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European Commission

Internal Market and Services DG
Financial Services Policy and
Financial Markets

Mail: Markt-G3@cec.eu.int

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city_date
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Draft Commission document on organisational requirements and identification, management and disclosure of conflicts of interests by investment firms [ESC/17/2005]

Dear Sir, Dear Madam,

The *Bundesverband der Wertpapierfirmen an den deutschen Börsen e.V.* (bwf) is a federal association representing securities trading firms and brokers at the stock markets throughout Germany. bwf expressly welcomes the opportunity to participate in the consultations on the aforesaid draft document of the European Commission.

We would like to make the following comments:

1. Form of implementation

The implementing measures for Art. 13 and 18 of the Directive 2004/39 EC on the markets in financial instruments ("MiFID") which are the subject of the present draft Commission document do not constitute matter of a purely technical nature for the implementation of organisational requirements and the management of conflicts of interests. Consequently, these implementing measures should be the subject of one or more subordinate directives. Only in this way is the still necessary transformation of the rules into national law of the member states assured, and this allows the possibility to make efficient use of the discretionary latitude in the interpretation of the numerous blanket-clause concepts. This possibility is not given if the instrument of a subordinate implementing regulation were chosen whose rules would have the force of directly applicable law and would considerably constrain, if not de facto exclude the aforesaid discretionary latitude.

Such a procedure is supported, moreover, by the experiences with the Directive 2003/6/EC on insider dealing and market manipulation (market

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abuse). Here, too, it has been found that it is expedient to regulate most of the Commission's subordinate implementing measures in the form of directives.

2. Compliance, Risk management and Internal audit function
(Art. 13 (2 to 4) MiFID, Art. 3-6 ESC/17/2005)

We expressly welcome the reference in the supplementary draft document ESC/18/2005, p. 2 (highlighted in bold print there: *"Our decision reflects .... and the nature of their business."*) which calls for special consideration in the general requirements for the needs of investor protection in the specific case on the one hand and the special business structures of the investment firms on the other. This assures an interpretation of the rules in Art. 4 to 6 of the draft document ESC/17/2005 in the sense of the flexibility allowed there (*"regulation should be sufficiently flexible"*). The associated discretionary latitude is essential for many investment firms and protects them from unreasonable overregulation.

3. Personal transactions
(Art. 13 (2) MiFID, Art. 9 ESC/17/2005)

The said rule in the draft document indicates that it does not cover all persons engaged on behalf of investment firms ("*managers, employees and tied agents*", cf. Art. 13 (2) MiFID). The said restriction of the persons who fall within the scope of application by virtue of the criteria of Art. 9 (1) ESC/17/2005 provides a, for the purposes of legal certainty, well defined and appropriate delimitation of the circle of persons to whom it is applicable.

4. Client order handling and Recording requirements
(Art. 13 (6) MiFID, Art. 20 ESC/17/2005)

The accompanying document ESC/18/2005, p. 3, points out that the present draft Commission document stipulates a more restrictive recording regime than provided for on the basis of the CESR recommendations. We consider the proposals submitted by CESR to be on the whole more appropriate and preferable. These allow the member states greater flexibility in implementing the substantive requirements of the MiFID, and also permit possible exceptions and simplifications for the investment firms in narrowly defined areas.

In this connection the accompanying document also points, quite rightly, to the major significance of lower costs for numerous (smaller) investment firms associated with the said requirements. Here, the firms are allowed the necessary latitude to keep the costs for any technical investments and implementations to a minimum if need be.

Furthermore, we welcome the fact that the originally explicitly stated burden-of-proof rules in the investment firms' disfavour (cf. Art. 13 (1, 4 and 5) ESC/17/2005) have been deleted from the text in the now revised version of the draft document.

5. Retention of records
(Art. 13 (6) MiFID, Art. 14 ESC/17/2005)

We welcome the fact that the CESR mandate to draft a definitive list of all conceivable types of record that had been provided for in the first version of the draft document has been transferred to the national investment regulatory authorities of the respective member states in the now revised version of the draft document.

With regard to the rules in Art. 13 and 14 of the draft document ESC/17/2005 generally it will need to be examined at member state level whether the rules provided for therein are compatible with the respective general provisions of national data protection law.

Yours faithfully,

Dr. Hans Mewes
Legal Adviser