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Comments by FESE on Commission Working Document ESC/20/2005 Rev. 1 – Draft level II measures for the MiFID (including comments on ESC/7/2005)

FESE is the representative organisation of Europe's Regulated Markets for securities and derivatives and has incorporated EACH, the European Association of Central Counterparty Clearing Houses. Our Membership comprises all Members States of the EU, old and new, as well as the countries of the EFTA.

We appreciate the opportunity to comment on the Commission' drafts for level II implementing measures on the MiFID. We are convinced of the crucial role of proper consultation in legislative processes since such consultation enables legislators to make better and more appropriate laws and rules. We may add at this juncture that the discussions and decisions in the ESC do not take place in the same spirit of openness and transparency to the outside world and we urge the European Commission to propose to the ESC improvements in this area.

We are aware that several of our Members submit individual comments. We expressly refer to these submissions; they do in certain cases focus on particularities in these Members' environment and may therefore provide additional specific insight to the Commission.

In this document, we chiefly submit our views on the European Commission's <u>third</u> (in order of publication) draft level II measures for the MiFID (ESC/20/2005) on <u>marketplace rules</u>. In its revised version Rev. 1. However, we add to these considerations some thoughts about the Commission's earlier documents ESC 7.

We have included our detailed comments in the annex to this letter which has the following structure:

- Market transparency (pre- and post-trade) – ESC 20 Art. 3 through 16
- Admission to trading – ESC 20 Art. 17 through 20
- More general comments on transaction reporting – ESC 7

Our main concerns in relation to the Commission's draft instrument on market transparency are:

- Some of the definitions or **classifications** in the instrument may still warrant additional consideration as they could jeopardise existing or hinder future developments on Europe's Exchanges.
- We object to the **national choice** between the two **quantitative criteria for "liquid shares"** – Art. 7(2). Such an option is in our view unnecessary and would stand in the way of even MiFID implementation across the EU.
- We are satisfied hearing that the issue of a "waiting period" before IPO shares may be found liquid and brought under the transparency regime for systematic internalisation is under continued discussion. We reject such a "waiting period" for a number of serious reasons which we lay out in more detail in the annex to this cover letter. We believe that internalisation in shares that can be expected to be actively traded following their admission <u>must from the beginning happen</u> under the same transparency regime as incumbent liquid shares.

- We recommend further discussion about the term “weighted spread” in Art. 4(1)(b)(i) since discussions among FESE Members have revealed that the phrasing of this Article my be ambiguous.
- Further discussion CESR Members and/or Member States about the core contents of CESR’s advice in this respect may facilitate an improvement of this passage
- The reference in Art. 12(3) – post-trade deferrals – to pre-trade transparency exemptions (Art. 10(1)(b)) is not relevant and shoots beyond the target. We think that for example VWAP transactions carry valuable market information and should therefore in principle be reported – of course under the standard deferral regime, should they exceed the relevant post-trade thresholds.
- We also see no justification whatsoever to suddenly introduce the **cross-reference** from **pre-trade transparency exemptions** to **post-trade deferrals** as proposed in Art. 13(1)(b).
- We noted with concern the “invitation” to Member States by the Commission in Explanatory Note ESC/21/2005 to indicate whether **more detailed requirements for shares** to be admitted to a Regulated Market should be laid down. We strongly recommend <u>against</u> any stricter ex-ante requirements as we are convinced that competition between markets with regard to the quality of admission rules is healthy and will not lead to any “race to the bottom”. Moreover, we fear that overly strict admission requirements on a European level will drive issuers away from EU Regulated Markets onto non-Regulated Markets or out of the EU. We enclose a few critical comments on the criteria for shares and we make remarks also on derivatives and UCITS.

We also enclose further input to the long and difficult discussion on structural and technical solutions for transaction reporting (Art. 25 and 58 MiFID and ESC/7/2005).

We hope that the Commission and its staff will find our comments useful in its deliberations, we are of course always available for the discussion of any related matters, and we look forward to further good co-operation.

Yours sincerely,

Gregor Pozniak
Deputy Secretary General, FESE

Annex

Market Transparency

Article 2(d)

1. We welcome the clarification in Rev. 1 that a **negotiated transaction** may indeed involve more than two parties. However, we suggest amending the final section of this definition: "… but executed within the rules of a regulated market or an MTF".

Article 3(3)

2. We suggest changes in the wording of the second sentence: "Those quotes shall represent binding commitments … shares in which the market makers are prepared to buy or sell".

