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Finnish Association of Securities Dealers
Futures and Options Association
Icelandic Financial Services Association
International Capital Market Association
International Swaps and Derivatives Association
Norwegian Securities Dealers Association
Securities Industry and Financial Market Association**

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24th April 2008

Dear Carlo

MIFID Level 3 Work Plan: CESR MIFID Q&A

This letter makes the same points as the letter which the European Forum of Securities Associations (EFSA) has sent to CESR, and follows up the response which we made, with some of the Members of EFSA, to CESR's 2007 consultation on CESR's MIFID Level 3 Work Plan.

In section (ii) of its MIFID Level 3 Expert Group Work Plan for Q4/2007-2008 (CESR/07-704c), CESR confirmed its intention to develop a Q&A mechanism for CESR to answer market participants and consumers' questions. On 11th April CESR published the first three questions and answers on its website (CESR/08-266).

In our responses to CESR's autumn 2007 consultation, we raised a number of queries about the proposed Q&A, which CESR's comments in the published Work Plan only partly answered.

We welcome the fact that CESR is putting in place mechanisms to promote consistency in implementation of MIFID throughout Europe. We think, in this context, that CESR's Q&A can make a constructive contribution to the predictability of application of MIFID, and convergence of regulatory practice, but to do so its precise status, its interaction with the Commission's MIFID Q&A, and the disciplines for maintaining it, need to be elaborated further. We think that the Q&A would most effectively ensure consistency in implementation by different CESR members if the

answers were directed to coordinate the application of MIFID provisions by competent authorities themselves, rather than being targeted at firms.

The first published questions and answers, which CESR posted on 11th April, have not been set in a context that resolves the issues that we raised in the 2007 consultation, and we would be grateful for an opportunity to discuss this with you further.

We have placed the issues under four headings below: the status of the Q&A, editorial control of the Q&A, the process for generating answers, and the relationship between CESR's Q&A and the Commission's Q&A.

Status of the Q&A

In CESR/07-704c, CESR commented of the proposed Q&A that:

“This tool will seek to provide clarity to market participants on issues where there is a need for common views of EU supervisors.”

“these will not constitute standards, guidelines, or recommendations and are not legally binding”

“the answers posted are capable of having legal effects such as:

- They may be used by Courts/Tribunal in assisting in the interpretation of level 1 and 2 material;
- They may have relevance in an enforcement action conducted by a competent authority;
- They may be seen as creating relevant considerations and legitimate expectations, particularly as regards the predictability of actions taken by competent authorities.”

“the MiFID Q&A is not designed to be a policy-making tool. Its main purpose is to address issues of practical application, for which a consultation process would unnecessarily delay the adoption of answers. For this reason, CESR does not intend to conduct regular formal consultations for the MiFID Q&A. However, in some circumstances CESR might consider it necessary to check its proposals with market participants and representatives of retail investors before taking its final decisions; these needs might be satisfied by consulting the MiFID Consultative Working Group.”

CESR does not make clear how the not-legally-binding status of the Q&A answers would relate to the possible use of the Q&A that CESR foresees that courts, tribunals, and competent authorities' enforcers might make of them. We suggest that it would be most appropriate to think of the Q&A as a means to converge supervisory practices by national competent authorities, rather than as an extra layer of 'requirements' or 'expectations' that acts directly on firms. This would mean that the Q&A would be able to exert a convergent effect on competent authorities' implementation of MIFID requirements, while firms would continue to be held (by courts, tribunals, or competent authorities as appropriate) solely to national requirements that take the Q&A into account. The CESR Q&A would thus provide guidance on consistent practical application of MIFID at the level of implementation of national rules by competent authorities, in the same way that the 'considered view' in the Commission's Q&A, which is specifically stated not to be relied on in enforcement or regulatory action, influences consistent interpretation and implementation of MIFID by Member State authorities and firms,.

If any aspect of the Q&A should, for whatever reason, have a direct bearing on firms, then it would be important for it to do so only as a defence against supervisory, enforcement, or legal action. Such a restriction is necessary in order to ensure that the appropriate policy-making disciplines are not overridden.

