

**International Swaps and Derivatives Association  
International Capital Market Association  
ACI The Financial Markets Association  
Asociación de Mercados Financieros  
Association of Private Client Investment Managers and Stockbrokers/EASD  
Bankers and Securities Dealers Association of Iceland  
Bond Market Association  
Danish Securities Dealers Association  
Finnish Association of Securities Dealers  
Futures and Options Association  
London Investment Banking Association  
Norwegian Securities Dealers Association  
Swedish Securities Dealers Association**

**Response to the European Commission's invitation for public comment on the working document [ESC/20/2005] on pre- and post-trade transparency and admission to trading, as modified by working document [ESC/20/2005-Rev1]**

Respond to [Markt-G3@cec.eu.int](mailto:Markt-G3@cec.eu.int); Markt-ESC@cec.eu.int

16<sup>th</sup> August 2005

We welcome the open and transparent process which the Commission is following by publishing working documents containing its initial drafting thoughts in the light of CESR's technical advice. There are a number of important respects in which this initial drafting would be problematic or unworkable or inconsistent with the Level 1 text, although the revised draft which the Commission published on 29<sup>th</sup> July (Working Document ESC/20/2005 – rev1) resolves some of the problems in the draft which the Commission published in June (Working Document ESC/20/2005). We urge the Commission to make the necessary further amendments before it makes its formal Proposal in the autumn, and we offer suggested drafting for this purpose in the Boxes in the text below.

It is vital that the Commission makes its formal Proposal with the necessary understanding of how the markets work and of the market impact of proposed measures. This will ensure that the measures are appropriately targeted and demonstrate the Commission's adherence to better regulation principles. We have tried to provide as much of this type of information as possible in the comments below, and we are ready to provide any further information that the Commission needs. We are concerned about a number of measures which appear to have been introduced at a late stage without any formal assessment of their market impact, for example:

- (a) the assessment of what is a liquid share is not consistent with market or economic reality.
- (b) the apparently random addition, removal and selection of the SMS cap.
- (c) the inclusion of stop loss and limit orders with market orders as 'orders subject to current market price'.
- (d) the proposal to require reporting of share loans.
- (e) the lack of appropriate provision for delayed reporting of portfolio transactions.

Where the Commission does not have the necessary information or understanding of an issue, it would be inappropriate for it to proceed, if at all, on anything other than a very cautious basis.

**The most important changes needed are as follows :**

Article 4 – Amendments needed to remove the discriminatory effect of the Recital to Article 4(1)(b).

Article 6 – Amendments needed to avoid too broad application of the ‘systematic internaliser’ definition.

Article 7 – Amendments needed to limit the number of ‘shares with a liquid market’, at least in the first stage of a two-stage implementation of Article 27.

Article 10 – Amendments needed to avoid burdensome restrictions on firms’ ability to control the number of orders they execute against a single quoted price.

Article 12 – Amendments needed to remove the requirement to report share loans.

Article 13 – Provisions needed to enable appropriate deferred publication of portfolio transactions.

Article 21 – Amendments needed to allow more time for the calculation and incorporation in market participants’ systems of numerical thresholds.

**Legal form of Level 2 measures in this area:**

Article 1 proposes that all these measures take the form of a Regulation rather than a Directive. A regulation may be rational if the provision concerned is independent and stands alone. However, if the provision depends on other aspects of national law being revised or, as with many MIFID measures, other aspects of the Level 1 Directive being implemented through national legislation, a regulation does not necessarily make sense. In these circumstances, while a Regulation may implement the subject matter of the Regulation, other dependent variables would still need to be brought into effect through national measures implementing the Level 1 Directive. Furthermore, a number of the draft measures would enable competent authorities to choose between options, or to choose not to apply the requirements, and to take into account the market structures characteristic in each Member State. A Regulation which embodied a choice could not take effect until the Member State enacted national legislation which made that choice, in which case the self-operative character of a Regulation would be nullified.

From a policy point of view, while there would be substantial benefit in using Regulations to deliver harmonisation especially of deferred trade reporting (though Level 1 allows Member States to top up) if firms wish to run a harmonised system across entities and products, on other sensitive issues such as systematic internalisation definitions and implementation, a Regulation in the form proposed by the Commission might well not allow enough flexibility in national implementation.

Article 1

These Regulations *and Directives* lays down implementing measures in respect of:

Article 23

*Parallel amendments needed.*

**Detailed comments on the Draft Commission document:**

Article 2(d)

The Commission's revised text, combined with the proposed Recital in Footnote 4, rightly ensures that the definition covers relevant bilateral transactions with clients. However, further amendment is needed to ensure that the exemption is broad enough to cover transactions which are conducted under the particular rules or arrangements of the relevant RM or MTF, which may not involve execution within the RM or MTF.

Article 2(d)

negotiated transaction means a transaction involving members or participants of a regulated market or an MTF which is negotiated privately but ~~executed~~ **conducted within subject to the rules of** the regulated market or MTF.

Article 3

We welcome the Commission's amendments to clarify that the Article applies only to those firms that operate an MTF.

A further amendment is needed to Paragraph 1 to make it consistent with Articles 29 and 44 of the Level 1 text: "Member States shall, at least require [investment firms and market operators operating an MTF/regulated markets] to make public current bid and offer prices and the depth of trading interests at those prices *which are advertised* through their systems...".

In Paragraph 3, amendments are needed to recognise that from time to time even on a RM or MTF, effective risk management by market makers will require them to make one-way prices, or indicative quotes.

In Paragraph 5, we welcome the Commission's deletion of the reference to 'other information relevant to its price formation', which was imprecise and effectively duplicated the reference to 'the level of transactions and of interest in that share'.

Article 3

1. For the purpose of Articles 29 and 44 of the Directive, regulated markets, and investment firms or market operators operating an MTF shall, in respect of each share which is admitted to trading on a regulated market and that is traded within their systems, make public at least the information ***which is advertised through their systems*** set out in this Article.

2. Regulated markets, and investment firms or market operators operating an MTF which (in each case) operate an continuous auction order book trading system shall, for each such share, make public continuously throughout its trading hours the aggregate number of orders and the shares they represent at each price level, for at least the five best bid and offer price levels.