Article 3(4) – Footnote 7

3. In the interest of further dynamic and flexible development of market models, the draft recital in FN 7 relating to a **variety of possible trading algorithms** in auction trading is of highest importance for FESE Members and we urge the Commission to retain this text in the final version of the level II document.

Article 3(5)

4. As we appreciated CESR's opening towards the recognition of an **open-ended list of possible market models**, we welcome the Commission's redrafting of Art. 3(5). We may suggest the following drafting improvement: "… that ensures that adequate information is made public at any particular time as to the level of orders and of trading interest in any share."

5. In any case, we urge Commission staff to take into good consideration any additional comments by individual FESE Member Exchanges concerning specificities of their own trading mechanisms and market models. We trust in the intent of the Commission to facilitate the continued use of existing successful market models and to allow innovation in this area.

6. Moreover, we strongly suggest considering and discussing how intermediated market models with human intervention (e. g. of the kind of the NYSE **specialist model**) should be classified. We believe that is important to ensure that such models, undoubtedly of a hybrid character due to the characteristics of their price determination process, could be subsumed under the more general rule of Art. 3(5) and avoid being caught by the special rule of Art. 3(2). Art. 3(2) would force such specialist models into full five-line transparency. This would devaluate their value proposition and would render their development and operation highly unlikely, if not outright impossible. We foresee that specialist intermediated market models could become very valuable in organising the trading in less liquid shares and that they may play an important role to ensure the global competitiveness of European capital markets.

7. A respective recital could provide clarification and could focus the scope of Art. 3(2). A further step necessary to make the operation of specialist-type market models feasible is to ensure that such models can be used to receive **client limit orders routed** in accordance with Art. 22(2) MiFID. For this purpose, a change to Art. 14(5) of the instrument would be useful, as in its present form that passage may be understood to refer solely to the market models under Art. 3(2) – see below.

Article 4(1)(b) – Footnote 8

8. We could envisage a shortening and straightening of the draft recital in Footnote 8 making it clearer that the main purpose is (as we understand the recital) to close any “negotiated trade” loophole for internalisers through which they could escape in view of the last indent of the new recital in FN 4. To serve this purpose, the text could probably read like: “A systematic internaliser cannot – when dealing under the systems of … - escape its obligations under Art. 27 by entering into a negotiated trade.

Article 4(1)(b)(i)

9. Discussions among FESE Members have revealed that the phrasing of Art. 4(1)(b)(i) may be ambiguous, notably as far as the term “weighted spread” is concerned. Further discussion with CESR Members and/or Member States about the core contents of CESR’s advice in this respect may facilitate an improvement of this passage.

Article 4(1)(b)(ii) – Footnote 10

10. We acknowledge that, strictly speaking, the text of the draft recital in FN 10 is not exclusive (“… and … are both examples …); however we fear that such a wording may steer those that have to implement the text (national legislators and/or regulators) to an **unnecessarily restrictive interpretation.** Commission services will receive from among FESE Membership examples of yet other types of transactions that are subject to conditions other than the current market price.

11. The respective recital should probably include such notified types of transactions as further examples; in any case, it should be made much clearer that the examples given are only **some among many existing and conceivable ones.** We suggest the following drafting change (also for the recital in FN 14): “Examples of transactions … are, among others, VWAP transactions …”

Article 5 – Table 2 of the Annex

12. We can only reiterate our observation that the middle bracket (for ADT) for the **determination of large orders** is excessively broad, not only in comparison with its neighbour brackets, but also with regard to the resulting minimum size for large orders. While brackets 2 and 4 both have only a factor 2 between upper and lower threshold, the middle bracket encompasses a factor 25. As a consequence, the resulting minimum size for a large order is between 1 and 25 per cent of ADT in that share. This percentage spread (1 to 25) is larger than the percentage spread in the neighbouring brackets and reaches even beyond the limits of the latter:

ADT	< € 500k	€ 500k-1m	**€ 1-25m**	€25-50m	> € 50m
Minimum size	€ 50k	€100k	**€250k**	€400k	€500k
Min. size in % of ADT	> 10 %	10-20 %	**1-40 %**	0.8-1.6 %	< 1 %

13. Remembering the difficult discussions with and within CESR, we are not in a position to make any concrete numeric proposal, but urge Commission services and CESR to revisit the issue with the aim of finding a more balanced scale – probably by narrowing the middle bracket while extending its neighbouring brackets on both sides.