We note that the answers so far published do not refer to the way in which competent authorities should apply MIFID provisions, but refer instead to things that firms 'should' do, or which it 'may be prudent' for firms to do. We think that the uncertain status of such messages to firms is unhelpful, and that the Q&A would be a much more effective tool if the answers were directed to coordinate the actions of competent authorities. For example, the first question answered by CESR seems closely related to matters relating to client profiles under Article 19(4) which are covered in the answers to the Commission's Questions 65 and 175. The inherent value of a CESR MIFID Q & A would reside in addressing questions where CESR has a specific role and expertise distinct from the Commission's: establishing a consensus between the different European regulators on how to promote converged supervisory practice.

Editorial control

One of the reasons why CESR's Prospectus Directive Q&A has been successful is that CESR selects the right questions to be answered. Rather than committing to answer publicly any question that a market participant or consumer may pose, it is appropriate to ensure that there is proper editorial discipline, so that questions are screened for publication, and answered in an appropriate way, to provide a structured corpus of CESR material on the recommended application of MIFID provisions. As part of this process, it needs to be clear when answers are posted, and when they are changed.

It is not clear from the published Q&A how the questions have been selected for answer, or what screening process they have been subject to. At present, perhaps because there are only three of them, they have the appearance of randomness.

Process for generating answers

To ensure congruence with the needs of firms' clients, and to ensure that the answers included in the Q&A are practical and feasible, it is important that the process of generating answers properly assesses the impact the answers would have on clients' ability to demand services, and firms' ability to provide them. We welcome CESR's intention to check the answers in certain cases with market participants, although the Work Plan does not explain how CESR would do so, except to say that it might consult the MIFID Consultative Working Group. This checking process should certainly not be omitted solely to ensure a quick answer. It should not be curtailed if the question is a complex one. Furthermore, it will be important for CESR to seek access to expert comment if the question concerns a specialised aspect of the market: in some cases, expertise on particular topics may not be available in the Consultative Working Group. CESR should be prepared to seek broad-based and expert advice where the issue merits it: trade associations can be an efficient means of obtaining such input.

Furthermore, it is also important to ensure that answers can be changed efficiently, either on CESR's initiative or in response to concerns expressed, when experience shows them to be inappropriate. We welcome the statement in CESR/08-266 that CESR intends to do this.

CESR's Q&A and the Commission's Q&A

We would have preferred the Commission's Q&A to be integrated with CESR's Q&A, to provide a single body of material, and we would encourage the Commission and CESR to keep an open mind on this point. If the Q&A's are not to be integrated, they must at least be coordinated, and cross-refer to one another, to avoid contradictions. Although CESR's Work Plan is silent on the point, we understand that the intention is that the Commission's Q&A would continue to answer questions about interpretation of MIFID, whereas CESR's would deal with MIFID's practical application. It remains to be seen how easy it will be to define this boundary in practice.

The published questions and answers illustrate very well the practical difficulties which will arise. They appear to include elements which interpret the meaning of the Directive, as well as aspects relating to the application of Directive requirements in practical circumstances. We think that the difficulty of drawing the boundary between the realms of the two Q&As illustrates the importance of targeting the CESR Q&A at the application of MIFID provisions by competent authorities, and not opining on how directive provisions apply to firms.

CESR says in the introduction ("The Context and Status of this Q&A") to CESR/08-266 that: "CESR intends to develop a common interface that will ensure high interoperability with the Commission database on MIFID....One of the modules in the new [CESR] website is a database for Q&A, which CESR plans to use for a number of Q & As, such as MIFID. This new database for Q&A will allow the Commission and CESR to develop a highly integrated solution, offering complete transparency in the development of CESR answers to a question (before publication) and a very similar structure and interface to submit questions on the public side." This paragraph seems to be describing the technical means by which users will be able to consult the Commission's and CESR's database alongside each other. We think that more attention is also needed to the criteria that the Commission and CESR use to draw the boundary between them.

Yours sincerely

Paul Richards and Nathalie Aubry, ICMA
On behalf of the Associations listed at the head of this letter.

Cc: Maria Velentza (DG Markt)
Jean-Paul Servais (Chairman of the CESR MIFID Level 3 Expert Group).