3. Regulated markets, and investment firms or market operators operating an MTF which (in each case) operate a quote driven trading system shall, for each such share, make public and continuously update throughout its trading hours ~~two-way~~ quotes of each registered market maker in that share ***as defined by the rules of the regulated market or MTF***. ~~Those quotes should represent binding commitments to buy and sell the shares and indicate the price and volume of shares in which they are prepared to buy or sell.~~

4. Regulated markets, and investment firms or market operators operating an MTF which (in each case) operate a periodic auction trading system shall, for each such share, make public and continuously update throughout its trading hours the price at which the auction trading system would best satisfy its trading algorithm and the volume that would potentially be executable at that price by participants in that system.

5. Where regulated markets, and investment firms or market operators operating an MTF operate a trading system which is not covered by paragraphs (2) to (4) above, either because it is a hybrid system or because the price determination process is of a different nature, they shall maintain a standard of pre-trade transparency that ensures that adequate information as to the level of orders and of trading interest in that share, at any particular time is made public. In particular, the five best bid and offer levels should be made public, if the characteristics of the price discovery mechanism so permit.

#### Article 4.1

In Article 4.1(a), a wide publication requirement is unnecessary if the reference price is generally regarded by market participants as reliable.

In Article 4.1(b), 'system' should be replaced with 'arrangements' to ensure that trades negotiated outside a 'system' but within a RM's or MTF's requirements are included.

#### Article 4.1

For the purposes of the application of Articles 29(2) and 44(2) of the Directive, competent authorities may waive the requirement to comply with the obligations mentioned in those articles for:

a ) a system based on a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is ~~widely published and~~ is regarded generally by market participants as a reliable reference price;

b) ~~a system~~ **arrangements** that formalises negotiated transactions, provided that:

Recital to Article 4.1(b)

The Commission's suggested recital, following CESR's advice, would arbitrarily exclude systematic internalisers from being able to negotiate on behalf of their clients below-SMS transactions on-exchange without pre-trade transparency. It should therefore be deleted as anticompetitive and discriminatory against the clients of SIs. Furthermore, it is illogical, and inconsistent with Article 4.1.7 and Recital 4 of the Level 1 Directive, to provide that a firm cannot enter into a transaction which complies with the rules and systems of a RM or MTF because it would, if the firm had done it outside those rules and systems, have given rise to an Article 27 quoting obligation.

Recital to Article 4.1(b)

~~The following Recital will be included: "Investment firms that deal on own account by executing client orders in an organised, systematic and frequent manner cannot, to the extent they do so by dealing under the systems of a regulated market or an MTF, profit from the pre-trade transparency waiver in respect of negotiated trades, where if those negotiated trades were done outside those systems they would be required to make public firm quotes. In this respect they are subject to the general transparency requirements imposed by this [Regulation]"~~

If the Commission's intention is to prevent a regulated market from offering a 'negotiated trade' facility which would enable a SI to evade its quoting obligation by requiring the SI only to post-trade-report transactions which would otherwise be subject to Article 27 obligations, the Commission should propose wording which specifically targets the mischief foreseen, for example:

Recital to Article 4.1(b)

***A negotiated trade facility provided by a regulated market or MTF shall not be designed, or promoted to users or potential users, specifically to enable a systematic internaliser to avoid its obligations under Article 27.***

Articles 6 to 11

Article 27's impact on the economic dynamics of the competitive environment will initially be through imposing higher costs on investment firms for establishing and maintaining quotes. Firms that see market opportunity and the ability to do many transactions in certain shares, and are thus able to amortise these costs over many transactions, will be able to absorb the new regulatory costs. Firms with lower volumes may not be able to justify the additional costs of Article 27, and may have to cease providing services to their customers, leading to a diminution in liquidity provision, unless SI obligations are appropriately calibrated so that they do not impose excessive burdens on this business.

Consequently, the point at which Article 27 becomes applicable will be an important consideration in the economics of the decision whether to enter or stay in the

business. Because of the requirement to provide continuous quotations for all shares subject to the article, being a SI is likely to be labour- and risk-intensive and thus costly. Firms will be able to justify these costs only if the revenues are sufficient. If a 'share with a liquid market' as defined yields sufficient orders, and the interpretation of 'systematic organised and frequent basis' is sufficiently narrow so that it captures only client business which the firm routes according to non-discriminatory procedures to its own account, the revenues of the activity may justify operating as an SI. However, if the definition of 'share with a liquid market' or the interpretation of 'systematic organised and frequent basis' subject low volume (and thus low revenue) activity to Article 27, the commercial reaction of many firms will be to withdraw from the activity because the revenues cannot justify the costs. It is this cut-off point which is critical and needs to be determined in a principled way, since it will determine whether Article 27 is good regulation with positive impact or a dead-weight cost which merely raises the barriers of entry to competition with the current dominant venues.

While the principle of pre-trade transparency is also important, it is not an end in itself. Amongst other factors, the objective should be to enable brokers to get the best price available. Since best execution may be achieved by investment firms which are not just competing on price but also providing lower transaction costs, it would be rational for the Commission to peg the requirements to provide Article 27 transparency at levels high enough that they affect only investment firms which are seeking to compete directly with RMs and only shares which are indisputably liquid at the European level.

We suggest that Article 27 should start to apply in those circumstances where investment firms are seeking to compete directly with RMs for order volume. For trades subject to Article 27 ("liquid" shares, below SMS) the question must be asked whether, and if so on what basis, a SI would 'compete' with a RM. CESR established in its first consultation on its advice on transaction reporting measures that in many shares trading is still concentrated in the EU in one marketplace or in one Member State, and that in 90% of cases the most liquid market has more than eleven times the size of the next biggest market. In these circumstances it is commercially demanding for competing execution venues, whether exchanges, MTFs, or SIs, to establish market share, because an investor seeking a better price will be most likely to find it in the established market, where there are most buyers and sellers. When deciding whether to compete for market share as a SI, investment firms must take account of the fact that, unlike RMs, they need to commit capital every time they transact as principal. As drafted, the Commission's interpretation of 'organised frequent and systematic basis' and 'shares with a liquid market' are both too broad. Because of the costs and risks described above, they are likely to deter firms from providing liquidity in the less liquid shares affected, thereby making them less, not more, liquid.

#### Article 6(1)

Several amendments are needed to focus the interpretation of 'organised frequent and systematic basis' in accordance with the intention of the Level 1 text of Article 4.1.7.