Article 6 – Footnote 12

14. FESE Members shared the Commission's original preference for leaving out the **quantitative criteria** that may exclude firms from the **definition of systematic internaliser** on the grounds that their internalising activity is below certain quantitative thresholds – which idea, as the Commission rightly observed, seems to have no foundation in the level I text. We therefore suggest to the Commission to revert to earlier thoughts by leaving out the word "material" in 6(1)(a) and even more so by avoiding any quantification as proposed in Footnote 12.

15. We recall that during the legislative process in EMAC an amendment was tabled by Mrs. Randzio-Plath (Am. 158) suggesting the inclusion of a quantitative threshold of 10 per cent of the firm's overall business below which the internaliser's activity should not be regarded as "material to the market". This amendment was later rejected by EMAC. We believe that the Commission should not endeavour to reintroduce via level II measures provisions that were clearly rejected during the codecision process on level I.

Article 7(1)

16. Most of our Members that operate stock markets in smaller economies (both, in old and new Member States) are satisfied to see the policy change proposed by the Commission with regard to the **definition of "liquid share".** We cannot conceal, however, that most of our Members in large economies have no particular view – as they are not directly affected. As a general policy line, they may express general scepticism about any legislation that creates special situations for particular Member States and/or their markets. Our small Members tend to agree with Commission's pragmatic approach and with the argumentation brought forward in the respective passage of Explanatory Note ESC 21.

17. A national option for the application of Art. 7(1) would allow regulators, market operators, and investment firms to discuss on a national basis whether such a clause is useful or necessary to maintain the level playing field between regulated markets and internalisers in any particular market, or whether the market is better served by lower transparency requirements for systematic internalisers in a larger number of shares. We have argued vis-à-vis CESR that a national choice in this respect does not create the danger of a unlevel playing field since all firms from throughout the EU (whether they are domestic ones on a particular market or remote foreign ones) would be affected in the same way when undertaking internalisation in a particular market's shares.

18. We are certain that Commission services will, as requested, receive feedback from Member States with smaller financial markets and we recommend to the Commission to take good account of this feedback.

19. We trust that the Commission and CESR have analysed the available data about the liquidity of individual shares in the various European markets. For the case that on any particular market the distribution of liquidity be very "flat" (meaning that, for example, no stock exceeds 5 per cent of overall trading activity and that therefore filling up the 60 per cent would bring a relatively large number of shares into the "liquid" category), the introduction of a maximum number of hares that can be "declared liquid" could be considered.

20. As a matter of legislative technique, we wonder whether paragraphs (1) and (2) of Art. 7 should not be switched so that par. 2 becomes the basic rule (however amended – see below) and Art. 1 the additional special feature.

Article 7(2)

21. We repeat our arguments (that we have already communicated to CESR during its consultation process) against the **choice for Member States** between the two numeric pan-European criteria for liquid shares. Here, our Members find that any solution would be better than the national option foreseen:
    - either (preferred) the two criteria are linked by OR (meaning that if either is fulfilled, the share is liquid);
    - or (as a fall-back) the two criteria are linked by AND (both would have to be fulfilled to declare a share liquid).

Article 7 (3) (and deleted Footnote 9)

22. As a matter of legislative technique, we wonder whether the reference in Art. 7(3) second subparagraph should not be drafted in a more flexible way, probably along the lines of FN 9 of the document dated 13 June 2005. We are aware that 20th January 2007 is the **transposition date** for the Transparency Directive. Given the experience with the timely transposition of (FSAP) Directives across Member States, we may expect that on that date, informations on holdings on the basis of this Directive may still not yet be available in some Member States. The phrasing used in the (earlier) footnote could cater for this situation.

Article 7(4)

23. We understand that the proposal introduced by the Commission in the new Art. 7(4) is under continuing discussion between Commission, Member States, regulators, and industry. Nevertheless, we would like to underline at this juncture that FESE and its Members are alerted to the highest degree by the possibility that shares that are for the first time admitted to trading on any regulated market shall not be considered to be liquid until six months after admission. We believe that exempting unconditionally internalisation in all IPO shares (and all non-EU shares that are for the first time admitted to trading within the EU) from pre-trade transparency would run completely contrary to

the MiFID's intention, is not supported by the level I text, and would be dangerous for the integrity of Europe's market during the highly sensitive phase immediately after an IPO.

