execute client orders outside Regulated Markets or MTFs to make public the terms of the corresponding transactions.

The mandate in respect of article 28 will only deal with those issues that have not been tackled through the mandates of article 44.

In delivering its advice CESR should take account of the need for investment firms to have a genuine choice of reporting arrangements.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on:

- (1) Specify the means by which investment firms may comply with their post-trade transparency obligations including the following possibilities: (i) through the facilities of any regulated market which has admitted the instrument in question to trading or through the facilities of an MTF in which the share in question is traded;(ii) through the offices of a third party; (iii) through proprietary arrangements
- (2) Specify the scope (which types of transactions) and the conditions of application of the post-trade transparency obligation to transactions involving the use of shares for collateral, lending or other purposes where the exchange of shares is determined by factors other than the current market valuation of the share

3. 8. Admission of financial instruments to trading (Art. 39)

Following issues are considered in this

- The minimum contents of the rules on admission to trading that each Regulated market has to establish (Article 39 (1), (2) and (6)a))
- The obligation for the Regulated market to establish the necessary arrangements to verify that the issuers of securities comply with their obligations under community law (Article 39 (3), first subparagraph and (6) (b)).
- The obligation imposed Regulated Markets to ensure that information previously disclosed is accessible to its members or participants (Article 39 (3), second subparagraph and (6)(c)).

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on:

(1) specify the characteristics of different classes of instruments to be taken into account by the regulated market when assessing whether an instrument is issued in a manner that allows it to be traded on a fair, orderly and efficient manner; in the case of transferable securities, define the conditions under which financial instruments are freely negotiable.

(2) clarify the arrangements that the regulated market is to implement so as to be considered to have fulfilled its obligation to verify that the issuer of a transferable security complies with its obligations under Community law in respect of initial, ongoing or *ad hoc* disclosure obligations.

(3) clarify the arrangements that a regulated market that admits transferable securities to trading has to establish in order to facilitate its members or participants in obtaining access to information which has been made public in the conditions established under Community law.

3. 9. Obligation to cooperate (Art. 56)

This provision establishes the obligation for competent authorities to establish proportionate cooperation arrangements when a regulated market has established arrangements in a host member state and provided that, taking into account the situation of the securities markets in the host member state, these arrangements have become of substantial importance for the functioning of the securities markets and the protection of investors in the host member state.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on:

The criteria under which the operations of a regulated market in a host member state could be considered as of substantial importance for the functioning of the securities markets and the protection of investors in the host member state

3.10. Exchange of information (Art. 58)

The provision establishes the obligation of competent authorities designated as contact points to immediately supply one another with the information required for the purposes of carrying out the duties of the competent authorities set out in the provisions adopted pursuant to the Directive.

In delivering its advice CESR should take into account the effectiveness of existing arrangements.

DG Internal Market requests CESR to provide technical advice on possible implementing measures by 31 January 2005 on the procedures for the exchange of information between competent authorities designated as contact points. CESR should take into account the Memorandums of Understanding adopted in international fora, including IOSCO, and/or European fora or on a bilateral basis and on the experience gained after its entry into force.