The essential element is the reference in the second part of paragraph 1(a) to 'non-discretionary rules and procedures' through which a firm executes client orders by dealing on own account. Any activity which does not systematically execute client

orders in a non-discriminatory way outside a RM or MTF should not constitute systematic internalisation. But in the Commission's draft, the word 'or' in Paragraph 1(a) would ignore this necessary condition, and capture any firm that executed more than a few client orders outside a RM or MTF, since the 'materiality' threshold is so low, and any dealing activity will have a 'commercial role', particularly where a firm puts its capital at risk. 'Commercial role' and 'non-discretionary rules' are qualitatively quite different things. It is inappropriate to treat them as alternatives as the Commission proposes. 'Non-discriminatory rules' should be a necessary condition in conjunction with any other indicators, not as an alternative to them.

In Paragraph 1(c), 'is available' on its own is too broad. The Commission should include CESR's earlier wording 'marketed to', which is consistent with other parts of the Level 2 measures which refer to systematic internalisation as an activity of which firms actively make their clients aware.

There is also a need to insert a specific exclusion for Recital 53 business, in order to carry forward into the Level 2 measures the interpretative effect of Recital 53 of the Level 1 Directive.

The insertion of 'material' in Article 6(1)(a) is helpful, but the attempt to quantify it in the Recital in footnote 12 by reference to the firm's overall business is not consistent with the Level 1 text. Recital 53 is clear that all business carried out on an OTC basis is to be excluded from the definition of the systematic internalisation activity, regardless of its size in relation to the firm's overall business. In its Explanatory note, the Commission asks whether this Article should include any quantitative indicators. CESR proposed two quantitative criteria: 0.5% of the total market, and 15% of the firm's own business. Both of these figures are very low. The 0.5% of total market figure in particular is far too low, particularly where less liquid shares are concerned, and should certainly be omitted unless it is raised significantly. Furthermore, neither measure is related to the qualitative nature of the activity. It is irrelevant to deciding whether a firm does a particular activity on an 'organised frequent and systematic basis' what relationship that activity bears either to other, unrelated, activities of the firm, or, especially, to the rest of the market. The 15% of total client orders test which the Commission proposes in its draft Recital, or any measure based on the total value of the firm's client orders, would also be incompatible with Recital 53 of the Level 1 Directive, which clearly contemplates that a firm could have a substantial 'OTC' business, separate from its systematic internalisation business, without falling into the definition. It is preferable to rely on the natural meaning of 'frequent' than to specify it in such an inappropriate way. The Commission should therefore delete the Recital in footnote 12 of the revised draft.

Article 6(1)

For the purposes of Article 4(1)(7) of the Directive, where an investment firm deals on own account by executing client orders outside a regulated market or an MTF, it shall be considered as carrying on this activity on an organised, frequent and systematic basis if:

(a) the activity has a material commercial role in the business model adopted by the firm, ~~or~~ **and** is carried on, in accordance with non-discretionary rules and procedures;

(b) the activity is carried on by personnel, or by means of an automated technical system, *specifically* assigned to that purpose (whether or not those personnel or that system are used exclusively for that the purpose); and

(c) the activity is *marketed and* available to clients on a regular and continuous basis;  
*and*

*(d) The activity is not carried out on an OTC basis, the characteristics of which include that transactions are ad hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is characterised by dealings above standard market size and are carried out outside the systems usually used for the firm's business as a systematic internaliser.*

Recital to Article 6(1)

~~The activity of internalisation shall be considered to have a material commercial role in the business model adopted by an investment firm with respect to a share if the value of all client orders executed on own account outside a regulated market or MTF is more than 15% of the total value of executed client orders for that share.~~

#### Article 6(2)

Article 4.2. of the Level 1 Directive specifies that Level 2 measures 'may clarify' the definitions in Article 4. Article 6(2) proposes a new requirement on systematic internalisers, not mentioned in the Level 1 text, to announce in advance that they intend to cease to be systematic internalisers. It should therefore be deleted. Even if such a provision was justified, it would be inappropriate to require a SI to make any announcements outside the systems it uses to publish its quotes, except to those clients which have access to the systematic internalisation activity. It is therefore at the very least necessary to delete 'and other market participants'.

#### Article 6(2)

~~An investment firm will cease to be a systematic internaliser in one or more shares if it ceases carrying on the activity mentioned in paragraph (1) in respect of those shares, provided that it has announced in advance that it intends to cease that activity using the same publication channels for that announcement as it uses to publish its quotes or, where that is not possible, using a channel which is equally accessible to its clients and other market participants~~

#### Article 7

CESR's approach to the question of determining whether a share has a liquid market was flawed in several respects. In particular, CESR did not explain the rationale for its thresholds, did not focus on the purpose of defining liquidity in this context – to determine whether there is enough liquidity to justify requiring SIs to maintain continuous quotes, and produced criteria which would probably result in quoting obligations being applied to over 500 shares, including many which do not have enough liquidity for firms to justify the commercial investment and risks attached to Article 27 obligations. The Commission's draft retains these flaws, and adds new

ones with the unsatisfactory proposal to determine liquidity on a national as well as EU basis. For none of these approaches has CESR or the Commission performed a market failure analysis, regulatory impact analysis, or cost/benefit analysis of the type to which the Commission is committed.

We think that it is necessary to take a more prudent approach to what is a new and untested requirement. What is needed is a cautious, phased implementation, consistent with best practice for such new requirements as established by IOSCO in its May 2004 paper “Transparency of Corporate Bond Markets”, section D3. When IOSCO discussed the proposition that “increased transparency can enhance liquidity by increasing investors’ confidence, but some argue that it may adversely impact liquidity if dealers consider that transparency requirements alter the risk-reward ratio in committing capital”, it concluded: “Where regulators do decide that they should more actively promote transparency, the recent experience in the US points to the desirability of working closely with the industry in implementing change, of focusing initially on the most liquid [instruments], and, in general, of progressing in stages with a degree of pragmatism”.

We think that this is a proposition of general application, equally valid for the imposition of transparency requirements for equities under Article 27, which is as experimental as the imposition of transparency on bonds was in the United States. We therefore think that the Commission should propose a two-phase approach to the definition of ‘shares with a liquid market’:

- 1) Phase 1 (30<sup>th</sup> April 2007): Launch Article 27 for a much smaller number of shares than the current draft proposes: 200 shares at most, and probably fewer, where firms are most likely to have a commercial incentive to compete with existing venues.
- 2) Phase 2 (30<sup>th</sup> April; 2008): As part of the Article 65(2) review of the application of Article 27, determine whether, in the light of experience of applying Article 27 in its first year, the Phase 1 definition of ‘shares with a liquid market’ is appropriate, or whether it needs to be expanded, kept the same, or narrowed.