24. We would like to bring forward the following arguments:

    (a) Art. 27(1) first subparagraph of the MiFID is clear in its instruction that firm quotes are to be published by systematic internalisers **if there is a liquid market** for the share in question. Art. 7(4) of the level II instrument would create a six-months period when this instruction by the European legislator would <u>have to be</u> ignored.

    (b) Art. 27(7) of the MiFID determines the Commission in its work on level II measures and requests that level II instruments lead to an application of the text of Art. 27 that "**maximis(es) the possibility of investment firms of obtaining the best deal for their clients**". We argue that during the proposed period those investment firms that <u>are not</u> systematic internalisers in the IPO share may be blocked from an appropriate fulfilment of their best execution obligations.

    (c) After offering two alternative texts in their consultation document 04-562 (par. 6 in Box 16 on page 73) and asking consultees for their preference (Question 9.5. in same document), **CESR decided in favour of immediate transparency for IPO shares** if a liquid market could be expected.[1] This indicates, among other things, that among themselves regulators felt confident with their possibilities to identify ex-ante potentially liquid IPOs.

    (d) We agree with CESR that in the time immediately after an IPO transparency in trading is particularly desirable. Experience shows that during this time the **proportion of retail orders** is often above average and higher than in later times when retail interest in the new stock has faded. The MiFID sets out to provide particular protection for the interests of retail shareholders and the proposal of Art. 7(4) would run contrary to this intention.

    (e) Participation in the consortium of an IPO is a matter of fierce competition among investment firms. Exempting those firms that decide to systematically internalise trades in the IPO share from pre-trade transparency under Art. 27 potentially disadvantages all other firms and their clients.

    (f) Experience also shows that the first days of trading of an IPO share are days of **increased price volatility**. During this time, best execution obligations must be controlled with particular scrutiny.

[1] "CESR is not convinced that the fact that such shares have no trading track-record for calculating SMS should mean that they should have no SMS until they have been trading for a number of months. On the contrary, these shares often experience substantial trading in their first few weeks after admission to a regulated market and it is desirable that there should be a high level of transparency during this period. CESR has therefore recommended that the competent authority should provisionally allocate a newly admitted share to an SMS group on the basis of known information about the size of the issue, likely trading interest and the SMS of any 'peer group' shares and review the suitability of the initial SMS three months after trading commences afterward." (CESR Advice 05-290b, top of p. 67; similar already earlier in document 05-164, par. 60, p. 51 f)

(g) Stabilisation is permitted within the legal framework of the MAD and its respective level II instrument. **Monitoring stabilisation** as well as the **surveillance of market participants' behaviour** (in order to prevent and detect market abuse) warrant full transparency from the start of trading in the IPO share.

(h) As CESR writes, "the scope of article 27 in respect of the shares covered should try and establish an **appropriate balance** between:
- the central role of pre-trade transparency in, among other things, helping to integrate separate/fragmented liquidity pools, aid competitive price formation and lower search costs for participants; and
- the need to take into account the risks born by systematic internalisers as a result of being required to continuously display quotes in shares in which they are systematic internalisers. (CESR Advice 05-290b, p. 61)".

(i) Above, we have tried to outline why creating integrated liquidity pools, ensuring an environment for competitive price formation and facilitating fulfilment of best execution obligation for all firms are particularly important during the early stages after the start of trading in an IPO share. We do, on the other hand, not see that the **risk position of an investment firm** choosing to internalise orders in an IPO share is significantly high – and should return to "normal" after six months.

25. Any arguments relating to potential difficulties in the ex-ante estimation of "liquidity" cannot and should not outweigh the **loss of transparency** and the reduction of chances for the maintenance of **market integrity** and **investor protection** that would arise from <u>any delay</u> in declaring a share liquid. We note that document ESC 20 Rev. 1 still contains the second and third sentence of Art. 15(3) and we feel that this text (in its revised form) provides the necessary tools and guidance for regulators to make the ex-ante assessment as advised by CESR and regarded indispensable by FESE Membership. We refer the Commission also to CESR's correct observation that several Regulated Markets in Europe take similar approaches in allocating provisional block sizes to shares before they start trading. The same is in many cases true for the ex-ante determination of the appropriate trading mechanisms (market segments) of the share or for their inclusion in certain indices.

26. In order to give the competent authority the possibility of reviewing its ex-ante decision, should market activity deviate significantly (in either direction) from expectations, we support CESR's proposal to introduce a relatively **early review possibility** (three months or less). Separating the review of the fundamental decision to declare a share liquid from the <u>more detailed decision about the provisional allocation in a certain SMS class</u> could make this review process more flexible and reduce the fear of excessive risk exposure on the side of the systematic internalisers.

<u>Article 8</u>

27. We note that the Commission has followed our suggestion to raise the **SMS** in the lowest class from € 5,000 to € 7,500 as this value is more likely to represent something like an average of order values in this class.

28. We also note that the Commission now abstains from the idea of an **"open" top class** and proposes extrapolating the classification for the purpose of establishing the SMS. Should the concept of an open top class be revived, we suggest considering applying the same argumentation to that highest

class (we use the example of the open-ended top class as proposed in the earlier document dated 13th June 2005):

The average size of all orders that are larger than € 90,000 is certainly very much higher than € 100,000 and no guesses should be made as to the true average size. However, we suggest raising the SMS in the highest class moderately, say to € 120,000.

Article 9

29. With regard to subpar. (a), we would like to repeat our opinion as expressed earlier that a phrasing like "… the prices of which are close to comparable quotes … in other relevant markets" is fuzzy and lends itself to divergent interpretation by regulators across the EU.

30. We understand that the text of Art. 9(b) will be changed specifying that the period of 12 months is the minimum.

Article 10

31. We welcome the improvement in the wording of Art. 10(1)(b), but would like to reiterate our comment made above in relation to FN 10. We would therefore suggest to rephrase the proposed recital in FN 14: "Stop orders, … are, among others, examples of orders that are …".

32. Despite the change in the text of Art. 10(1)(b), we still observe that there exists a **variety of order types** that can not be reasonably subsumed under the Commission's proposed categorisation of market/equivalent/limit order. Other combinations and hybrid types of orders do exist; examples are "fill-or-kill" and "execute-and-eliminate" orders.

33. We argue that such orders should not be treated differently (i.e. enjoy exemption from fixed-quote obligations if received from professional investors) because they are certainly in one form or the other subject to current market price conditions without entirely fitting into the proposed scheme.

Article 10(2) last subparagraph

34. While we welcome the clarification that investment firms have **to establish and communicate in advance** the arrangements that they have to ensure non-discriminatory treatment of clients. At the same time, we would have seen good value in the obligation for firms as specified in Art. 10(3) of the document dated 13th June 2005 (obligation to **keep a record** of all non-executed orders).

Article 12(1)

35. We understand that the mention of **share loans** in Art. 12(1) is under continuing discussion: FESE Members feel that neither enough legal discussion nor enough technical and organisational preparation have taken place to allow the inclusion of share loans at this point of time. We agree that the issue might warrant further discussion and could envisage the inclusion of a respective recital and/or a report/review clause in the instrument.

Article 12(3)

36. FESE and its Members are against the inclusion of Art. 12(3). The revised version of this paragraph is in our view certainly preferable to the earlier proposal as it is more in line with the clear intention of Art. 28 MiFID, namely to exclude from publication those types of transactions that do not contribute significantly to price formation.

37. We argue, however, that the attempt to use the definition of Art. 10(1)(b) is inappropriate since Art. 10 governs how orders are to be treated by systematic internalisers while Art. 12 deals with details of the reporting of completed transactions. The mere fact that both make a reference to conditions other than price does not provide any reason to tie the two together.

38. The underlying presumption for all trades that are market-price driven should be that they be made public, subject to the standard size-related deferral rules. This regime is in our view absolutely sufficient for the risk protection of the investment firm.

Article 12(4)

39. We welcome the **flexibilisation of the reporting arrangements** in Art. 12(4). For clarity's sake, we propose a drafting change in the introductory clause: "Where the transaction … as agreed by the parties; in the absence of an agreement, the information, the information shall be made public by: …".

Article 13(1)

40. We note a change in wording in the first lines of Art. 13(1). While the earlier version of the document contained the permission to the competent authority to grant a waiver under certain defined circumstances, the new text seems to grant the right of deferral directly to the RM/MTF. We would seek clarification of the relation between this "direct" right and the "may"-clause in Art. 30(2) and 45(2) if the level II instrument should be promulgated as a regulation.

Article 13(1)(b)

41. FESE and its Members highly welcome the revised version of Art. 13(1), in particular the clarification that the conditions of letters (a) and (b) are **cumulative**.