To determine which shares should be covered by Phase 1, the Commission could simply adapt the approach set out in Article 7(1), by providing that the shares constituting the top 40%, or at most the top 50%, of *overall turnover in the EU market as a whole* have a liquid market. (It is not clear how the Commission arrived at the 60% figure in Article 7(1), but as an arbitrary starting point, it is safer to apply Article 27 to 40%, or at most 50%, of the EU market than to 60% of it.)

#### Article 7

***1. For the purposes of Article 27 of the Directive there is a liquid market in a share if that share is among the most liquid shares representing 40% of the total cumulative annual turnover of shares in the EU.***

***2. As part of the report referred to in Article 65(2) of the Directive, the Commission shall report on whether or not there is a need to revise Paragraph 1.***

[Delete existing text of Article 7]

We have the following further comments on Article 7:

#### Article 7(1)

It is not appropriate, and inconsistent with the single market approach, to define whether a share has a liquid market by reference to a percentage of 'turnover of shares in a Member State'. The European equities market has reached a level of integration in which only the exchange and clearing infrastructure remains largely organised along national or regional lines, whilst most trading activity is undertaken on a pan-European basis. We do not understand how, taking account of this fact, the Commission intends these calculations to be performed. Would 'turnover of shares in a Member State' refer to all transactions in European shares traded by investment firms of a particular Member State? Or would it refer to the turnover of shares for which a regulated market in that particular Member State is the lead market, regardless of the fact that even in that Member State other European shares might be responsible for a higher turnover of its investment firms? Either approach would artificially divide the pan-European equities market into separate national markets and would run counter to the idea of a single European market. Indeed, it would tend to prevent further integration of the single market and have a significant depressant effect on share prices of issuers in emerging markets. It would discriminate against such issuers because wrongly labelling less liquid shares as 'liquid' and subjecting them to Article 27 would deter firms from providing liquidity in those shares, and would therefore mean that the market in those shares would depend more on domestic investors to provide liquidity to each other. Additionally, viewing liquidity in the context of domestic markets would perpetuate analysis based solely on domestic markets rather than taking the first step towards a single market and the identification of shares which at present have broad, pan-EU interest.

Firms will be reluctant to invest in maintaining continuous quotes in shares which are not actually liquid. Countries with emerging markets may be reluctant to acknowledge that they do not have any shares which are labelled as 'liquid' for these purposes. But it should be remembered that Article 27 Level 2 measures are not a general measure of liquidity, and that wrongly including less liquid shares in Article 27 is likely to depress their liquidity further, not enhance it, and therefore increase the cost of capital to issuers whose shares are wrongly so defined. Also the designation as 'liquid' of shares which are not liquid according to objective criteria could mislead retail customers who, but for this designation, might not deem an investment in these shares appropriate.

It is difficult to estimate how many additional shares would be affected over and above those captured by the Article 7(2) test. However, the above analysis would remain valid even if, as preliminary indications suggest, the number of shares affected in each emerging market would be in single figures. Furthermore, the Commission has given no explanation of how it arrived at the figure of 60%, or of its analysis of how many shares would be affected. It is not consistent with the principles of better regulation to which DG Markt is committed to bring forward new proposals of this type without evidence-based analysis or prior consultation. For all of the above reasons, Article 7.1 should be deleted.

It is also likely that applying Article 27 to shares which are not liquid according to absolute or pan-EU criteria would be inconsistent with the Level 1 text.

Article 7(1)

~~For the purposes of article 27 of the Directive, there is a liquid market for a share if:~~

~~(a) that share is among the most liquid shares representing 60% of the total cumulative annual turnover of shares in a Member State ; and~~

~~(b) that State is the most relevant market in terms of liquidity for that share.~~

Articles 7(2) and 7(3)

The thresholds that the Commission proposes, following CESR's advice, are too low, and would capture too many shares that would not generally be considered to have a liquid market. CESR did not explain how it arrived at these figures, and in its final advice arbitrarily reduced the free float threshold from €1 billion to €500million. 'Shares with a liquid market' needs to be defined in a way which is consistent with market participants' perception of whether there is enough liquidity to support the commercial investment and risks that maintaining a continuous quote involves. Market participants' understanding is that shares that truly have a genuinely liquid market of this sort would have a free float of at least €1 billion (excluding all holdings of 5% or more), would trade at least 1,000 times day, and have an average daily turnover of at least €5 million. At least the following amendments would be necessary, although it would be better for the Commission to adopt the two-stage approach which we recommend in our introductory comments on Article 7 above.

Article 7(2)

In addition to paragraph (1), shares admitted to trading on a regulated market shall be considered to have a liquid market if:

(a) the shares are traded daily and the free float of any share is equal to or higher than ~~€1000 500~~ million; and

(b) ~~one of~~ the following criteria applies -

(i) the average daily number of transactions in the share is equal to or higher than ~~1000 500; ~~or~~ and~~

(ii) the average daily turnover for the share is equal to or higher than ~~€ 5~~ million.

~~For the purposes of this paragraph, each Member State shall choose which one of the criteria set out in sub paragraphs (i) and (ii) above applies in that State. That choice shall take into account the market structures characteristic in that State.~~

Article 7(3)

For the purposes of this Article, the calculation of the free float of a share made on or after 20<sup>th</sup> January 2007 shall exclude holdings exceeding 5% of the total voting rights

of the issuer, ~~unless such a holding is held by a collective investment undertaking or a pension fund~~, and those voting rights shall be calculated on the basis set out in the Transparency Directive.

The calculation of the free float of a share made before 20<sup>th</sup> January 2007 shall be made using, as a proxy, an index based on a market of the European Union that is widely accepted and used by market participants.

#### Article 7(4)

The Commission is right to include in the amended draft a provision that a share will not be considered to be liquid until six months after it is first admitted to trading on any regulated market. It will not be apparent from the outset whether a share will be a 'share with a liquid market' or not (and actual trading volumes in the early months would be an even more unreliable indicator than shares with a similar capitalisation, since almost without exception, new issues trade much more frequently and in greater size in the period immediately after issue than subsequently.) It would be far better, and safer, to wait for 6 months to establish a trading record before establishing whether any, and if so what, systematic internalisation obligations apply. Much trading activity in new issues is in any case focused on regulated markets, in particular because stabilisation is carried out only on a RM, and investment firms which are part of the underwriting syndicate will not usually make markets until the issue is fully sold. Furthermore, whether or not a share is 'liquid' is only the first determination in a two-stage process. The second and possibly more important stage is determining SMS. Determining SMS requires more precision and may have a greater impact on whether a dealer decides to act as a systematic internaliser or not. A reasonable SMS will be difficult to determine appropriately in the first 6 months of trading.