42. On the level of legislative technique, we seek clarity here about the situation that a competent authority has not exercised its right under Art. 29(2) and 44(2) to grant a size-related waiver. Would in this case Art. 13(1)(b)

   - apply if an order exceeded the threshold established on the European level or
   - would it not apply because nobody "considered" it to be large for the purpose of pre-trade transparency?

43. As a drafting comment, we observe that no reference seems to be made in Art. 13(1) to the actual delay that may be granted. Art. 13(1) and the first sentence of par. 2 speak only of the thresholds (i.e. columns 1 to 3 of Table 4) and not of the delays granted (column 4).

Article 14(2)

44. We regard unnecessary and suggest deleting the words added to Art. 14(2) in its revised version. We recall the clear commitment by the Commission and by CESR to request post-trade information as close to real time as possible (Art. 45(1) MiFID) and see no reason for expressly referring to "the characteristics of the trading venue". We trust that regulators do not need this guidance for their judgement about how close to real time it is possible for different trading venues to fulfil their information obligation.

Article 14(3)

45. With regard to the first sentence of par. 3 we wonder which case could be addressed by the words "or is intended to take place". Post-trade information duties arise when an order is executed – during the closing hours of a venue, no transactions can take place there. We think that
   - if the internaliser executed during the night (against his own book), he has to report the transaction before he opens next morning; and
   - if the order is only intended to be executed, it has not been executed yet and no obligation to report the transaction has been created.

Article 14(5)

46. In line with our earlier comments about the necessity for flexible and open definitions (e.g. for market models or order types), we suggest considering a change in the final passage of Art. 14(5) first subparagraph from "a continuous auction order book trading system" to "**an order-driven system**". It is absolutely conceivable that order-driven systems that do not exactly fulfil the description of "a continuous auction order book trading system" are appropriate for accepting unexecuted client limit orders from firms and granting them the appropriate visibility and accessibility. With this argumentation, we follow our remarks in the context of Art. 3(5), both about the continued use of existing market models and, in particular, about the facilitation of specialist-type market models.

47. With a view to what we interpret as a preference on CESR's side for order transmission to an RM or MTF[2], we ask the Commission also to reconsider changing the beginning of Art. 14(5) to "Where an investment firm **can not** transmit the limit order …".

48. Furthermore, we suggest clarifying the concept of broad visibility and accessibility by adding towards the end "… is made available to **all** other market participants …".

49. We understand that the Commission is working on an improvement of the text in Art. 14(5), clarifying that the level I principles of visibility and easy accessibility (Art. 22(2) MiFID) are observed.

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[2] see in particular the fourth paragraph on p. 73 of CESR's advice 05-290b: "… where existing RMs and MTFs provide no opportunity to display and make accessible …"

50. In this context it is important for us that it be clear that **visibility and accessibility** should be granted to all market participants, regardless of their MiFID status (see the broad definition of possible market participants in Art. 42(3) MiFID). We strongly recommend including a recital in the level II document specifying that the term “market participants” should not – neither in this context nor in others – be interpreted as restricted to investment firms and credit institutions.

51. Finally; we regret to note that the Commission chose not to include in Art. 14(5) any express reference to **best execution obligations**. We recall that CESR, in its advice (par. 53 in Box 23 on p. 74 of document 05-290b) explicitly requested that “… firms should fulfil best execution obligations when choosing how and where to display a non-executed client limit order”. We strongly suggest including such a reference in the level II document.

Article 14(6)

52. In view of the overarching importance of consolidatability, we recommend strengthening the wording of Art. 14(6)(b) by replacing the words “not prevent or impede the consolidation” by the word “**allow consolidation**” (or, even stronger, by adding the word “promote”).

Article 15(2)

53. It seems to be the intention of the final part Art. 15(2) to include in the calculation only the part of the year when a share was actually admitted to trading on a (meaning on any?) RM in the EU. If this is the case, clarity is required whether counting is to stop only when a share is suspended from all Regulated Markets or whether any main/secondary markets differentiations would be made.

Article 15(3)

54. FESE Members welcome the **widening of the criteria** to be taken into account when estimating the future trading activity of IPO shares etc.

Article 15(4)

55. At the end of Art. 15(4), we preferred the text of the earlier version (“significantly and permanently”) to the revised text (“on an ongoing basis”). Should “permanently” be regarded as too strong, we propose to use a phrase such as “significantly and for an extended period of time” or “a significant and lasting effect”.

Article 16

56. Without being directly affected, we wonder whether the **duplication of the publication requirement** for regulators (according to par. 1 every competent authority plus under par. 4 also CESR) is necessary.

57. In the interest of simplification of the text, we suggest rewording the first words of Art. 16(1) to “Each year, on the **first business day in March**, …”. A similar wording could be used in Art. 21(2), catering for the case that for any reason 1st March 2007 should not be a business day for any of the competent authorities.

Admission to Trading

Article 17(3)

58. With regard to the criteria for the admission of shares to trading on a Regulated Market, we regret to see that we are one square back compared to CESR's advice. Contrary to the argumentation by the Commission at the bottom of page 3 of document ESC 21, we think that the wording as drafted by the Commission in Art. 3 opens the doors for national competent authorities to give different interpretations to "sufficient number of financial instruments", and to "sufficient breadth of distribution". We therefore suggest reverting to the spirit of CESR's advice text where Regulated Markets are merely required **to take into account** the number of financial instruments in public hands and the breadth of distribution. A similar comment is applicable to Art. 17(5) where again the RM shall take into account whether there is sufficient information available of a kind needed to value a derivative security.

59. Our concerns about potentially uneven and arbitrary implementation of admission criteria are enhanced by the new link to Art. 48 of the CALD. That passage with its wide room for interpretation (notably of its par. 5) was in the past certainly among those that were interpreted in member States in a fairly differentiated way.

60. In addition to the fundamental comments above, we would like to underline that the concept of "**public hands**" is, firstly, not defined and, secondly, lends itself to misunderstandings as the term "public hand" is often used for the entirety of state, regional, and local authorities – exactly the opposite of what the text of the level II instrument tries to address.

61. Furthermore, it is unclear whether criterion of **sufficient distribution** relates to the distribution of the share in the country of the Regulated Market that intends to admit the share, in the EU or in a global context. We would of course assume that the distribution of instrument on the global market is the decisive criterion[3], but this should be explicitly mentioned, as it is in Directive 2001/34.

62. During discussions with our Membership, we have also found cases where admissions to trading on additional markets (**"secondary" listings**, mostly in jurisdictions outside the issuer's home Member State; but the reverse case is also possible) are pursued primarily for reasons other than starting active trading on that market (e.g. for taxation purposes, to avoid investment restrictions, etc.). We see no reason why in the MiFID and FSAP environment that is, among others, characterised by cross-border access facilities, transparency for the overall market, and a strict best execution principle, such secondary listings should be restricted. For this reason, too, we recommend clarifying that the criterion of breadth of distribution applies to the overall market for the share in question.

63. Finally, we repeat our earlier comments that any **duplication of provisions** of the Prospectus Directive is unnecessary and inadequate since the MiFID sets out to address Europe's secondary markets. Exactly the same argument is true for the surprising new reference to the CLAD.

[3] The FSAP Directives in the area of securities markets are based on the concept of free cross-border access and tradability of securities. A Regulated Market should therefore not be blocked from admitting a share to its markets solely on the grounds that this share is not broadly distributed among investors in its jurisdiction. Given the free access opportunities for investment firms from all over the world to link up to that market, the distribution in that market's local environment is totally irrelevant. This interpretation is not new (cf. Art. 48(1) and (4) of the CLAD).

Article 17(5)

64. FESE and some of its Members find that Art. 17(5)(b) is still too restrictive and potentially hinders innovation and progress in financial markets. Evidence shows that **derivative products** are increasingly synthetic. This means that not in every case the valuing measure of the underlying is publicly available (as it might have to be synthetically construed at every moment of time). We recommend a deletion of this clause or at least a much more flexible wording.

Article 18

65. We note with satisfaction that the Commission to the concerns raised by FESE and others about the admission requirement for UCITS that the units must be **marketable** in the jurisdiction of the Regulated Market.

66. However, we still argue that the requirements as phrased are ambiguous and may leave room for too many interpretations. FESE believes that the admission to Regulated Markets should be encouraged which encouragement will only succeed if requirements are adequately light but at the same time appropriately clear.

67. As indicated above, we regard the national option to opt out from the requirement of Art. 18(1) first sentence as a possible compromise, but would nevertheless express our strong preference for a deletion of the entire requirement. As another, better compromise, we would suggest the following approach:

    "… a regulated market shall take into account whether the collective investment undertaking complies with the registration procedures in the investment undertaking's home Member State."