#### Article 8

We strongly support the principle of a cap on SMS which the Commission proposed in its original draft, for the reasons which the Commission gave in the explanatory memorandum. However, the cap appears to have disappeared from the revised draft of Table 3. The Commission should reinstate the cap to ensure that liquidity provision is not endangered by excessive SMSs.

The €100,000 cap that the Commission originally proposed would be larger than the largest SMS computed according to CESR's figures (€80,000). To make the cap meaningful, the ceiling should be lower, for example €50,000.

The SMS for the first band (€7,500) is arbitrarily skewed to match high customary retail size in Article 11. It is not appropriate to distort SMS in this way, nor is it consistent with the Level 1 text of Article 27(1), which refers to a SMS which is representative of the arithmetic average value of the orders executed for each class. It should be €5,000, the mid-point of the €0-10,000 band, like the other bands.

**Table 3: Standard market sizes**

|  |                                   |  |  |  |  |   |  |     |
|--|-----------------------------------|--|--|--|--|---|--|-----|
| Class in terms of average value of orders executed (AVO) | AVO less than €10,000             | AVO greater than or equal to €10,000 and less than €20,000 | AVO greater than or equal to €20,000 and less than €30,000 | AVO greater than or equal to €30,000 and less than €40,000 | AVO greater than or equal to €40,000 and less than €50,000 | <del>€50,000</del><br><b>=AVO greater than or equal to 50,000</b> | <del>€70,000</del><br><b>=AVO &lt; €90,000</b> | Etc |
| Standard market size                                     | <del>€7,500</del><br><b>5,000</b> | €15,000  | €25,000  | €35,000  | €45,000  | <del>€60,000</del><br><b>50,000</b>                               | <del>€80,000</del>                             | Etc |

Article 9(b)

It would be burdensome and costly for firms to keep a record of quoted prices. Such a record is not provided for in Level 1.

Article 9(b)

~~a record of its quoted prices, which it shall retain for a maximum period of 12 months.~~

Article 10(1)(b) and Recital in footnote 14

Limit orders, stop loss orders, and stop limit orders are not ‘subject to current market price’. They are subject to the price limit which they set. Reference to such orders in this provision would therefore be inconsistent with Level 1 text.

Article 10(1)(b)

an order subject to price conditions other than the current market price means any order which is not an order for the execution of a transaction in shares at the prevailing market price (market order) ~~or equivalent order or a limit order.~~

Recital to Article 10(1)(b)

~~Stop orders, stop loss orders and stop limit orders are examples of orders that are equivalent to market orders for the purposes of Article [10(1)(b)].~~

Article 10(2)

While there are important improvements in the Commission’s revised draft, there remain differences from CESR’s advice which it would be burdensome or impossible for firms to comply with. The Commission should revert to CESR’s advice.

The reference to ‘prudently’ in the first paragraph of (2), combined with the reference to ‘the capital that the firm has at risk generally’ in the second paragraph of (2), still implies that firms should be required to execute orders entered at the same time by different clients until their overall capital position is impaired. This is an excessive obligation. Firms should not be required to commit any more capital than they have allocated to the trading book for that share. It is a generally accepted principle of all quote-driven markets that a quote is good until the firm has executed orders up to the size in which it is quoting, when it has an opportunity to update its quote before it is obliged to deal again. The Commission should revert to the ‘undue risk’ wording in CESR’s advice.

The second paragraph of (2) takes no account of the fact that dynamic market conditions and measures of risk cannot be predicted in advance in the way that the Commission’s draft implies. Volume of orders may not matter as much as volatility and liquidity. The ability to foresee which permutations apply is limited. It is in the most unforeseen market conditions that a firm most needs the flexibility that such a provision would deny. Furthermore, firms cannot practically write down and communicate a ‘policy’ on these matters.

We welcome the Commission’s deletion of the proposal to require firms to keep a record of unexecuted orders, which would effectively have been impossible to do, and would at least have been enormously costly and burdensome.

Article 10(2)

~~2. For the purposes of Article 27(6) of the Directive, the number or volume of an order considerably exceeds the norm if a systematic internaliser cannot execute those orders prudently without exposing itself to undue risk.~~

~~In order to identify the number and volume of orders that it can execute without exposing itself to undue risk, an investment firm which acts in the capacity of a systematic internaliser shall maintain and implement as part of its risk management policy under Article [5 of ESC/17/2005 a non discriminatory policy which takes into account the volume of the transactions, the capital that the firm has at risk generally and the prevailing conditions in the market in which the firm is operating.~~

~~An investment firm will document the arrangements which ensure non discriminatory treatment of clients when, in accordance with Article 27(6) of the Directive, it decides to limit the number and/or volume of orders it will execute. These arrangements shall be set out in writing and made available to clients and potential clients.~~

*A systematic internaliser should develop and document an internal policy relating to the number and/or volume of orders sought by clients that it can manage prudently without exposing itself to undue risk, taking into account the value of the transactions, the capital the firm has at risk for those trades, and the prevailing market conditions. A systematic internaliser should communicate to its clients in writing that it reserves the right to limit the total number of transactions from different clients that it executes at the same time, for instance, in the firm’s general terms and conditions. Where a systematic internaliser decides to limit the number and/or volume of orders that it executes, in line with its internal policy, it should*

*document the arrangements by which it ensured the equitable treatment of its clients.*

Alternatively, at least the following amendments should be made to the Commission's revised draft.

2. For the purposes of Article 27(6) of the Directive, the number or volume of an order considerably exceeds the norm if a systematic internaliser cannot execute those orders prudently without exposing itself to undue risk, *taking*

~~In order to identify the number and volume of orders that it can execute without exposing itself to undue risk, an investment firm which acts in the capacity of a systematic internaliser shall maintain and implement as part of its risk management policy under Article [5 of ESC/17/2005 a non-discriminatory policy which takes into account the volume of the transactions, the capital that the firm has~~ *at has available to cover the risk generally for those trades*, and the prevailing conditions in the market in which the firm is operating.

An investment firm will document the arrangements which ensure non-discriminatory treatment of clients when, in accordance with Article 27(6) of the Directive, it decides to limit the number and/or volume of orders it will execute. These arrangements shall be set out in writing and made available to clients and potential clients.

#### Article 11

The Commission's proposed customary retail size arbitrarily follows the distorted SMS figure in Table 3. It is too high a threshold, in particular for smaller markets like those in Nordic countries and probably even more so in new Member States. For example, a round lot on the primary list at Stockholmsborsen is €2,000. Retail investors normal trade one or in some instances two round lots at a time. Thus, the customary retail size should be €2,000 or €3,000 at most.

#### Article 11

For the purposes of the fourth sub-paragraph of Article 27(3) of the Directive, an order is of a size bigger than the size customarily undertaken by a retail investor if it exceeds ~~€7,500~~ *2,000*.

#### Article 12(1)

Making public information on stock lending, an OTC market, in the same way as at the transparent end of on-exchange trading, would be a significant change with important ramifications for the market. In particular, it would enable a firm's competitors more easily to identify its positions in particular shares. It would also result in unnecessary and misleading duplicative reporting of the same transaction. Furthermore, publication of share loans would be an extremely blunt and uninformative or misleading way of identifying short sales, since loans are used for many other purposes. Periodic publication of aggregated information for the market as a whole, without identifying firms or clients, as occurs at present in some markets, is in any case an easier and less misleading way of tracking short positions than a requirement to publish every stock loan. The technology effort to implement this kind

of reporting would be significant, as it would need to cover many different business processes leading to stock borrows (including funding transactions, settling short sales with or without explicit borrow transaction, potentially repos etc.)

We disagree with the suggestion of the Commission that the resulting data would enhance transparency in the market. The relevant price data for the stock borrows would be at best meaningless, and at worst misleading, as stock borrows are a non-standardised product. At any one time there will be a whole range of prices for any one share to borrow, depending on an unlimited number of factors, including collateral arrangements, credit ratings and tax status of the parties, duration, agreements on dividends, whether or not the loan is callable, ongoing arrangements between the lender and borrower etc. For example, firms often have arrangements with lenders exclusively to borrow a certain pool of securities for a yearly or monthly fee, so that no fee would be attributable for individual borrows.

Trade reports on stock borrows would similarly not deliver meaningful information about short selling volumes. Securities lending transactions are increasingly used by the major investment banks for the purpose of funding both house and customer long inventory; in these cases there is no underlying short. The volumes of such funding transactions will in many cases be higher than the volume of borrows for short selling. Share borrowing also occurs involuntarily because of settlement difficulties. Even purely as regards stock lending in the context of facilitating shorts, stock loans do not map well to the underlying sales. For example, a hedge fund may borrow a significant amount of stock to enable it to sell short should the price move up in the future, though the relevant sales will often never occur (or only occur in smaller quantities). Also, a significant part of the short selling activity is done synthetically through derivatives, which would not be picked up by this form of trade reporting. There would also be nothing to stop borrowers and lenders disintermediating (for example a hedge fund, which has no reporting requirement, borrowing directly from an insurance company, which also has no reporting requirement) if they wanted to conceal their activities. The picture which regulators gained from such information could therefore not be comprehensive. While the in the UK CREST data on stock loans are more comprehensive, because of the 'noise' they are still not used in the market for assessing short selling.

The Commission proposal would thus lead to an intricate and costly infrastructure to generate information which will be meaningless or misleading. The main cost, to maintain the accuracy of information in the many different scenarios in which share loans of some kind occur, is not possible to estimate accurately, but would run into many millions of euros per firm. The initial cost of establishing a system for share loan reporting would also run into the millions of euros for a typical firm.

If, despite the above explanation, the Commission still has concerns on this point, in accordance with better regulation principles it should consider as a separate exercise, not as part of the MIFID Level 2 measures, whether there is any market failure in existing alternative methods such as the periodic reporting of aggregate information by CSDs.

#### Article 12(1)

For the purposes of Articles 28, 30 and 45 of the Directive, investment firms, regulated markets, and investment firms and market operators operating an MTF shall make public the details of the transactions in respect of shares admitted to trading on regulated markets concluded by them or within their systems. ~~These transactions shall include sales and loans of shares.~~

#### Article 12(2)

Requiring all the information listed to be published within three minutes (as required by Article 14) would impede market participants' ability to absorb essential information from the trade tape quickly in fast-moving markets. The information to be published within three minutes need be only instrument identification, price, quantity, and non-current-market-price indicator. The Level 1 provision 'as close to real time as possible' should be interpreted in a way which enables non-essential information to be published on a longer time-scale than three minutes. There should be no requirement to identify all execution venues. There is also a need to delete Article 12(2)(h) to reflect the necessary amendment to Article 12(1).

#### Article 12(2)

The information shall be made **available for publication** either by reference to each transaction or in a form aggregating the volume and price of all transactions in the same share taking place at the same time. It shall include the following information items (as defined in Annex A of [ESC Working Document 7/2005]), where those items are relevant to the transaction in question

- a ) ~~execution venue~~ identification **of the regulated market or MTF where the transaction was executed if applicable;**
- b ) instrument identification;
- c ) trading day;
- d ) trading time;
- e ) quantity;
- f ) price per share;
- g ) indication that the trade is subject to conditions other than the current market price;
- h ) any amendments to previously disclosed information; and
- i ) ~~[indication that the transaction is a loan].~~

### Article 12(3)

Trades in individual shares which are subject to conditions other than current market price should be trade reported, subject to deferred reporting in accordance with Article 13 (amended as we suggest), with an indicator that they are subject to conditions other than current market price, as set out in Article 12(2)(g).

### Article 12(3)

~~In the case of transactions arising from orders that are subject to price conditions other than the current market price of the share, as referred to in Article 10(1)(b), post trade information is only required to be made public if such publication would entail information that is significant for the efficient price formation of the share in question.~~

### Article 12(4)

We welcome the fact that the revised draft provides for the parties to the transaction to be able to agree which party has the reporting responsibility. This is necessary to ensure that inadvertent early publication of a deferred trade by the party not at risk does not damage the position of the party at risk. It is also necessary because the Commission's proposed default rules for determining which party should report a trade outside a RM or MTF are too rigid in several respects, and could lead to significant duplicated reporting of the same trade. In some cases it is also not clear how they would work in practice. In particular:

- (a) The definition of 'investment firm', including brokers, asset managers, order transmitters etc, would impose reporting requirements on entities which do not currently have them, in a way which would vary depending on the nature of the trade and the status of the broker. Duplicative reporting obligations are avoided at the moment because the broker community assumes responsibility for reporting its clients' trades.
- (b) Firms would have to treat transactions with investment firm clients differently depending on whether the client was an EU or non EU investment firm.
- (c) Paragraph 4 (b)(i) appears to be trying to avoid duplicate reporting of "agency" chains where stock moves, for example: Client » broker 1 (agent) » broker 2 (agent) » client. But it would not be able to do so for more complicated chains, for example: broker 1(buyer/principal) » broker 2(agent) » broker3 (agent) » client(seller). Unless all parties in this example knew the entire chain and agreed to avoid duplicate reporting, both broker 1 and broker 3 would report.
- (d) Paragraph 4 (b)(ii) seems to relate to agency crosses: client » broker » client. It is not clear which side of the transaction the broker should report - buy or sell.
- (e) There is no organised or systematic method for knowing the capacity in which a firm's counterparty is acting on a transaction by transaction basis. A regime which depends on the capacity of the counterparty will not be workable,

because firms do not disclose the capacity in which they are acting to other market participants.