68. This porposed text change would also bring Art. 18(1) in line with several passages in Art. 17 were earlier uses of "shall satisfy itself" were already replaced by "shall take into account whether".

69. Finally we see a legal and practical difficulty for market operators to assess the "**breadth of distribution**" of units (Art. 18(2)(a)), especially in the case where the jurisdiction of admission is not the jurisdiction of distribution.

Article 19

70. We welcome the change of words in several sections of Art. 19 clarifying that certain types of information have to be publicly available. We suggest considering the same clarification also in the passage in letter (b) "Where a regulated market …".

71. It would be important to us to clarify in Art. 19(c) that the information "of a kind needed **to value the derivative**" should (only) be available from any source, but need not necessarily be provided by the Regulated Market itself.

72. We note that the complete Article would gain from a **restructuring** of the various requirements. We understand that one of our Members will provide Commission Services with such a restructured draft and draw the Commission Staff's attention to this draft.

Article 20

73. With regard the obligations put on Regulated Markets in Art. 20, we reiterate our critical remarks made earlier to CESR.

74. Firstly, in the context of Art. 20(1)(c), we see practical difficulties for RMs in "verifying" the **notification by the issuer's home competent authority** to a host authority. Such act is one between two competent authorities which will probably (but not with certainty) be communicated to the issuer (and/or the person who applies for admission), but commonly not (directly) to the RM.

75. Secondly, we repeat our question how CESR and the Commission expect the RM to gain certainty about the **publication of a prospectus** (and/or any of its integral parts).

76. Finally, we note a drafting error (duplication of words "is published" in Art. 20(3)).

Transaction Reporting

77. We acknowledge the efforts that CESR, the Commission, and the ESC have undertaken to arrive at a practical and reasonable solution for the reporting obligation of Exchange's Remote Members. We have communicated earlier our concerns about the abolition of the waiver possibility of Art. 20(2) of the old ISD and have made proposals how to address the problem.

78. At this juncture, we would again like to contribute to the discussion by pointing out some criteria which from our point of view should at least be met by such a solution:

79. *Ensure efficient market supervision*

    We believe we concur with CESR that any new regime should not lead to a decrease of market surveillance possibilities. Therefore, it may be seen as essential to ensure that the Regulated Market's home competent authority (as the competent authority for the surveillance of that market and, commonly, the majority of the participants on that market) has the necessary information on market trading activities available as a complete picture.
    We conclude from this line of argument, in more general terms, that – were a CAM (Market) is not at the same time the CAR ("most relevant") – the CAM would not receive trade reports from remote members.
    More specifically, some of our Members fear that their competent authority (CAM) would still require from them a complete picture of all transactions carried out on the market (or, even by all of their members), including Annex A information or even more.

80. *No double reporting obligation*

    The new regime should not impose any double reporting obligation to any of the involved entities, since such an obligation is not known by the old ISD regime and would only give an impression of over-burden bureaucracy to market participants.

81. *Reasonable cost-value ratio*

    We would like to recall CESR's early commitment to paying special attention to existing arrangements for transaction reporting and to refrain from proposing unnecessary new requirements that would involve radical changes to the existing arrangements and would bring about excessive additional costs for the entities concerned.
    As far as Remote Members are concerned, each of these will severely be affected by the cost of reorganization and redesign of transaction reporting.
    At some of FESE's Members, a large number of Remote Members currently use the Regulated Market's arrangements as a distribution channel for the relevant transaction reports. The new regime will interfere with these arrangements and most probably lead to the cessation of such services, because it will not be commercially feasible for Regulated Markets any more to maintain separate data channels (with probably different contents requirements) to each of the competent authorities within the EEA.

82. We hope that CESR will in its assessment of options for the design of the mechanism for the exchange of transaction reports arrive at the conclusion that the concept of a Central Database has the potential to address many of the open issues. We would encourage CESR to extend its thinking beyond the immediate necessity to secure transport of reports to the CAR. Designing a Central Database in a way that allows market participants (and not only regulators!) to feed the database, that enables all regulators (CAI, CAM, and CAR) to draw from the Database the information they need,

and that is fully flexible with regard to the contents of the input (Annex A or A+ or B) would probably provide solutions to these issues.

83. We are fully aware that the design and implementation of such a complex Central Database would probably exceed the timeframe for the implementation of the MiFID. We would, however, strongly recommend making any decision about the design of the database with a clear view towards its future extended use.