### Article 13

The Commission's revised draft leaves it to RMs and operators of MTFs to allow deferred publication. Articles 30 and 45 of the Directive leave it to competent authorities to decide whether or not to authorise deferred publication of large trades. It needs to be made clear that deferred publication also applies to trades undertaken outside a RM or MTF, as provided for in Article 28(2) of the Directive. In these cases, ideally deferred publication should be at the option of the firm at risk, not at the discretion of competent authorities. This is because differing reporting delays in different Member States would be difficult and costly to manage where firms envisage integrated systems for trading in the single market. The Commission's revisions to its original text are therefore helpful, though further amendments are needed. A harmonised regime is particularly important for portfolio transactions, whose delayed reporting as envisaged in Article 13(2) would not work for pan-European portfolios without real harmonisation of reporting delays. Specifically, Article 13(2) does not address what happens if there is a clash between the deferred reporting regimes of different competent authorities which have jurisdiction over different shares contained in the same portfolio.

Portfolio transactions form a significant percentage (perhaps 20 or 25 per cent) of total trading activity. They are driven by factors such as an increased focus on asset allocation and indexation, lower transaction costs and the growth of stock index futures and options markets. Investors ask the firm to execute buy and/or sell transactions in a portfolio of stocks. Clients can ask for different trading techniques, including agency transactions, agency transactions with some form of implied or explicit price guarantee (for example relative to the volume weighted average price in the relevant period), or principal transactions.

Typically, where some form of protection is given, portfolio transactions are agreed based on only very limited information about the relevant securities (such as the size of the portfolio and its liquidity characteristics) given by the client to the firm, or to a range of firms in a competitive bidding process. Information about whether the transaction concerns buys or sells or both, and the specific securities in the portfolio, is typically not disclosed until after the client has given the relevant order and, for transactions with a principal element, until after the transaction has been agreed.

The treatment of such transactions under the Level 1 text is not entirely clear, since Article 28 presumes transactions in a particular share, not transactions in portfolios of shares. After the firm has executed the transaction in the market, and booked the client-side transaction taking into account any price protections given, it would be difficult or impossible to break down the pricing for the whole portfolio to yield prices for individual securities, and to publish a resulting trade for each security, within 3 minutes. Since there is no agreement between the firm and the client about such sub-prices, there is also a danger that the inclusion of such trades in the normal trade publication stream might give misleading signals to the market. The price at which the portfolio is purchased, e.g. at a discount to the closing market price on the exchange, is not based on the price of any particular share in the portfolio, since the make-up of the portfolio is usually unknown to the dealer at the time.

Appropriate treatment of portfolio transactions will be required to avoid disrupting firms' ability to service clients' needs. They are a special type of transaction (Article 45(2) of the Directive) whose price is determined by factors other than the current market valuation of the share (Article 28(3)(b) of the Directive), and which are usually of significant size (Article 45(3)(b) of the Directive). As a portfolio transaction is a single trade, consisting of many shares, regard should be had under Article 13(2) to the total size of the trade, not to the size of each component. Firms will need the protection of the deferred reporting regime to lay off the often significant risk they assume by providing liquidity for the whole portfolio. Furthermore, when calculating the appropriate delay, regard should be had to the least liquid shares in the portfolio, as well as the most liquid, since it is often the least liquid shares which involve the firm in the greatest risk, and which will typically take the firm the longest time to protect its position.

For all the reasons described above, it is important to find a way, consistent with the Level 1 text, and at Level 3 if not possible at Level 2, to agree a consistent regime for deferred reporting, especially of portfolio transactions, which gives due recognition to the practicalities of trade publication and the risks to which firms expose themselves. We suggest below an example of wording which, combined with our suggested amendments to Article 14(2), would achieve the required result. We urge the Commission to seek agreement, in a way which is consistent with the Level 1 text, that achieves this result.

As an additional point, Article 13(2)(b) should be deleted, because it would raise the deferred reporting threshold in certain cases above what is provided for in Table 4. It would be inappropriate, and very difficult to manage in practice, to apply the same test to post-trade deferral as to pre-trade disclosure, since the parties at risk differ, and the firm which has the position after the transaction should be entitled to the same deferral rights as a firm which executes a transaction of similar size against own account.

#### Article 13

1. Notwithstanding Articles 12 and 14(2), a ~~regulated market, or market operator or investment firm operating an MTF~~ **person** required to make information in respect of a transaction public in accordance with Article 12 may defer that publication where:

a) the transaction is between an investment firm dealing on own account and a client of that firm, and the size of that transaction is equal to or exceeds the relevant minimum qualifying size, as specified in Table [4] in [the Annex];

~~b) in a case where there is a transaction arising from an order which was subject to a pre-trade transparency obligation under the Directive, the order was considered as large in scale compared to normal market size in accordance with Article 5.~~

For the purposes of determining the relevant minimum qualifying size all shares admitted to trading on a regulated market shall be classified in accordance with their average daily turnover to be calculated in accordance with Article 15.

2. Publication of information relating to a transaction of a kind mentioned in Article 10(1)(a) may ~~only~~ be deferred ***if any constituent of that transaction permits a*** ~~if it involves at least one execution relating to a share that meets the relevant threshold for deferred publication specified in Table [4] of the Annex.. Where there is more than one execution that meets such a threshold, the delay permitted in accordance with Table 4 in the Annex, in which case the longest delay for the execution in the highest class of shares in terms of average daily turnover shall apply in relation to all the executions which are part of a single transaction in accordance with Article 10(1)(a).~~

Article 13, Table 4

For trades in mid-liquidity and less liquid shares, firms should have a longer period, 5 days following the trade, to unwind positions above 250% of ADV. This addition to Table 4 is necessary to preserve firms' ability to provide liquidity to clients for very large positions in less liquid shares. The additional row in Table 4 would be as follows:

***Table 4: Deferred publication thresholds and delays***

| Minimum qualifying size of transaction for each class of shares in terms of average daily turnover (ADT) |   |  | Permitted delay for transaction publication              |
|--|---|--|--|
| ADT less than €1,000,000   | ADT greater than or equal to €1,000,000 and less than €50,000,000 | ADT greater than or equal to €50,000,000 |  |
| <b><i>250% of ADT</i></b>  | <b><i>250% of ADT</i></b>   |  | <b><i>Until end of fifth trading day after trade</i></b> |

Article 14(2)

See our comments on the need not to overload the trade tape by requiring too much information to be made public within 3 minutes under Article 12(2), and on portfolio transactions under Article 13(2) above. Only the instrument identification, price, quantity, and a non-current-market-price indicator should be made public immediately.

Portfolio transactions often consist of hundreds of constituent shares. It is likely to be physically impossible to break down the pricing for the whole portfolio to yield prices for individual securities, and to publish a resulting trade for each security, within 3 minutes. For this reason, for transactions of the type mentioned in Article 10(1)(a), and for the less urgent items in the list in Article 12(2), reliance should be placed on the natural meaning of 'as close to real time as possible', and the three minute deadline should apply only to the essential information about transactions containing fewer than 10 shares.

Article 14(2)

Pre-trade information shall be made available in real time. Post-trade information shall be made public as close to real time as possible taking into account the characteristics of the trading venue where the transaction was executed and the complexity of the trade and, in ~~any~~ ***the case of a transaction of a kind other than those mentioned in Article 10(1), the instrument identification, price, quantity, and (where relevant) non-current-market-price indicator shall be made public*** no later than three minutes after the relevant transaction.

Article 14(3)

We welcome the amendments the Commission has made in the revised draft. Many international firms trade continuously around the world. Obligatory publication outside the market hours of the most relevant market would expose firms to undue risk by giving their competitors information about their positions which would enable those competitors to move the market against the firm. The result would be to limit firms' willingness to provide liquidity to clients outside market hours.

Article 14(4)

We welcome the Commission's amendment in the revised draft. The wording 'where the share is traded' could have inappropriately restricted firms' choices for making information public, and the amendment was necessary for consistency with the Level 1 text.

Article 14(6)

The Level 1 text does not provide explicitly for firms to make information public in a way which does not prevent or impede its consolidation. Amendment to Article 14(6)(b) is at least necessary for consistency with Recital 34 of the Level 1 Directive, and to avoid the anti-competitive imposition of particular data formats. Furthermore, there is no reference at Level 1 to ensuring the reliability of information, to monitoring it for errors, or to correcting errors as proposed in Article 14(6)(a): while such a regime may be appropriate for post-trade information, it is not appropriate for Article 27 quotes. The reference to non-discrimination in paragraph (c) should also be removed for consistency with the Level 1 text.

Article 14(6)

Any arrangement adopted for the purposes of paragraphs 4 and 5 above shall:

(a) ***where appropriate***, include all reasonable steps necessary to secure that the information to be published is reliable, monitored continuously for errors, and corrected as soon as errors are detected;

(b) not ~~prevent or~~ impede ***Member States' ability to remove obstacles to*** the consolidation of the data with ~~similar~~ data from other sources ***as provided for in Recital 34 of the Directive***;

(c) make the information available to the public on a reasonable ~~and non-discriminatory~~ commercial basis.

### Article 15

We comment under Articles 16 and 21 below on the practical difficulties associated with the timing and reference period of the competent authorities' computations. It will be necessary to ensure that the relationship between the reference period in Article 15 and the deadline for performing calculations and implementing their results in Articles 16 and 21 (especially the latter, given the novelty of the exercise) is practical for both competent authorities and market operators and market participants.

### Article 15(3)

It is important to note that initial public offerings (IPOs) do not have a trading history on the basis of which competent authorities can estimate trading volumes. Furthermore, the company's industry and the history of companies in comparable businesses are likely better comparators for its likely trading activity than companies in different sectors with the same market capitalisation and free float. For example, technology companies and utility companies of comparable market capitalisation are unlikely to have similar turnover patterns. We therefore welcome the amendments which the Commission has made to Articles 7(4) and 15(3) to recognise these facts. For consistency with Article 7(4), a further amendment to Article 15(3) is needed to provide that the relevant calculations are not to be carried out for new issues until six months after admission to trading.

### Article 15(3)

In the calculations of the average daily turnover, average value of the orders executed and average number of transactions of a share, non-business days in the Member State of the competent authority making the calculation shall be excluded. When a share is first admitted to trading on a regulated market, prior to that admission the competent authority of the most relevant market in terms of liquidity for that share shall estimate the average daily turnover, the average value of the orders executed, the free float and the average number of transactions to be executed for the remainder of the calendar year. This estimate shall take account of any previous trading history of the share, as well as that of shares that are considered to have similar characteristics. ***However, when a share is first admitted to trading on a regulated market, for the purposes of determining the obligations of systematic internalisers under Article 27 of the Directive, the competent authority shall perform these calculations six months after the share is admitted to trading.***

### Article 16

We comment under Article 21 below on the practical difficulties that may arise as a result of a requirement for competent authorities to publish the result of their calculations within two months of the end of 2006, and a requirement for market participants to apply those figures at the end of a further two months. Although both competent authorities and market participants will be more practised in later years, there is still a risk that two months will not be long enough for competent authorities

to reperform calculations, and that one month will not be long enough for firms to adjust systems.

Article 21(2)

Competent authorities may not be able to produce the data required by this Article within the required two months. During CESR's March 2005 MIFID consultation, CESR Members encountered severe difficulty in producing accurate statistical information quickly and in a consistent format. Publication of reliable 2006 data by 1<sup>st</sup> March 2007 may therefore be difficult or impossible to achieve.

RMs, MTFs and firms may also, once the competent authorities have published the data, be unable to incorporate them into their systems and test those systems with the new data within the required further two months. The importance of the numbers concerned to the operation of the MIFID regime, and the fact that the requirements and the arrangements supporting them will be essentially new, mean that the risk of systemic failure and consequent market disruption is high.

It is therefore necessary to provide for a longer transitional period. The reference period should end earlier to allow more time for both competent authorities and firms to convert systems.

Article 21(2)

Competent authorities shall publish the data for *the 12 months to 30<sup>th</sup> June 2006* on 1 ~~March~~ *January* 2007. This data will be applicable from 30 April 2007.